IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMON LAW DIVISION
JUDICIAL REVIEW AND APPEALS LIST

Not Restricted

S ECI 2019 02813

BALD HILLS WIND FARM PTY LTD
(ACN 117 264 712) — Plaintiff

v

SOUTH GIPPSLAND SHIRE COUNCIL — First Defendant

and

JOHN ZAKULA,
NOEL MURRAY UREN,
DON JELBART,
SALLY JELBART and
DON FAIRBROTHER — Second to Sixth Defendants

JUDGE:	Richards J
WHERE HELD:	Melbourne
DATE OF HEARING:	10–11 June 2020
DATE OF JUDGMENT:	18 August 2020
CASE MAY BE CITED AS:	Bald Hills Wind Farm Pty Ltd v South Gippsland Shire Council
MEDIUM NEUTRAL CITATION:	[2020] VSC 512

ADMINISTRATIVE LAW — Judicial review — Notification to Council of alleged nuisance due to noise from wind farm, under s 62(1) *Public Health and Wellbeing Act 2008* (Vic) — Council resolution under s 62(3), recording finding of intermittent nuisance of the kind alleged and Council's opinion that matter better settled privately — Whether wind farm operator had standing to seek judicial review of Council's resolution — Whether resolution amenable to certiorari — Whether Council failed to have regard to mandatory considerations in finding that a nuisance existed — Whether Council disregarded material essential to performance of its statutory task — No jurisdictional error established — *Public Health and Wellbeing Act 2008* (Vic), s 62.

APPEARANCES:	Counsel	Solicitors
For the Plaintiff	Mr JD Pizer QC with Mr R Kruse	Allens
For the First Defendant	Mr CJ Horan QC with Ms CL Symons	Maddocks
For the Second to Sixth Defendants	Ms GA Costello SC with Mr J Fetter	DST Legal

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HER HONOUR:

1 **Bald Hills** Wind Farm Pty Ltd owns and operates a wind farm in Tarwin Lower, Victoria, within the municipality of South Gippsland. The 52 turbine wind farm has been operating since 2015. During 2016, a number of people who lived nearby complained to the South Gippsland Shire **Council,** under s 62 of the *Public Health and **Wellbeing Act** 2008* (Vic), about noise from the wind farm. These people included John Zakula, Noel Uren, Don Jelbart, Sally Jelbart, and Don Fairbrother, who I will refer to collectively as the **complainants**.

2 On 27 March 2019, the Council passed a resolution, in which it recorded its satisfaction that there existed a nuisance of the kind alleged by the complainants, but that the nuisance existed only intermittently. The **March Resolution** recorded the Council's opinion, under s 62(3)(b) of the Wellbeing Act, that the matter was better settled privately, and identified several methods available for doing so.

3 In this proceeding, Bald Hills seeks judicial review of the Council's decision to pass the March Resolution on the grounds that the decision was affected by jurisdictional error. It seeks an order in the nature of certiorari quashing the decision, or alternatively a declaration that the March Resolution is invalid and of no force or effect. The proceeding is defended by the Council, the first defendant, and the complainants, who are the second to sixth defendants. All of the defendants contend that the March Resolution was valid and that no relief should be granted.

4 The issues for determination, and a summary of my conclusions in relation to each issue, are as follows:

(1) *Does Bald Hills have standing to seek judicial review remedies in relation to the March Resolution?*

Yes. Bald Hills has a special interest in the subject matter of the March Resolution, beyond the interest held by the public at large.

(2) *Can the March Resolution be quashed by an order in the nature of certiorari?*

No. The March Resolution is not amenable to certiorari, because it had no legal effect or consequence and there is nothing that can be quashed.

(3) *Did the Council fail to have regard to mandatory considerations when it passed the March Resolution?*

No. The 'reasonableness factors' set out in *Southern Properties (WA) Pty Ltd v Executive Director of the Department of Conservation and Land Management*[1] are not mandatory considerations for a council contemplating a finding of nuisance under s 62(3) of the Wellbeing Act. Even if they were, Bald Hills did not establish that the Council disregarded any matter put to it, or that it overlooked anything that was material to its finding.

(4) *Did the Council fail to perform its statutory task under s 62(3) of the Wellbeing Act?*

No. In order to perform its statutory function under s 62(3), in determining whether a nuisance existed the Council was obliged to, and did, consider the acoustic material relied on by Bald Hills.

(5) *Should declaratory relief be granted?*

Bald Hills has not established that the March Resolution was affected by jurisdictional error. There is no basis to make the declaration it seeks, and the proceeding must be dismissed.

5 My reasons for those conclusions follow.

Bald Hills Wind Farm

6 Bald Hills Wind Farm comprises 52 wind turbines spread across farmland in Tarwin Lower, to the north of Walkerville and Cape Liptrap. The wind farm has been fully operational since May 2015. According to a submission made by Bald Hills to the

[1] (2012) 42 WAR 287, [118] (McClure P, Buss JA agreeing).

Council in February 2019, it generates up to 380,000 MWh of renewable energy each year, an output that represents 4.3% of Victoria's annual renewable energy generation.

7 The **Minister** for Planning granted a planning permit for the wind farm in August 2004, which includes a number of permit conditions relating to noise. Condition 19 provides:

> The operation of the wind energy facility must comply with the New Zealand Standard 'Acoustics – The Assessment and Measurement of Sound from Wind Turbine Generators' (NZ 6806:1998) (the 'New Zealand Standard'), in relation to any dwelling existing at the date of approval of this document to the satisfaction of the Minister for Planning.
>
> In determining compliance with the New Zealand Standard, the following apply:
>
> (a) The sound level from the wind energy facility, when measured outdoors within 10 metres of a dwelling at any relevant nominated wind speed, should not exceed the background level (L95) by more than 5dBA or a level of 40dBA L95, whichever is the greater.
>
> (b) When sound has a special audible characteristic, the measured sound level of the source shall have a 5dB penalty applied.
>
> (c) Compliance at night must be separately assessed with regard to night time data. For these purposes the night is as defined in SEPP – N1. For sleep protection purposes, a breach of the standard set out at 19(a), for 10% of the night, amounts to a breach of the condition.

8 Before the development started, condition 18 required local background sound level measurements to be taken at two specific locations, and condition 21 required a noise complaint, evaluation and response process to be submitted to and approved by the Minister. Condition 22 sets out the action that may be taken by the Minister where condition 19 is found to have been breached, which includes a request to 'noise selectively shut down the operation of the relevant turbine or turbines' in the relevant meteorological circumstances.

9 Condition 23 of the planning permit required an independent post-construction noise monitoring program to be commissioned by the Minister, to be paid for by Bald Hills, within two months from commissioning the first generator until 12 months after the commissioning of the last generator. The Minister is obliged to make the independent

report of the monitoring program available for public inspection.

10 Marshall Day Acoustics (**MDA**) was engaged to carry out the post-construction noise monitoring program. In a report dated December 2016, MDA concluded that overall compliance with condition 19 was demonstrated at all assessed properties, based on combined day and night time data. However, compliance during night hours could only be demonstrated at nine of the 13 properties assessed. This led to the adoption of a preliminary curtailment strategy designed to reduce wind farm noise levels at night at the four properties where compliance had not been achieved. In a second report dated May 2017, MDA concluded that night time compliance had been demonstrated at three of those four properties, but had not been achieved at one property. A further curtailment strategy was implemented to address that non-compliance.

The complaints, the investigation and the submissions

11 The locations at which MDA's post-construction noise monitoring was conducted, and the four properties for which the preliminary curtailment strategy was adopted, did not include the properties of any of the complainants. Their dwellings are located as follows:

(a) Mr Zakula lives on Buffalo–Waratah Road, Tarwin Lower, near the north-eastern corner of the wind farm;

(b) Mr Fairbrother also lives on Buffalo–Waratah Road, south of Mr Zakula, to the south and south-east of the northerly group of turbines, and to the east of the southerly group;

(c) Mr Uren lives further south on Buffalo–Waratah Road, to the east of the southerly group of turbines;

(d) Mr and Mrs Jelbart live on McBurnie and Boags Road, Tarwin Lower, to the south-east of the southerly group of turbines.

12 Between April and August 2016, the complainants' solicitor, Dominica Tannock of DST Legal, wrote a number of letters to the Council notifying it of her clients' belief that a nuisance existed at their properties, caused by noise transmitted by the wind farm. She advised:

(a) In relation to Mr Zakula — 'The nuisance is adversely affecting my client's health: since the Bald Hills Wind Farm became fully operational in mid-2015, Mr Zakula complains of constant sleep disruption and sleep deprivation'.

(b) In relation to Mr Fairbrother — 'The nuisance is adversely affecting Mr Fairbrother's health: since the Bald Hills Wind Farm became fully operational in mid-2015, Mr Fairbrother has developed headaches. His sleep is also disturbed by the nuisance. Mr Fairbrother instructs me that the nuisance becomes progressively worse over winter months when the wind is blowing from a north-northwest direction'.

(c) In relation to Mr Uren — 'The nuisance is adversely affecting my client's health: since the Bald Hills Wind Farm became fully operational in mid-2015, Mr Uren complains of headaches and sleep disruption'.

(d) In relation to Mr Jelbart — 'The nuisance is adversely affecting my client's health: since the Bald Hills Wind Farm became fully operational in mid-2015, Mr Jelbart complains of headaches and sleep disruption. At times, the noise is so intolerable that my client has to leave his home'.

(e) In relation to Mrs Jelbart — 'The nuisance is adversely affecting my client's health: Mrs Jelbart complains that since the wind turbines have been [in] operation, she wakes up with headaches of varying severity and sleep disruption. When the northwest wind has been blowing for four or five days in a row, the noise is so unbearable that Mrs Jelbart has to leave her home in order to get rest'.

Each letter communicated a request by the complainant to the Council 'to fulfil its

statutory obligations and investigate the nuisance existing at the property and to take action to remedy the nuisance as far as is reasonably possible'.

13 In February 2017, the Council passed resolutions to the effect that no nuisance existed for the purposes of s 62 of the Wellbeing Act. The complainants and several others brought a judicial review proceeding against the Council. Bald Hills was not a party to that proceeding. On 29 August 2017, Daly AsJ made orders by consent, entering judgment for the plaintiffs, quashing the February 2017 resolutions, and requiring the Council to consider whether a nuisance existed as notified by the plaintiffs in accordance with the law under s 62 of the Wellbeing Act.

14 On 28 February 2018, the Council endorsed a Bald Hills Wind Farm noise complaint investigation plan. An investigation was conducted by James C Smith & Associates, who provided a report to the Council in September 2018. Dr Smith's conclusion was:

> It is clear from the investigation that noise from the wind farm is audible within residences although there are noise monitoring reports stating that there is compliance by the wind farm with permit conditions and the New Zealand Standard 1998, and with a noise mitigation strategy in place at the wind farm. The noise was clearly audible in Mr Zakula's dwelling at night time twice and in the Jelbart residence at night time twice and this is held to be unreasonable in both cases. The experience at the Jelbart residence on 24th and 25th July 2018 whereby wind farm noise intruded on conversation within the residence at night time is seen to be detrimental to personal comfort and the enjoyment of the residential environment by Mr and Mrs Jelbart. After consideration of the completed noise logs by individual complainants and subsequent discussions with some of these individuals it appears there is a nuisance caused by wind farm noise, in that, the noise is audible frequently within individual residences and this noise is adversely impacting on the personal comfort and wellbeing of individuals.

15 A copy of the **Smith Report** was provided to Bald Hills. In October 2018, Bald Hills' solicitors, Allens, responded with a letter submitting that the Smith Report was deficient in both its methodology and conclusion, and did not provide a sound or proper basis upon which to conclude that the wind farm was causing a nuisance under the Wellbeing Act. The letter attached two expert reports commissioned by Bald Hills, and a joint memorandum of advice prepared by Jason Pizer QC and Rudi Kruse of counsel (**Pizer/Kruse opinion**).

16 In November 2018, the complainants' solicitor made a written submission, to the effect that the Council could be 'comfortably satisfied that the noise is a nuisance which is at the very least injurious to the personal comfort of my clients'. She urged the Council to take action to abate the nuisance and prevent its occurrence. Her letter attached a list of documents on which the complainants relied. The 'Attachment A' documents comprised nearly 1,400 pages of material.

17 On 25 November 2018, Allens wrote to the Council on behalf of Bald Hills providing a detailed response to the complainants' submission, which included two further expert reports. The letter included further submissions in relation to the legal meaning of 'nuisance' in the Wellbeing Act, in addition to relying on the Pizer/Kruse opinion.

18 The Council met on 6 February 2019, and heard oral submissions from Mr Kruse on behalf of Bald Hills, and from Ms Tannock on behalf of the complainants. A written submission prepared by Mr Kruse was also tabled. Following this meeting, the Council requested further information from Bald Hills about its curtailment strategy, MDA's data filtering techniques, and noise monitoring data referable to the complainants' properties. Allens responded in letters dated 15 February 2019 and 1 March 2019.

19 On 8 March 2019, the Council's solicitors advised that it would make a decision at its meeting on 27 March 2019.

March Resolution

20 The Council's decision was contained in a resolution adopted on 27 March 2019:

> That Council notes:
>
> A. That the following persons represented by DST Legal have notified Council of the existence of a nuisance contrary to the provisions of the Public Health and Wellbeing Act 2008 (the **Act**):
>
> - John Zakula of 860 Buffalo-Waratah Road, Tarwin Lower;
> - Noel Uren of 1550 Buffalo-Waratah Road, Tarwin Lower;

- Don Jelbart of 102 McBurnie and Boag Road, Tarwin Lower;
- Don Fairbrother of Kings Flat, 1405 Buffalo-Waratah Road, Tarwin Lower; and
- Sally Jelbart of 102 McBurnie and Boag Road, Tarwin Lower

(collectively the **complainants**), as well as

- Tim Le Roy of 1671 Walkerville Road, Tarwin Lower;
- Andree and Michael Fox of 24 Bennetts Road, Buffalo;
- Sascha Fox and Tristan Wilson of 930 Buffalo-Waratah Road, Tarwin Lower; and
- Andrew Kilsby and his sons John Kilsby and Stuart Kilsby of 965 Walkerville Road, Tarwin Lower.

(collectively the **other complainants**).

B. That an investigation into the alleged nuisance was carried out on Council's behalf by James C. Smith & Associates, the results of that investigation being presented in a report compiled by James C. Smith & Associates (the **Smith report**).

C. That the Smith report concluded that there exists a nuisance of the kind alleged by the complainants.

D. The submissions made by DST Legal and Allens Linklaters (on behalf of Bald Hills Wind Farm Pty Ltd), and the extensive evidentiary material made available to Councillors in connection with the matter.

E. The opinion provided to Council by Paul Connor QC (the **QC opinion**), and adopting the legal tests set out in the QC opinion[.]

It is resolved as follows:

1. Council is satisfied [that] there exists a nuisance of the kind alleged by the complainants, for the following reasons:

    a. the credible and consistent character of the noise logs provided by the complainants and/or the complaints made by the complainants about sleep disturbance and the injury to their personal comfort;

    b. the conclusions of the Smith report; and

    c. the weight of the other evidence presented to Councillors suggests the existence of a nuisance.

    But notes that the nuisance exists only intermittently.

2. Council is, for the purposes of section 62(3)(b) of the Act, of the opinion that the matter is better settled privately because the nuisance is more

likely to be abated if:

a. the parties are able to negotiate a mutually satisfactory resolution; or

b. the complainants initiate proceedings of the kind described in paragraph 3 of this resolution

and because of the difficulties associated with each action specified in section 62(4) of the Act (which difficulties are set out in the QC opinion).

3. Council's solicitors write to DST Legal advising of the following methods for settling the matter privately:

a. the joint appointment of a mediator to assist the parties to resolve the dispute;

b. the commencement of legal proceedings in private nuisance by the complainants;

c. the commencement of proceedings pursuant to section 114 of the Planning and Environment Act 1987 by the complainants, claiming that the Bald Hills Wind Farm is not complying with the acoustic conditions contained in the relevant planning permit; and/or

d. the commencement of proceedings pursuant to section 149B of the Planning And Environment Act 1987 seeking a declaration that that the Bald Hills Wind Farm is not complying with the acoustic conditions contained in the relevant planning permit.

4. Because of doubts as to the sufficiency of the evidence as to whether there exists a nuisance in respect of the other complainants, further legal advice be provided to Council as to the status of the complaints made by the other complainants and such advice be considered at the next ordinary meeting of council.

5. This resolution and the QC opinion be:

a. given to DST Legal and Allens Linklaters; and

b. made public, subject to the redaction of the complainants' names and the names of all other individuals who, for reasons of privacy, should, in the opinion of the chief executive officer, have their names redacted.

6. The Council requests the chief executive officer to provide a future report on confidential documents that may be released relating to the Bald Hills Wind Farm matter.

21 The QC opinion referred to in the March Resolution was an advice prepared by Paul Connor QC, addressing the following questions:

(a) Is it reasonably open to Council to find that noise emanating from the Bald Hills wind energy facility constitutes a nuisance of the type governed by the *Public Health and Wellbeing Act 2008* (Vic) ('**Act**')?

(b) If so:

(i) What are Council's prospects of success in prosecuting the operator of the facility, Bald Hills Wind Farm Pty Ltd?

(ii) Does Council have an ability to clearly and effectively direct the Operator to abate the nuisance through an improvement notice issued pursuant to s 194 of the Act?

(iii) Is the matter better settled privately as contemplated by s 62(3)(b) of the Act?

22 Mr Connor's advice, which I will refer to in more detail later in these reasons, was:

(a) There was sufficient evidence for the Council to make a finding of nuisance in relation to each of the complainants, having regard to Dr Smith's investigation and the evidence collected by him, including his own observations and the noise logs appended to his report.

(b) Although the Council had a good arguable case on which to found criminal proceedings, the proceedings could be lengthy, complicated and expensive, and may not solve the problem. Prosecution was not recommended.

(c) Without further technical assistance, an improvement notice would not be capable of clearly and effectively directing Bald Hills to abate the nuisance.

(d) It was open for the Council to consider that the matter was better settled privately, including by private mediation, and by the complainants commencing legal proceedings in private nuisance.

23 The QC opinion was provided to Bald Hills, through its solicitors, together with the March Resolution. Bald Hills promptly requested a statement of reasons for the Council's decision that there existed a 'nuisance' for the purposes of the Wellbeing Act. The request was made pursuant to section 8(1) of the ***Administrative Law Act 1978*** (Vic).

24 On 24 April 2019, the Council adopted a second resolution recording its finding that there was a nuisance in respect of one of the other complainants, Sascha Fox. The second resolution is the subject of a separate judicial review proceeding brought by Bald Hills.[2]

25 Although the Council did not accept that it was obliged to provide a statement of reasons under the Administrative Law Act, and maintained that the reasons given in the March Resolution were adequate, it provided further reasons in the form of a further resolution adopted on 29 May 2019:

> That Council note that:
>
> A. At its ordinary meeting on 27 March 2019 Council resolved that it was satisfied that there was a nuisance of the kind alleged by certain persons described in the resolution as 'the complainants' (first resolution); and
>
> B. At its ordinary meeting on 24 April 2019 Council resolved that it was satisfied that there was a nuisance of the kind alleged by Sas[c]ha Fox (second resolution); and
>
> C. Allens Linklaters (solicitors for the Bald Hills Wind Farm Pty Ltd) have asserted that the reasons given in the first resolution and the second resolution for being satisfied about the existence of a nuisance were inadequate, and that a further statement of reasons is required under the *Administrative Law Act 1978*; and
>
> D. Council's solicitors have disputed that any further statement of reasons is legally required,
>
> Council now resolves, without prejudice to its right to argue that no or no further reasons are legally necessary, as follows:
>
> 1. Its reasons for the first resolution were that, consistent with and in reliance upon the opinion of Paul Connor QC (QC opinion) made available to Council prior to the first resolution being made:
>
> (a) a nuisance of the kind described in the *Public Health and Wellbeing Act 2008* is a nuisance at common law which is either dangerous to health or noxious or injurious to personal [comfort];
>
> (b) Council was reasonably satisfied that a nuisance existed because, without forming any view that there had been non-compliance with planning permit no. TRA/03/002, it assessed the evidence in the manner outlined in paragraphs 55-67

[2] S ECI 2019 02834.

(inclusive) of the QC opinion, namely:

(i) noise creating sleep disturbance can be a nuisance at common law;

(ii) the noise logs from 2018 provided significant evidence of sleep disturbance;

(iii) the Council found that the noise logs from 2018 attached to the report of James C Smith & Associates were truthful and reliable;

(iv) if the noise interrupted the sleep of the complainants in the manner alleged by them (which was accepted) the nuisance was offensive because it was injurious to the personal comfort of the complainants;

(v) the observations made by Dr James Smith in the Smith & Associates report (being observations of an independent and objective professional) supported the inferences set out in paragraph 66 of the QC opinion; and

(vi) the effluxion of time since the 2018 logs and the completion of the report of James C Smith & Associates report did not provide any basis for coming to a different view of the evidence, for the reasons set out in paragraph 71 of the QC opinion.

2. Its reasons for the second resolution were that, consistent with and in reliance upon the QC opinion made available to Council prior to the second resolution being made:

(a) a nuisance of the kind described in the *Public Health and Wellbeing Act 2008* is a nuisance at common law which is either dangerous to health or noxious or injurious to personal confront;

(b) Council was reasonably satisfied that a nuisance existed because, without forming any view that there had been non-compliance with planning permit no. TRA/03/002, it assessed the evidence in the manner outlined in paragraphs 55-67 (inclusive) of the QC opinion, namely:

(i) noise creating sleep disturbance can be a nuisance at common law;

(ii) the noise log from 2018 provided significant evidence of sleep disturbance;

(iii) the Council found that the noise logs from 2018 attached to the report of James C Smith & Associates were truthful and reliable;

(iv) if the noise interrupted the sleep of Sas[c]ha Fox in the manner alleged by her (which was accepted) the nuisance was offensive because it was injurious to her personal comfort;

(v) the observations made by Dr James Smith in the Smith & Associates report (being observations of an independent and objective professional) supported the inferences set out in paragraph 66 of the QC opinion; and

(vi) the effluxion of time since the 2018 logs and the completion of the report of James C Smith & Associates report did not provide any basis for coming to a different view of the evidence, for the reasons set out in paragraph 71 of the QC opinion.

3. In relation to the complainants referred to in the second resolution, with the exception of Tim Le Roy, none of them were able or willing to provide evidence of any nuisance to James C Smith & Associates. Council considered that the evidence provided by Tim Le Roy to James C Smith & Associates was inconclusive. Accordingly, in the absence of any evidence, or any persuasive evidence, received by James C Smith & Associates, Council was not satisfied that a nuisance existed.

4. Authorise the acting chief executive officer to:

(a) provide a copy of the resolution to Allens Linklaters (solicitors for the operator of the Bald Hills Wind Farm) and DST Legal.

26 Bald Hills commenced judicial review proceedings in respect of the March Resolution on 21 June 2019.

27 Separately, Bald Hills and the complainants participated in a private mediation conducted by Ray Finkelstein QC in August 2019. The disputes between them did not resolve at mediation. The complainants subsequently commenced a proceeding in this Court against Bald Hills, in which they allege that Bald Hills' operation of the wind farm constitutes a nuisance, and seek remedies including an injunction and damages.

Standing

28 The complainants submitted that Bald Hills does not have standing to seek judicial review of the March resolution. They argued that the March Resolution was no more than a non-binding finding of nuisance by the Council, about which the Council

decided to take no action, and which had no real effect on Bald Hills' legal rights.

29 Bald Hills submitted that it had an interest or grievance in the March Resolution that was different from that of the public at large.[3] Its 'special interest'[4] in the subject matter of the proceeding arose primarily from the fact that the Council had investigated the operation of its wind farm and, in the March Resolution, had determined that it was causing a nuisance. Based on the evidence of one of its directors, Craig Whalen, it argued that the Council's finding of nuisance had an impact on its reputation, and also had the potential to affect its accreditation under the ***Renewable Energy** (Electricity) **Act** 2000* (Cth), and its ability to obtain finance.

30 The applicable principles were not in dispute.[5] A private entity has standing to sue if it has a special interest in the subject matter of the action.[6] The special interest test is flexible, and its content will depend on the nature and subject matter of the litigation.[7] A special interest is not limited to a legal, proprietary or financial interest protected by the private law.[8] There must be some 'intersection between the interest identified by the plaintiff and the decision that is sought to be impugned'.[9]

31 I was not convinced that the March Resolution had any potential to affect Bald Hills' accreditation by the Clean Energy **Regulator**. The evidence was that it did not. Bald Hills notified the Regulator of the March Resolution, which responded in April 2019 that it had decided to take no action at that stage, and would continue to monitor the responses of the parties involved. That situation was unchanged when Mr Whalen gave evidence in June 2020.

32 Mr Whalen's concern that the March Resolution might affect the ability of Bald Hills

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3 Relying on *Argos Pty Ltd v Corbell* (2014) 254 CLR 394, [61].
4 *Australian Conservation Foundation Inc. v Commonwealth* (1980) 146 CLR 493, 526 (***ACF***).
5 See generally ***Maguire** v Parks Victoria* [2020] VSCA 172, [63]–[81].
6 *Maguire*, [63], citing *ACF*, 530–1 (Gibbs CJ).
7 *Maguire*, [64], citing *Shop Distributive and Allied Employees Association v Minister for Industrial Affairs (SA)* (1995) 183 CLR, 552, 558 and ***Bateman's Bay** Local Aboriginal Land Council v The Aboriginal Community Benefit Fund Pty Ltd* (1998) 194 CLR 247, [46] (Gaudron, Gummow and Kirby JJ).
8 *Maguire*, [65], citing *Onus v Alcoa of Australia Ltd* (1981) 149 CLR 27, 73 (Brennan J).
9 *Maguire*, [76].

to refinance its debt or raise additional capital was, in my view, no more than speculation. Although its investors are aware of the finding, there was no evidence that any of them had foreshadowed that the finding might affect their investment or result in less favourable terms when the wind farm's debt is refinanced later this year.

33 However, I am satisfied that the finding of nuisance in the March Resolution affected Bald Hills' reputation. It is the operator of the wind farm and the occupier of the land on which it is located. It is the permit holder for the purposes of the planning permit, and holds other licences related to its operation of the wind farm. It is a significant business in the South Gippsland region. Its reputation as a law-abiding corporate citizen and good neighbour has an intrinsic value that is affected by the Council's finding of nuisance. Because this is not a defamation proceeding, I have put to one side the complainants' submission that Bald Hills' reputation in the local community was already poor. It is sufficient that the Council's finding of nuisance affected Bald Hills' reputation, in the community and in the regulatory and commercial environments in which it operates.

34 In my view, Bald Hills has standing to seek judicial review of the March Resolution. Bald Hills' interest in the Council's finding that noise from its wind farm amounted, intermittently, to a nuisance was 'as a matter of practical reality … immediate, significant and peculiar' to it,[10] including because of the effect of the finding on Bald Hills' reputation.

35 It is a separate question whether the March Resolution has any continuing legal effect that may be quashed by an order in the nature of certiorari.

Is certiorari available to quash the March Resolution?

36 The primary remedy sought by Bald Hills is an order in the nature of certiorari quashing the decision made by the Council on 27 March 2019 to pass the March Resolution. The particular aspects of the March Resolution challenged by Bald Hills is the Council's satisfaction that there existed a nuisance of the kind alleged by the

10 *Bateman's Bay*, [52] (Gaudron, Gummow and Kirby JJ).

complainants in respect of the operation of the Bald Hills wind farm, but that the nuisance existed only intermittently.

37 The Council queried whether the March Resolution sufficiently affects legal rights or otherwise has legal consequences so as to attract a grant of certiorari. The complainants contended that it does not, and that certiorari is not available in respect of the March Resolution.

Availability of certiorari

38 The limits of the remedy of certiorari were explained in ***Ainsworth*** *v Criminal Justice Commission*:[11]

> The function of certiorari is to quash the legal effect or the legal consequences of the decision or order under review. The report made and delivered by the Commission has, of itself, no legal effect and carries no legal consequences, whether direct or indirect. It is different when a report or recommendation operates as a precondition or as a bar to a course of action, or as a step in a process capable of altering rights, interests or liabilities. A report or a recommendation of that kind may be quashed, that is to say its legal effect may be nullified by certiorari. But the Commission's report is not in that category. …

That case concerned a report of the Criminal Justice Commission that was highly critical of Mr Ainsworth and his companies, and recommended that they should not be permitted to participate in the gaming machine industry in Queensland. The High Court found that the Commission had failed to observe procedural fairness before making findings adverse to the appellants. However, no legal effect or consequence attached to the Commission's report, even though it affected the appellants' reputation and their prospects of obtaining gaming machine licences.

39 The characteristics of a decision with legal effect was explored further in ***Hot Holdings*** *Pty Ltd v Creasy*,[12] which involved a decision of a mining warden to hold a ballot to determine priority between competing applications for a mining exploration licence. The decision was made by the mining warden in the course of preparing a

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11 (1992) 175 CLR 564 (***Ainsworth***), 580 (Mason CJ, Dawson, Toohey and Gaudron JJ) (citations omitted). See also Brennan J at 595.

12 (1996) 185 CLR 149 (***Hot Holdings***).

recommendation to the Minister, who was the ultimate decision-maker in respect of the licence. There was therefore a question whether the decision to hold a ballot was amenable to certiorari:[13]

> [For] certiorari to issue, it must be possible to identify a decision which has a discernible or apparent legal effect upon rights. It is that legal effect which may be removed for quashing.
>
> This formulation encompasses two broadly typical situations where the requirement of legal effect is in issue: (1) where the decision under challenge is the ultimate decision in the decision-making process and the question is whether that ultimate decision sufficiently "affects rights" in a legal sense; (2) where the ultimate decision to be made undoubtedly affects legal rights but the question is whether a decision made at a preliminary or recommendatory stage of the decision-making process sufficiently "determines" or is connected with that decision.

40 *Ainsworth* was an example of the first situation. The Criminal Justice Commission's report there was not amenable to certiorari because it 'neither directly affects rights nor in any way subjects to a new hazard the rights of the applicant'.[14] The mining warden's decision was an example of the second situation, because it was 'a step in a process capable of altering rights, interest or liabilities',[15] namely the mining warden's recommendation to the Minister. Under the relevant statutory scheme, the Minister could only grant or refuse an exploration licence after receiving and considering the warden's recommendation. On that basis, the majority in *Hot Holdings* concluded that the warden's decision to hold a ballot had a 'discernible legal effect' on the exercise of the Minister's discretion, and was therefore amenable to certiorari.[16]

41 Another instance in which certiorari is not available is where the decision under review no longer has any legal effect. In *Wingfoot Australia Partners Pty Ltd v Kocak*,[17] the High Court considered an opinion of a Medical Panel given under s 68 of the

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13 *Hot Holdings*, 159 (Brennan CJ, Gaudron and Gummow JJ).

14 *Hot Holdings*, 162 (Brennan CJ, Gaudron and Gummow JJ), citing *R v Collins; Ex parte ACTU-Solo Enterprises Pty Ltd* (1976) 50 ALJR 471, 475.

15 *Hot Holdings*, 162 (Brennan CJ, Gaudron and Gummow JJ), citing *Ainsworth*, 580 (Mason CJ, Dawson, Toohey and Gaudron JJ).

16 *Hot Holdings*, 174 (Brennan CJ, Gaudron and Gummow JJ).

17 (2013) 252 CLR 480 (***Wingfoot***).

Accident Compensation Act 1985 (Vic). It held that certiorari was not available to quash the opinion, because its legal effect was spent when the worker's statutory compensation application was dismissed:[18]

> The function of an order in the nature of certiorari is to remove the legal consequences or purported legal consequences of an exercise or purported exercise of power. Thus, an order in the nature of certiorari is available only in respect of an exercise or purported exercise of power which has, at the date of order, an "apparent legal effect". An order in the nature of certiorari is not available in respect of an exercise or purported exercise of power[,] the legal effect or purported legal effect of which is moot or spent. An order in the nature of certiorari in those circumstances would be not simply inutile; it would be unavailable.

42 In each case, the availability of certiorari depends on the nature of the decision under review, and the statute under which it was made.

Wellbeing Act

43 The Wellbeing Act covers a wide range of matters, including nuisances,[19] pest control,[20] the management and control of infectious diseases,[21] and safe access to premises at which abortions are provided.[22] Its overall objective is set out in s 4:

> (1) The Parliament recognises that—
>
> (a) the State has a significant role in promoting and protecting the public health and wellbeing of persons in Victoria;
>
> (b) public health and wellbeing includes the absence of disease, illness, injury, disability or premature death and the collective state of public health and wellbeing;
>
> (c) public health interventions are one of the ways in which the public health and wellbeing can be improved and inequalities reduced;
>
> (d) where appropriate, the State has a role in assisting in responses to public health concerns of national and international significance.
>
> (2) In the context of subsection (1), the objective of this Act is to achieve the

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18 *Wingfoot,* [25] (citations omitted).
19 *Public Health and* ***Wellbeing Act*** *2008* (Vic), Pt 6, Div 1.
20 Wellbeing Act, Pt 7, Div 2.
21 Wellbeing Act, Pt 8.
22 Wellbeing Act, Pt 9A.

highest attainable standard of public health and wellbeing by—

(a) protecting public health and preventing disease, illness, injury, disability or premature death;

(b) promoting conditions in which persons can be healthy;

(c) reducing inequalities in the state of public health and wellbeing.

(3) It is the intention of Parliament that in the administration of this Act and in seeking to achieve the objective of this Act, regard should be given to the guiding principles set out in sections 5 to 11A.

44 These guiding principles include the principle of evidence-based decision-making, the precautionary principle, and the principle of the primacy of prevention.[23]

45 Part 6 of the Wellbeing Act contains regulatory provisions administered by municipal councils. Division 1 deals with nuisances, specifically 'nuisances which are, or are liable to be, dangerous to health or offensive'.[24] It applies to various kinds of nuisances, including nuisances constituted by any noise or emission.[25] The provisions of Pt 6, Div 1 supplement and operate alongside the common law of nuisance.[26]

46 A nuisance is offensive if it is 'noxious or injurious to personal comfort'.[27] In determining whether a nuisance is dangerous to health or offensive, regard may be had to the degree of offensiveness, but not to the number of persons affected.[28]

47 Section 60 provides that a council has a duty to remedy as far as is reasonably possible all nuisances existing in its municipal district.

48 Under s 61, it is an offence to cause a nuisance:

(1) A person must not—

(a) cause a nuisance; or

(b) knowingly allow or suffer a nuisance to exist on, or emanate from, any land owned or occupied by that person.

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23 Wellbeing Act, ss 5, 6 and 7.
24 Wellbeing Act, s 58(1).
25 Wellbeing Act, s 58(2)(e).
26 Wellbeing Act, s 59.
27 Wellbeing Act, s 58(4).
28 Wellbeing Act, s 58(3).

Penalty: In the case of a natural person, 120 penalty units;

In the case of a body corporate, 600 penalty units.

(2) A person is not guilty of an offence under subsection (1)(b) if the person had a lawful excuse for knowingly allowing or suffering a nuisance to exist on, or emanate from, any land owned or occupied by that person.

Proceedings for an offence against s 61 may only be instituted by the relevant council.[29]

49 Section 62 provides a mechanism for notifying a nuisance to the relevant council. It provides:

(1) If a person believes that a nuisance exists, that person may notify the Council in whose municipal district the alleged nuisance exists.

(2) The Council must investigate any notice of a nuisance.

(3) If, upon investigation, a nuisance is found to exist, the Council must—

(a) take any action specified in subsection (4) that the Council considers appropriate; or

(b) if the Council is of the opinion that the matter is better settled privately, advise the person notifying the Council of the nuisance of any available methods for settling the matter privately.

(4) For the purposes of subsection (3)(a), the Council may—

(a) if section 66 applies,[30] exercise the powers conferred by that section;

(b) issue an improvement notice or a prohibition notice;

(c) bring proceedings under section 219(2) for an offence against this Act.

50 If the council does not investigate the notification within a reasonable time, the notifier may make a complaint to the Magistrates' Court of the existence of the alleged nuisance.[31] The Magistrates' Court may deal with a complaint made under s 63 as if

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29 Wellbeing Act, s 64.

30 Section 66 applies to nuisances on land that is unoccupied or where the occupier and owner cannot be found.

31 Wellbeing Act, s 63(1).

it was a complaint by the council,[32] and may order the council to pay costs and expenses incurred by the notifier.[33]

51 As to the actions specified in s 62(4):

(a) Section 66 applies if a nuisance exists on or emanates from land that is unoccupied, or where the occupier and owner cannot be found. In that event, s 66(2) empowers the relevant council to enter the land and take steps to abate the nuisance.

(b) A council may issue an improvement notice or a prohibition notice under s 194, which applies if the council believes that a person has contravened a provision of the Wellbeing Act administered by the council, in circumstances that make it likely that the contravention is continuing or will re-occur.[34]

(c) Section 219(2) provides power to bring proceedings:

> A Council or an authorised officer appointed by the Council may bring proceedings for any of the following—
>
> (a) an offence against Part 6, 9 or 10 (or any regulations made under Part 6, 9 or 10) committed wholly or partly in the Council's municipal district;
>
> (b) an offence relating to an improvement notice or a prohibition notice issued by the Council.

Consideration

52 The March Resolution had no immediate legal consequences for Bald Hills. It recorded the Council's finding that a nuisance of the kind alleged by the complainants existed, intermittently, and its opinion that the matter was better settled privately. The latter opinion was based in part on the difficulties associated with each of the actions specified in s 62(4), which had been canvassed in detail in the QC opinion. In other words, although the Council found a nuisance to exist, it decided to take no action in respect of that nuisance. It advised the complainants of various actions they could

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32 Wellbeing Act, ss 63(2) and 197.
33 Wellbeing Act, s 197(3).
34 Wellbeing Act, s 194(1).

take privately, all of which were already available to them.

53 Bald Hills submitted that the March Resolution had legal consequences for it in three ways:

(a) first, it affected its rights and interests by damaging its reputation and exposing it to potential suspension of accreditation under the Renewable Energy Act;

(b) second, it had continuing effect because of the Council's continuing duty under s 60 of the Wellbeing Act to 'remedy as far as is reasonably possible all nuisances existing in its municipal district'; and

(c) third, a finding that a nuisance exists is a necessary precondition to any further enforcement action that may be taken by the Council.

54 I have already found that the March Resolution affected Bald Hills' reputation, so that it has a special interest sufficient to give it standing to bring this proceeding. However, it is clear from the High Court's reasoning in *Ainsworth* that this kind of reputational effect is not a legal effect that can be quashed by an order in the nature of certiorari.[35]

55 I do not accept that the March Resolution exposed Bald Hills to potential suspension of its accreditation under the Renewable Energy Act. The Council's finding that a nuisance existed does not legally affect Bald Hills' accreditation under the Renewable Energy Act, even though it may bear on the prospects of retaining that accreditation.[36] Unlike the mining warden's decision in *Hot Holdings*, a finding of nuisance under s 62(3) of the Wellbeing Act is not a step in a process under the provisions of the Renewable Energy Act that deal with suspension of accreditation.[37]

56 There are several difficulties with the argument that the March Resolution, and specifically the Council's finding that a nuisance existed, has an ongoing legal effect

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35 *Ainsworth*, 580–581 (Mason CJ, Dawson, Toohey and Gaudron JJ), 595 (Brennan J).

36 *Ainsworth*, 580–581 (Mason CJ, Dawson, Toohey and Gaudron JJ).

37 *Renewable Energy (Electricity) Act 2000* (Cth), Pt 2, Div 11; *Renewable Energy (Electricity) Regulations 2001* (Cth), Pt 2, Div 2.5.

because the Council has a continuing duty under s 60 of the Wellbeing Act.

57 The first is that it is doubtful whether the duty in s 60 is enforceable against the Council, by means of an order in the nature of mandamus. In *Fertility Control Clinic v Melbourne City Council*,[38] it was submitted that the duty created by s 60 was too generic and vague to be amenable to mandamus.[39] Although not reaching a concluded view, McDonald J considered that submission to have 'considerable force'.[40] I agree with that observation. Without deciding the question, it appears to me that the 'duty' in s 60 is expressed in terms of a function that is conferred on councils under the Wellbeing Act, rather than a mandatory legal obligation.[41] If that is the position, the Council's duty under s 60 would not result in the finding of nuisance under s 62(3) having any legal consequence for Bald Hills.

58 Second, as was pointed out in the QC opinion, there is a temporal element to s 62(3). It premises a decision to take action on a finding that a nuisance exists; not that it existed at some time in the past. The finding that an intermittent nuisance existed in March 2019 was the basis for the Council's decision at that time to advise the complainants of available methods for settling the matter privately. Even if the Council has an enforceable duty under s 60 to remedy a nuisance, that duty could only arise in relation to an existing nuisance.

59 The third difficulty is that, if the Council has an enforceable duty under s 60, the duty is to be performed in accordance with the provisions of Pt 6, Div 1. Specifically, where a person notifies a council of an alleged nuisance under s 62(1), it is obliged to investigate the notice and, if 'a nuisance is found to exist,' must take one of the actions specified in s 62(3). The finding that a nuisance exists is the premise for the council's decision to act. Once that decision is made, and the action has been taken, the council has performed its duty under s 60 — whether the duty is a function or an enforceable

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38 (2015) 47 VR 368 (***Fertility Control Clinic***).
39 Relying on *Weaven v Secretary to the Department of Justice* [2012] VSC 582, [12].
40 *Fertility Control Clinic*, [12].
41 See *Director of Public Prosecutions v Zierk* (2008) 184 A Crim R 582, [18].

obligation.

60 This conclusion is consistent with the outcome in *Fertility Control Clinic*, in which the relevant council had received a notification of an alleged nuisance in the form of protest activity outside the clinic. The council responded by advising the clinic that the matter was better settled privately through a referral to Victoria Police. The clinic sought mandamus to compel the council to exercise its powers under the Wellbeing Act to remedy the alleged nuisance. McDonald J concluded that there was no actual or constructive failure by the council to perform the duties imposed on it by ss 60 and 62(3) of the Wellbeing Act, and so there was no basis to grant mandamus. That was so even though the protest activity outside the clinic was continuing, as it had for more than 20 years.

61 Here, the Council performed its duty under s 60 by investigating the complainants' notification and, on finding that a nuisance existed, deciding that the best course of action was to advise the complainants of several available methods for settling the matter privately. The finding that a nuisance existed was the premise for the Council's decision under s 62(3)(b). Once that decision was taken, and the advice provided, the finding had no further significance and its effect was spent.

62 Bald Hills' third contention was that a finding under s 62(3) that a nuisance exists is a statutory precondition to any further enforcement action by the Council. That is plainly not the case. Under s 66, a council may enter onto unoccupied land to abate a nuisance regardless of whether it has received a notification under s 62(1) or made a finding under s 62(3). Under s 194, a council may issue an improvement notice or a prohibition notice to a person who it believes has caused a nuisance in contravention of s 61(1), where the contravention is likely to continue or re-occur. The belief of the council for the purposes of s 194 does not depend on a finding under s 62(3). Similarly, the power to bring proceedings for an offence against s 61(1) exists independently of s 62(3), and may be exercised whether or not the nuisance was notified under s 62(1). In short, the Council's finding that a nuisance existed did not directly affect Bald Hills'

legal rights or expose them to any new hazard.[42]

63 The March Resolution is not amenable to an order in the nature of certiorari because it had no legal effect or consequence, and there is nothing that can be quashed. The Council's finding that a nuisance existed was the premise for its decision to do no more than advise the complainants of methods for settling the matter privately. Once it had done that, the effect of its finding — other than on Bald Hills' reputation — was spent.

64 Bald Hills sought alternative relief, in the form of a declaration that the decision of the Council to pass the March Resolution is invalid and of no force or effect. It is therefore necessary to consider whether the March Resolution was affected by any jurisdictional error that could provide a basis for such a declaration.

Did the Council fail to have regard to mandatory considerations?

65 In order to understand Bald Hills' contention that the March Resolution was affected by jurisdictional error, it is necessary to say something about the common law of nuisance.

Common law nuisance

66 It was common ground that a 'nuisance' for the purposes of Pt 6, Div 1 of the Wellbeing Act is a nuisance at common law. While this encompasses both private and public nuisances,[43] this case is concerned with complaints of private nuisance; namely, that noise from the wind farm is interfering with the complainants' use and enjoyment of their land. To constitute a nuisance, the interference must be both substantial and unreasonable:[44]

> In nuisance liability is founded upon a state of affairs, created, adopted or continued by one person (otherwise than in the reasonable and convenient use by him of his own land) which, to a substantial degree, harms another person

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42 *Hot Holdings*, 162 (Brennan CJ, Gaudron and Gummow JJ), citing *R v Collins; Ex parte ACTU-Solo Enterprises Pty Ltd* (1976) 50 ALJR 471, 475.

43 *Fertility Control Clinic*, [26].

44 *Hargrave v Goldman* (1963) 110 CLR 40, 62 (Windeyer J).

(an owner or occupier of land) in his enjoyment of his land.

67 Whether an interference is substantial is a question of fact.[45] A substantial interference may involve property damage, personal injury, or harm to an occupier's use or enjoyment of land; for example, by air pollution, vibration, noise or dust.[46] While it does not extend to a trivial interference, or protect those of 'delicate or fastidious' habits,[47] it does include an interference that disturbs an occupier's sleep.[48]

68 Once a substantial interference has been established, there is a *prima facie* case of nuisance. In a civil claim for nuisance, the evidentiary burden shifts to the person who created the substantial interference to demonstrate that it was reasonable.[49]

69 Whether an interference is unreasonable is an objective question, to be answered by 'weighing the respective rights of the parties in the use of their land to make a value judgment as to whether the interference is unreasonable'.[50] The authorities direct attention to a range of considerations that may be relevant to the question of reasonableness. Bald Hills places particular reliance on the list of '**reasonableness factors**' identified by of the Court of Appeal of Western Australia in ***Southern Properties*** *(WA) Pty Ltd v Executive Director of the Department of Conservation and Land Management*:[51]

> To constitute a nuisance, the interference must be unreasonable. In making that judgment, regard is had to a variety of factors including: the nature and extent of the harm or interference; the social or public interest value in the defendant's activity; the hypersensitivity (if any) of the user or use of the claimant's land; the nature of established uses in the locality (eg residential, industrial, rural); whether all reasonable precautions were taken to minimise any interference; and the type of damage suffered.

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45 ***Riverman*** *Orchards Pty Ltd v Hayden* [2017] VSC 379, [179].
46 ***Marsh v Baxter*** (2015) 49 WAR 1, [245] (McClure P).
47 *Haddon v Lynch* [1911] VLR 5, 9.
48 *Haddon v Lynch* [1911] VLR 5, 9; *Munro v Southern Dairies* [1955] VLR 332, 335.
49 *Kraemers v Attorney General (Tasmania)* [1966] Tas SR 113, 122–5 (Burbury CJ); ***Southern Properties*** *(WA) Pty Ltd v Executive Director of the Department of Conservation and Land Management* (2012) 42 WAR 287, [119] (McClure P, Buss JA agreeing); ***Butler Market Gardens*** *Pty Ltd v GG & PM Burrell Pty Ltd* [2018] VSC 768, [100].
50 *Southern Properties*, [119] (McClure P, Buss JA agreeing).
51 (2012) 42 WAR 287, [118] (McClure P, Buss JA agreeing).

70 This formulation has been adopted in a subsequent Court of Appeal decision in Western Australia,[52] and has been applied by single judges of this Court.[53]

Mandatory considerations?

71 Bald Hills contended that the list of reasonableness factors enumerated in *Southern Properties* are mandatory considerations for a council that is contemplating whether a nuisance exists for the purposes of s 62(3) of the Wellbeing Act. It argued that these factors are matters that a council is bound to take into account, in the sense explained by Mason J in *Minister for Aboriginal Affairs v* ***Peko-Wallsend*** *Ltd*.[54] It submitted that, in evaluating whether an interference is unreasonable, a council must apply the legal standard to the facts as it finds them, an exercise 'in respect of which there is only one uniquely correct outcome'.[55]

72 Accepting that *Southern Properties* was decided after the enactment of the Wellbeing Act, Bald Hills submitted that it was simply 'a clear and convenient statement of existing law'. It relied on ***St Helen's Smelting*** *Co v Tipping*[56] as an early statement that the nature of the locality and social utility are relevant to whether an interference is unreasonable. It further submitted that the text of the statute was to be read as speaking continuously to the present, so that the word 'nuisance' in the Wellbeing Act was to be given meaning according to the common law at the relevant time.[57]

73 Bald Hills submitted that the Council failed to have regard to three of the reasonableness factors before adopting the March Resolution; namely, what reasonable precautions were taken by Bald Hills to minimise interference by noise from the wind farm, the social and public interest in its operation of the wind farm, and the suitability of the location for the wind farm. None of these factors was 'so

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52 ***Ammon*** *v Colonial Leisure Group Pty Ltd* [2019] WASCA 158, [121]. See also *Marsh v Baxter*, [248] (McClure P).

53 *Riverman*, [180]–[181]; *Butler Market Gardens*, [93].

54 (1986) 162 CLR 24 (***Peko-Wallsend***), 39–40.

55 *Ammon*, [128].

56 (1865) 11 HLC 642; 11 ER 1483.

57 Relying on *Boughey v R* (1986) 161 CLR 10, 30–31 (Brennan J); *Ostrowski v Palmer* (2004) 218 CLR 493, [29] (McHugh J), and *R v LK* (2010) 241 CLR 177, [97] (Gummow, Hayne, Crennan, Kiefel and Bell JJ).

insignificant that the failure to take it into account could not have materially affected the decision'[58] and hence, Bald Hills submitted, the decision involved jurisdictional error.

74 The Council disputed the proposition that the 'reasonableness factors' in *Southern Properties* were mandatory considerations to which a council is bound to have regard when making a finding of nuisance for the purposes of s 62(3) of the Wellbeing Act. It submitted that the various factors should, at their highest, be understood as providing guidance to the inquiry whether a nuisance exists. It argued that accepting that 'nuisance' has its common law meaning does not lead to the conclusion that the unreasonableness factors constitute a mandatory checklist of discrete considerations for a council performing its statutory task under s 62(3). The Council submitted that the matters that might bear on whether an interference is unreasonable will vary depending on the facts and circumstances of each particular case.

75 Because s 62(3) is silent on the considerations to be taken into account by a council in determining whether a nuisance exists, identifying any mandatory relevant considerations is a matter of construing the Wellbeing Act 'by reference to its scope, subject matter and purpose'.[59] The Council drew attention to the public health objectives of the Wellbeing Act, and to the statutory context of s 62 within the Wellbeing Act. It emphasised that a finding of nuisance under s 62(3) has no legal consequence or effect, and in particular is not a precondition to a council taking any of the actions in s 62(4) or to the matter being settled privately.

76 The complainants adopted the Council's submissions on this issue. They argued that a finding of nuisance by a council under s 62(3) sets up a binary choice for the council — it must either take one of the actions specified in s 62(4) or, if it is of the opinion that the matter is better settled privately, advise the notifier of available methods for doing so. They submitted that a finding that a nuisance exists is not the decision to be made

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58 *Peko-Wallsend*, 40 (Mason J).

59 *Peko-Wallsend*, 39–40 (Mason J).

under s 62(3); the decision is the choice between options (a) and (b), where a nuisance is found to exist. If a decision is made to take one of the actions listed in s 62(4), the question of whether the matters notified amount to a nuisance must be determined within the relevant legal context — for example, an appeal against an improvement or prohibition notice, or a proceeding for an offence against s 61.

Consideration

77 I do not accept Bald Hills' submission that each of the *Southern Properties* reasonableness factors is a mandatory consideration for a council that is contemplating taking action under s 62(3) of the Wellbeing Act. There are several reasons for this conclusion.

78 First, the submission is not consistent with the scope, subject matter, and purpose of the Wellbeing Act. Section 62 is a component of a statutory regime for the regulation of dangerous and offensive nuisances by municipal councils. It provides a mechanism for a council to discharge its duty to remedy nuisances existing within its municipal district. That mechanism sits within a broader public health statute, which seeks to protect public health, prevent illness and injury, and promote conditions in which people can be healthy. It would go against the grain of the public health objectives of the Wellbeing Act to conclude that a council cannot take action in relation to a substantial interference with a person's use and enjoyment of their land, which is dangerous to health or offensive, unless it has had regard to a set of considerations that are not referred to in the statute. Bearing in mind the very wide range of matters that might amount to a nuisance under Pt 6, Div 1 of the Wellbeing Act,[60] it is sufficient for the council to consider whether the interference is unreasonable in the particular circumstances of the alleged nuisance.

79 Second, the submission assumes that a finding of nuisance under s 62(3) has some legal effect or consequence. As discussed above, it does not. It is no more than a premise for the decision posed by s 62(3), namely whether to take one of the actions

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60 Wellbeing Act, s 58(2).

specified in s 62(4), or to advise the notifier of methods for settling the matter privately. The legislative scheme does not contemplate that a council's finding of nuisance will be conclusive. The final word is left to the courts. A finding of nuisance under s 62(3) does not compel the Magistrates' Court to find that there has been an offence against s 61, or to affirm the issue of an improvement notice or prohibition notice.[61] Nor does it guarantee that the notifier will succeed in a private nuisance claim. The provisional nature of a finding under s 62(3) is a further indication that a council is not obliged to consider each of the *Southern Properties* reasonableness factors in reaching that finding.

80 Third, and relatedly, a council does not fall into jurisdictional error merely by making a finding of nuisance that is later held to be erroneous. While the council must address itself to the correct question, a wrong answer to that question is an error within jurisdiction.[62] In relation to an allegation of private nuisance, the correct question is simply whether there is a substantial and unreasonable interference with the use and enjoyment of land.[63] The various judicial formulations of matters that might be relevant to the evaluation of whether a substantial interference is unreasonable, including the formulation in *Southern Properties*, do not translate to preconditions on the performance of a council's statutory function under s 62(3).

81 Fourth, the common law position is that a substantial interference with a person's enjoyment of their land is *prima facie* a nuisance, unless the person creating the interference can show it to be reasonable. This may be done by, for example, demonstrating that the person took reasonable precautions to avoid the interference, that the interference is justified by its social utility, or that the interference arises from an activity that is an established use in the locality. Bald Hills' submission did not take into account that it bore the onus of satisfying the Council that its interference

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61 An improvement notice and a prohibition notice may be appealed to the Magistrates' Court under s 208 of the Wellbeing Act. On the hearing of the appeal, the Magistrates' Court must reconsider the decision to issue the notice, hear any relevant evidence, and affirm or revoke the issue of the notice: s 208(2).

62 *Fertility Control Clinic*, [22], [32].

63 See [66] above.

with the complainants' enjoyment of their land was reasonable, by drawing the Council's attention to relevant matters. As discussed below, in performing its function under s 62(3), the Council was obliged to have regard to relevant material put forward by Bald Hills. However, it did not also have to work through a mandatory checklist of the *Southern Properties* reasonableness factors before making a finding that a nuisance existed.

82 As a result, Bald Hills' contention that the Council failed to have regard to mandatory considerations must fail.

83 For completeness, and because it was fully argued, I will also consider the extent to which the Council in fact had regard to those matters, and their materiality to its finding of nuisance.

The Council's reasons

84 The Wellbeing Act does not require a council that makes a finding of nuisance for the purposes of s 62(3) to provide reasons for its finding. As noted, Bald Hills asserted that the Council was obliged by s 8(1) of the Administrative Law Act to provide a statement of reasons for the March Resolution, an assertion rejected by the Council. This dispute was not the subject of argument before me, and there is no need for me to resolve it. However, it is necessary to identify what the Council had regard to in reaching its finding that a nuisance existed.

85 The Council submitted that the March Resolution and its further resolution of 29 May 2019 were evidence of its reasoning process, but could not be taken as a definitive or exhaustive statement of its reasons. The Council contended that, in order to identify the matters it considered, I should 'follow the breadcrumbs' from the resolutions, to the QC opinion and analysis of the evidence set out in that opinion, and then to the evidence itself.

86 Bald Hills accepted that I could 'adopt the breadcrumb approach', by considering the resolutions and the material referred to in them, in particular the QC opinion and the

Smith Report. It submitted that the resolutions taken together represented the reasoning of the Council, which incorporated by reference parts of the Smith Report and the analysis and legal tests set out in the QC opinion.

87 While the Council's resolutions are the primary evidence of its reasoning process, I accept the Council's submission that the resolutions are not a definitive statement of its reasons or the material it considered in finding that a nuisance existed. I also consider it relevant that, after hearing oral submissions on behalf of Bald Hills and the complainants at its meeting on 6 February 2019, the Council requested Bald Hills to provide it with some further information. The requested information was provided to the Council by Bald Hills' solicitors in letters dated 15 February 2019 and 1 March 2019.

Reasonable precautions

88 Bald Hills submitted that the Council had failed to have regard to the reasonable precautions it had taken to minimise any noise caused by the operation of the wind farm. It relied on the following matters:

(a) It had engaged MDA, an independent acoustician, to prepare a noise compliance testing plan and assess the wind farm's operational noise in accordance with that plan, to demonstrate compliance with the planning permit and the New Zealand Standard.

(b) Following the assessment reports in December 2016 and May 2017, it implemented a 'curtailment strategy' in order to address non-compliance with the New Zealand Standard at identified locations.

(c) In response to the complainants' complaints about noise, it engaged MDA to evaluate them and report on whether there was any non-compliance at any of the complainants' properties.

It argued that these were reasonable precautions because they were the precautions required by the planning permit and were consistent with the New Zealand Standard.

89 This submission cannot be accepted, because these were all matters that were considered by the Council in relation to the March Resolution.

90 The Council gave Bald Hills every opportunity to make submissions and provide supporting evidence before making its decision on the complainants' notifications. In the preamble to the March Resolution, the Council noted the submissions made by Allens on behalf of Bald Hills and 'the extensive evidentiary material made available to the Councillors in connection with the matter'. That evidentiary material included all of the acoustic material that Bald Hills now says the Council overlooked, as well as the submissions made on behalf of Bald Hills about that material. That material included:

(a) A letter from Bald Hills dated 3 April 2018, enclosing a letter of advice from Allens to the effect that:

> (a) the noise limits in the Planning Permit are based on authoritative research about levels of noise that have the potential to cause annoyance and sleep disturbance;
>
> (b) noise below these levels (including noise below the perception thresholds) is not dangerous to health or offensive for the majority of people;
>
> (c) the law of nuisance does not offer additional protection to hypersensitive people; and
>
> (d) accordingly, noise that complies with Condition 19 of the Planning Permit is not reasonably capable of constituting nuisance under the PHW Act.

(b) A submission from Allens dated 8 October 2018, enclosing a peer review of the Smith Report prepared by Arup, a 'Review of Nuisance Investigation Report' prepared by MDA, and the Pizer/Kruse advice. The submission said that these reports provided 'a comprehensive peer review of technical and legal aspects of the Smith Report. In reliance on them, Allens submitted:

> 1 The Smith Report places undue weight on subjective data contained in noise logs prepared by the complainants. The noise log entries relied upon lack detail and are incomplete in certain respects. Further, the investigator made only a limited number

of personal attended observations.

2 The Smith Report does not take into account critical objective data on the Wind Farm's noise emissions, including acoustic and meteorological data. Therefore, the subjective data contained in the complainants' noise logs are not corroborated in any meaningful way.

3 The Smith Report does not take into account the personal circumstances of the complainants, including whether any or all of the complainants are hypersensitive to noise or have existing health conditions which would impact their subjective experience of noise.

4 The Smith Report does not take into account the paucity of available empirical research or evidence in support of the view that wind turbine noise has a detrimental effect on health, wellbeing and sleep.

5 The Smith Report does not identify or apply the proper test for determining whether the Wind Farm's noise constitutes a nuisance under Part 6 of the PHW Act. In particular, the Smith Report does not recognise that a nuisance under Part 6 of the PHW Act is a substantial and unreasonable interference with a person's use of their land that is both: (a) dangerous to health, noxious or injurious to personal comfort; and (b) more than annoying.

6 The Smith Report does not take into account whether Bald Hills Wind Farm Pty Ltd has taken all reasonable precautions to minimise the Wind Farm's noise emissions, or whether the Wind Farm's noise emissions are in compliance with its planning permit.

Allens submitted that, having regard to all relevant factors, including the objective data in respect of noise emissions from the wind farm and their effect, the proper course was for the Council to take no action.

(c) A further submission from Allens dated 25 November 2018, in response to the complainants' submissions of 8 October 2018. This submission made the point that 'the Council is statutorily obliged to take into account the substantial steps the Wind Farm has taken to curtail its noise emissions when determining whether a nuisance is being caused under the PHW Act.' It emphasised:

(a) The Council should take into account the reasonable precautions implemented by the Wind Farm to curtail its noise emissions and ensure compliance with its planning permit.

(b) The Council should not place undue weight on the subjective data contained in the noise logs of the complainants, which lack detail and are incomplete in certain respects.

(c) The Council should recognise the paucity of empirical and scientific research supporting the view that wind turbine noise has a detrimental effect on health, wellbeing and sleep.

A further report from Arup was enclosed in support of the final point.

(d) Written and oral submissions made by Mr Kruse on behalf of Bald Hills to the Council meeting on 6 February 2019. These submissions referred to the material already provided to the Council on behalf of Bald Hills, and argued that the Council could not be satisfied that the noise was unreasonably made. In that regard, the written submissions said:

> 34. The complainants are entitled to enjoy their land without unreasonable interferences, including by noise from the Wind Farm. All residents are. That is why the planning permit requires compliance with the New Zealand Standard, independent review of compliance, a complaint process, and review of the complaint process.
>
> 35. The existence of, and compliance with, the planning conditions is not determinative of whether or not a nuisance under the PHW Act exists. But it is a relevant consideration and it carries weight. The conditions are specifically designed to address the effect of noise emitted by the Wind Farm upon local residents according to international best practice. The planning permit balances the respective rights of residents to enjoy their land and BHWF to operate the Wind Farm.
>
> 36. That balance must reasonably be drawn according to what are acceptable noise limits. A decommissioning of the Wind Farm would be no balance at all. It is appropriate that the acceptable noise limits be those specified in the New Zealand Standard. It is also respectfully submitted that it should not, and does not, fall to individual councils to pioneer a new standard, separate and inconsistent with the New Zealand Standard, for the purposes of the PHW Act, thereby drawing the PHW Act into conflict with the planning regime.
>
> 37. The complainants provide no evidence or submission that the verified measurable noise emitted by the Wind Farm is unreasonable. By seeking to challenge MDA's noise measurements and analysis, the complainants' position appears to be that the noise is unreasonable because it does not comply with the permit conditions and Standard.

38. Council can be satisfied that noise emitted in compliance with the planning conditions strikes the appropriate balance and is not unreasonable.

39. On the basis of the above, the only course reasonably available to Council is to find that no nuisance exists.

(e) The further material requested by the Council during its meeting on 6 February 2019; namely, details of the filtering methods employed by MDA in assessing post-construction noise levels, and details of the curtailment strategy being implemented at the wind farm. The Council also requested noise monitoring data referable to each of the complainants' properties between 1 May and 31 August 2018. In response, Bald Hills was only able to provide data collected at Mr Fairbrother's property between 1 May and 7 July 2018.

91 I accept at face value the Council's statement that it noted the submissions and evidentiary material provided on behalf of Bald Hills. There was so much acoustic material that it would have been difficult for the Council to overlook it. Notably, it is apparent from the Council's request for further information following its meeting on 6 February 2019 that it had given consideration to the acoustic material submitted by Bald Hills, and required further information before determining whether there was a nuisance. The Council's request was focused on information relevant to the complainants' allegation of nuisance, as distinct from Bald Hills' compliance with the planning permit. Given that the Council specifically requested details of the curtailment strategy being implemented by Bald Hills, I am satisfied that it had regard to that strategy before making its finding of nuisance.

92 Further, the March Resolution relied on the QC opinion, which contained a detailed analysis of the acoustic material provided by Bald Hills, starting with MDA's July 2016 investigations of noise complaints made by Mr and Mrs Jelbart and Mr Uren, and ending with MDA's March 2019 assessment of noise at Mr Fairbrother's property between May and July 2018.[64] The QC opinion noted that MDA's 'substantial work'

64 QC opinion, [43].

supported the proposition that Bald Hills was compliant with the planning permit, in particular at the complainants' dwellings.[65] It noted the discussion of permit compliance in the Pizer/Kruse opinion, including their conclusion that, while compliance with the planning permit is not determinative of whether a nuisance exists, it is relevant to the question of reasonableness. It is worth setting out the following paragraphs of the QC opinion in full:[66]

> 47. There is force in the submission that compliance with the planning permit will represent a 'starting point' which supports the conclusion that the noise emitted by the BHWEF is within acceptable limits and is not unreasonable.
>
> 48. The question of compliance with a Standard and planning permit conditions which are designed to address acoustic amenity is also clearly relevant as to whether any noise emitted can be found to be unreasonably made. Where there is clear evidence that conditions in a permit addressing acoustic amenity are met, and those conditions, as they are in this case, are based on an international Standard, this provides a strong basis for the proposition that the noise emitted is not unreasonable.
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> 49. There is conflicting evidence and at least some doubt raised by the assessments of Mr Huson, Dr Thorne and Dr Broner as to whether the BHWEF operates in compliance with its permit. It is not possible, without having the evidence of all acoustic experts tested, to make definitive conclusions about planning permit compliance in this case. Further, even if these experts were to give evidence and have their evidence tested in a Court or Tribunal, it is clear that Dr Thorne's assessment period differs from the assessments conducted by Marshall Day. Dr Thorne's assessment coincides with part of the period in 2018 in which the noise logs considered by Dr Smith were created. Dr Thorne concludes that the BHWEF was not compliant with its permit on dates and times in June, July and August 2018. In turn, in a recent letter, Mr Delaire (of Marshall Day) is highly critical of Dr Thorne's assessment.
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> 50. Given the conflicting evidence and reports, the sheer quantity of the material in the reports, their highly technical nature, and the fact that it is not part of my brief to question the authors in person, I am not in a position to offer an opinion as to whether the BHWEF is operating in accordance with its planning permit. I agree with the comment in a recent letter from Allens Linklaters that Council's investigation 'should not become a contest between competing noise experts.'
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> 51. The proper place to adjudicate whether a land use is operating in accordance with the terms of its planning permit is the Victorian Civil

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65 QC opinion, [44].

66 QC opinion, [47]–[54] (citations omitted).

and Administrative Tribunal ('**Tribunal**'). …

52. It can be observed that no person (including the Minister for Planning, the Council or any neighbour) has commenced proceedings at the Tribunal alleging that the BHWEF is not in compliance with its planning permit.

53. In the event that the complainants wish to pursue the question of whether there is compliance with the planning permit, it is open for them to do so by commencing proceedings which invoke these provisions. A potential complication in taking such action is that condition 19 does not simply state that the facility must observe certain noise limits. Rather, the requirement is compliance with the relevant noise limits 'to the satisfaction of the Minister for Planning'. Strictly speaking, condition 19 is only breached when the given noise limits are not met *and* the Minister for Planning is dissatisfied.

54. Given that it is very difficult for Council to determine whether there is compliance with the planning permit, combined with the fact that compliance will not be determinative as to whether a nuisance exists, I think that the preferable course for Council is to decide whether a nuisance exists, as best this can be done, without coming to a conclusion concerning planning permit compliance. However, if Council forms the view that based on the material before it, there is compliance with the planning permit, this will provide support for the conclusion that any noise emitted by the BHWEF is not unreasonably made. Alternatively, if Council forms the view that based on the material before it, there is non-compliance with the planning permit, this will support the conclusion that any noise emitted by the BHWEF is unreasonably made.

93 The QC opinion then went on to assess the evidence of noise from the wind farm at the complainants' properties, concluding:[67]

63. In my opinion, if Council can be satisfied that the noise logs represent truthful accounts of the impact of the noise of the BHWEF upon the complainants, then, from time to time, the noise emitted by the BHWEF substantially and materially impacts upon their comfort and the enjoyment of their homes. If the noise of the BHWEF disrupts their sleep as often as is claimed, I believe this represents a private nuisance which is 'offensive' for the purposes of the Act because it is 'injurious' to the personal comfort of the complainants. In other words, it causes injury to their personal comfort. At the very least, noise from the BHWEF is liable to cause injury to the personal comfort of the complainants.

64. As stated above, the common law authorities on nuisance place significant emphasis on sleep disturbance. In stating that the loss of one night's sleep caused by noise may amount to nuisance, the

[67] QC opinion, [63]–[67] (citations omitted).

Supreme Court referred favourably to the following passage:

> … that the complaints were substantial complaints I, for one am satisfied, and I certainly protest against the idea that, if persons, for their own profit and convenience, choose to destroy even one night's rest of their neighbours, they are doing something which is excusable. To say that the loss of one or two nights' rest is one of those trivial matters in respect of which the law will take no notice appears to me to be quite a misconception, and, if it be a misconception existing in the minds of those who conduct these operations, the sooner it is removed the better.[68]

65. In this case it does not appear to be argued by any party that the operator of the BHWEF is choosing to cause injury to its neighbours. To the contrary, numerous assessments and acoustic investigations have been undertaken at the expense of the operator in order to assess compliance with applicable noise limits. However, the passage quoted above emphasises the strong approach that the Courts have historically taken to interference with sleep.

66. In my opinion, if Council concludes that the noise logs are truthful, it is reasonably open for the Council to find that noise emanating from the BHWEF constitutes a nuisance for the purposes of the Act. Further, in my opinion, the observations made by Dr Smith concerning the level of intrusion caused by noise emitted from the BHWEF support the following inferences:

    (a) noise emanating from the facility, observed by Dr Smith to be capable of intruding into conversation, held indoors, with windows and doors shut, is capable of causing sleep disturbance;

    (b) such noise has the capacity to cause sleep disturbance within the normal population of people. It is likely that many people within the normal population would be aroused from sleep if a noise was present in their bedroom sufficient to intrude into a conversation held within that room;

    (c) such noise has greater capacity to cause sleep disturbance within the normal population of people, if they make a reasonable choice to sleep with windows open;

    (d) given the significance of the intrusion, notwithstanding planning permit compliance, such noise is unlikely to be reasonably made.

67. Having particular regard to the investigation conducted by Dr Smith and the evidence he has collected in 2018, including his own observations and the noise logs appended to his report, I believe there is sufficient evidence to make a finding of nuisance in relation to [the

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68 *Munro v Southern Dairies* [1955] VLR 332, 335, Sholl J, referring favourably to the judgement of Sir Wilfrid Greene M.R. in *Andreae v Selfridge* [1937] 3 All ER 255, 261.

complainants].

94 The Council noted and relied on the QC opinion in the March Resolution, and in its further resolution of 29 May 2019. The QC opinion identified 'whether all reasonable precautions were taken to minimise any interference' as a factor to be considered in assessing whether the interference was unreasonable.[69] This further supports the conclusion that the Council had regard to the acoustic material submitted by Bald Hills, on which it based its submissions that it had taken reasonable precautions in relation to noise emissions.

95 In oral submissions, Bald Hills accepted that the QC opinion referred to the acoustic material, but assessed it only through the lens of permit compliance. It submitted that the QC opinion, and hence the Council, did not evaluate the acoustic material in a way that considered the precautions taken by Bald Hills as an element of reasonableness. In my view, this submission did not acknowledge the connection made in the QC opinion between the question of compliance with the planning permit and whether noise from the wind farm was unreasonable. It is apparent from the passages of the QC opinion set out above that the analysis of the acoustic material provided by Bald Hills informed both Mr Connor's view that he could not offer an opinion as to whether Bald Hills was compliant with the planning permit, and his advice that it was open to the Council to find that a nuisance existed. He prefaced that advice by noting the 'numerous assessments and acoustic investigations have been undertaken at the expense of the operator in order to assess compliance with applicable noise limits'.[70] Mr Connor, and hence the Council, had regard to those assessment and investigations.

96 The real problem for Bald Hills was that it did not provide the Council with evidence that it had taken any precautions to avoid or minimise the turbine noise that disturbed the complainants in their homes. The abundant material provided by Bald Hills to demonstrate that it was compliant with the planning permit simply did not engage with the alleged nuisance notified by the complainants. While the curtailment

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69 QC opinion, [34], quoting *Riverman*, [180].
70 QC opinion, [65]. See further [115] below.

strategies implemented by Bald Hills in December 2016 and May 2017 showed that it could take measures to abate noise levels at a given location, it had not implemented those strategies in respect of any of the complainants' properties. Even if the Council had disregarded the matters relied on by Bald Hills as precautions, it is difficult to see how those matters could have materially affected its finding that there was an intermittent nuisance of the kind alleged by the complainants.

Social or public interest

97 Next, Bald Hills submitted that the Council disregarded the social or public interest value in its operation of the wind farm in reaching its finding of nuisance.

98 It may be accepted that the generation of electricity from renewable wind energy is a socially useful activity, and that State and local planning policy recognises the public interest in the development and operation of wind farms. In this proceeding, Bald Hills referred to the Victoria Planning Provisions, the State of Victoria's *Policy and Planning Guidelines – Development of Wind Energy Facilities in Victoria*, local planning policy in the South Gippsland Planning Scheme, and the *Climate Change Act 2017* (Vic), all of which support the development of renewable energy sources in Victoria.

99 It may also be accepted that the Council did not refer to the social and public interest of the wind farm's operations in either the March Resolution or its further resolution of 29 May 2019, and nor was it discussed in the QC opinion. However, Bald Hills did not make any submission to the Council that the noise emissions from the wind farm were reasonable because of the social and public interest in its operations.

100 Bald Hills did submit, under the heading 'If the Council were to find that a nuisance exists, what then?':[71]

> 40. In this respect, the benefits of BHWF's operations to the South Gippsland Shire Region are a relevant consideration. Those benefits include:
>
> (a) annual direct financial contributions to the South Gippsland

[71] Written submissions prepared by Mr Kruse of counsel, tabled on behalf of Bald Hills at the Council meeting on 6 February 2019.

Shire Region of $2.8 million;

(b) annual indirect financial contributions the South Gippsland Shire Region of $2.5 million;

(c) (a) and (b) combined represent approximately $75 million of financial contributions over the remaining life of the Wind Farm;

(d) annual production of up to 380,000 MWh or renewable energy, meeting over four times the electricity requirements of the homes in South Gippsland Shire Region, and 4.3% of Victoria's annual renewable energy generation;

(e) emissions abatement of up to 335,000 tonnes of carbon dioxide emissions.

41. A finding of nuisance, and the nature and extent of any remedy required by Council, may reduce these benefits, and may adversely affect further private investment in renewable energy in South Gippsland Shire and Victoria. It may also have significant regulatory effects upon BHWF's operations.

The submission then turned to the reasons why the Council should not issue an improvement notice or a prohibition notice, in the event that it found that there was a nuisance.

101 As discussed above, I am satisfied that the Council had regard to the submissions made on Bald Hills' behalf, including the submission that was made about the benefits of the wind farm. The Council clearly accepted the submission that it should not issue an improvement notice or a prohibition notice, which relied on the benefits of the wind farm's operations to the South Gippsland region and for the production of renewable energy.

102 However, on the question of reasonableness, Bald Hills made no submission to the Council about the social and public utility of its operation. On judicial review, the Council's finding of nuisance must be considered in light of the submissions that were made to it, and 'not upon an entirely different basis which may occur to an applicant, or an applicant's lawyers, at some later stage in the process'.[72] It was not open to Bald

[72] *Appellant S395/2002 v Minister for Immigration and Multicultural Affairs* (2003) 216 CLR 473, [1] (Gleeson CJ). See also *WET052 v The Republic of Nauru* (2018) 92 ALJR 1010, [36] (Gageler, Keane and Edelman JJ).

Hills to contend that the Council's finding involved jurisdictional error because it did not take into account a matter that was not put to it in the otherwise comprehensive submissions made on Bald Hills' behalf.

103 Further, it was difficult to discern exactly what it was that Bald Hills said the Council should have taken into account, or how it could have been material to the Council's finding of nuisance. It did not appear to contend that the noise that from time to time disturbed the complainants' sleep was necessary in order for it to continue generating electricity. Even if the social and public interest in the wind farm's operations was a mandatory consideration for the Council, the fact that the Council did not refer to it in either resolution was not shown to have been material to the outcome.

Locality

104 The third reasonableness factor that Bald Hills contended was overlooked by the Council was the suitability of the locality. This was said to be evidenced by the planning permit for the use and development of land for a wind energy facility, within a Farming Zone. Bald Hills referred me to clause 52.32 of the South Gippsland Planning Scheme and sections of the Policy and Planning Guidelines, which required the Minister to consider the suitability of the locality for a wind farm, before granting a planning permit.

105 In the March Resolution the Council adopted the legal tests set out in the QC opinion, which directed attention to 'the nature of established uses in the locality'[73] as a factor relevant to reasonableness. On that basis, I am satisfied that the Council understood that this factor might be relevant.

106 However, it was not clear what Bald Hills said the Council should have taken into account in relation to this factor, or how it might have been material to the Council's finding. There was no evidence that Bald Hills made any submission to the Council that noise from the wind farm was reasonable because of the suitability of its location. Once again, the Council's finding that a nuisance existed must be considered in light

[73] QC opinion, [34], quoting *Riverman*, [180].

of the submissions that were made to it. There was no jurisdictional error in not considering a submission that was not made.

107 Bald Hills has not established that the Council disregarded any submission made to it in relation to the locality of the wind farm, or that it overlooked some feature of the wind farm's location that might have been material to its finding of nuisance.

The Council did not fail to have regard to mandatory considerations

108 The Council's finding, in the March Resolution, that a nuisance existed was not affected by jurisdictional error in the form of failure to have regard to mandatory considerations. In summary:

(a) The *Southern Properties* reasonableness factors are not mandatory considerations for a council contemplating a finding of nuisance under s 62(3) of the Wellbeing Act. Rather, they are matters to which the council may have regard in forming a view whether a substantial interference is unreasonable.

(b) The Council had regard to the factor of whether reasonable precautions were taken to minimise the interference. The Council considered the acoustic material and the curtailment strategies implemented by Bald Hills, although these matters did not address the complainants' concerns and were not shown to be material to the Council's finding of nuisance.

(c) The Council considered and apparently accepted the submissions made to it about the benefits of the wind farm, when deciding what action to take under s 62(3). Bald Hills made no submission to the Council that the noise emissions from the wind farm were reasonable because of the social and public interest in its operations. On review, it did not identify specific matters that the Council might have considered that were material to its finding of nuisance.

(d) The Council was aware that the nature of established uses in the locality could be relevant to reasonableness. However, Bald Hills made no submission to it about that factor, and did not identify any feature of the wind farm's location

that might have been material to the Council's finding of nuisance.

Did the Council fail to perform its statutory function?

109 The final ground of review concerned the Council's treatment of the evidence and submissions provided to it by Bald Hills to demonstrate its compliance with the planning permit, in particular the measured acoustic levels at the complainants' properties. Bald Hills submitted that this material was central to the Council's task of determining whether a nuisance existed, irrespective of whether it made a finding about permit compliance. It argued that the Council failed to identify the importance of the material and failed to consider it other than through the lens of compliance, and that this amounted to a constructive failure to perform its statutory function under s 62(3).

110 This ground of review sought to establish jurisdictional error in the form of a failure to have regard to relevant material that is essential to the performance of the statutory task.[74]

111 Bald Hills relied on the Council's adoption of the analysis of the acoustic material in the QC opinion, which assessed that material primarily in relation to compliance with the planning permit. Having come to the view that the Council should decide whether a nuisance existed without reaching any conclusion about permit compliance, Mr Connor went on to assess the evidence in relation to nuisance. In doing so, he did not assess or evaluate the acoustic evidence. There was a brief further reference to that evidence at [65] of the QC opinion:

> In this case it does not appear to be argued by any party that the operator of the BHWEF is choosing to cause injury to its neighbours. To the contrary, numerous assessments and acoustic investigations have been undertaken at the expense of the operator in order to assess compliance with applicable noise limits. However, the passage quoted above emphasises the strong approach that the Courts have historically taken to interference with sleep.

112 I accept that the acoustic material provided by Bald Hills to the Council was relevant

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74 *Minister for Immigration and Citizenship v SZJSS* (2010) 243 CLR 164, [27]; *Minister for Immigration and Border Protection v MZYTS* (2013) 230 FCR 431, [68]; *Chang v Neill* [2019] VSCA 151, [92]. See also *Chief Executive Officer, Department for Child Protection v Grindrod (No 2)* (2008) 36 WAR 39, [84], [100]–[101].

to the Council's assessment of whether the noise emitted from the wind farm was a nuisance. As was submitted for Bald Hills, it was relevant to whether the interference with the complainants' enjoyment of their land was substantial, to the extent that the objective measurements corroborated or contradicted the subjective noise logs kept by the complainants. It was also relevant to whether the interference was unreasonable, in relation to its nature and extent, and whether all reasonable precautions had been taken by Bald Hills. The Council had to consider it in order to perform its statutory function under s 62(3).

113 However, I do not accept that the Council disregarded the acoustic material in making its finding of nuisance. As discussed above, I am satisfied that the Council took it into account on the question of reasonableness.[75]

114 It is true that Mr Connor undertook a detailed assessment of all of the acoustic material in relation to the question of permit compliance,[76] and did not repeat that exercise when he turned to the question of nuisance in the following paragraphs.[77] That would have been unnecessarily repetitive, given that he had already noted that the question of compliance with the Standard and the planning permit was 'also clearly relevant to whether any noise emitted can be found to be unreasonably made'.[78] Reading the QC opinion as a whole, and in sequence, it appears to me that Mr Connor's assessment of the acoustic material informed both his view that it was difficult for Council to determine whether Bald Hills was compliant with the planning permit, and that it was open to the Council to find a nuisance of the kind alleged by the complainants.

115 Bald Hills sought to dismiss the reference, in [65] of the QC opinion, to its 'numerous assessments and acoustic investigations … to assess compliance with applicable noise limits' as being directed only to whether it was 'choosing to cause injury to its neighbours'. I do not read the paragraph in that way. I understand that paragraph as

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75 See [88]–[96] above.
76 QC opinion, [43]–[44], [48]–[50].
77 QC opinion, [55]–[67].
78 QC opinion, [48].

an acknowledgement that Bald Hills was not deliberately creating the alleged nuisance, and had taken extensive measures to demonstrate that it was compliant with the planning permit conditions regarding noise. In other words, it was a reference to the acoustic material that had been discussed in detail in previous paragraphs. The absence of any more specific reference to Bald Hills' acoustic material is perhaps explained by the fact that it did not really engage with the nuisance alleged by the complainants, or with their noise logs.

116 The Council was satisfied that there existed a nuisance because it accepted the complainants' complaints of wind farm noise that disturbed their sleep and injured their personal comfort as 'credible and consistent', and in light of the conclusions of the Smith Report and 'the weight of the other evidence'.[79] Given the Council's earlier reference to the submissions and 'extensive evidentiary material' made available to it, and its reliance on the QC opinion, I am satisfied that the 'other evidence' that it weighed included Bald Hills' acoustic material.

117 Bald Hills did not establish that the Council disregarded relevant material that was essential to the performance of its statutory function.

Disposition

118 As none of the grounds of review have been made out, there is no basis to make the declaration sought by Bald Hills. There is therefore no need for me to consider whether declaratory relief should be refused on discretionary grounds, as was submitted for the complainants. The proceeding must be dismissed.

119 I will hear from the parties on the question of costs.

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[79] March Resolution, [1].

CERTIFICATE

I certify that this and the 47 preceding pages are a true copy of the reasons for judgment of Justice Richards of the Supreme Court of Victoria delivered on 18 August 2020.

DATED this eighteenth day of August 2020.

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Associate