

5 May 2023

Attention: Jennifer Valentine

c/o Let Capital Number 3 Limited Partnership
4Sight Consulting
201 Victoria Street West
Auckland 1010

s 9(2)(a)

Dear Jennifer

LANDOWNER APPROVALS AND THE ELECTRICITY ACT 1992

Introduction

1. The Ministry for the Environment has raised a question regarding the requirement for other approvals to upgrade Counties Energy's existing 33kV transmission line to connect the Waiuku Wind Farm Project to the National Grid at Glenbrook.
2. We have discussed the required approvals (particularly landowner approvals) a number of times during the scoping, design and investigation of the Project. This letter summarises why, in our opinion, landowner approvals are not required for that transmission option.

Electricity Act 1992

3. Section 23(1)(a) of the Electricity Act 1992 (**Act**) empowers the owner of existing electricity transmission infrastructure to enter land to access infrastructure and to do anything necessary for the purpose of inspecting, maintaining or operating the infrastructure.
4. The definition of "maintenance" under s 23(3) includes:
 - (a) any repairs and any other activities for the purpose of maintaining, or that have the effect of maintaining, existing works; and
 - (b) the carrying out of any **replacement or upgrade** of existing works as long as the land will not be **injuriously affected** as a result of the replacement or upgrade.

Analysis

5. Counties Energy is the owner of the existing 33kV transmission line and is entitled to rely on the Act to replace or upgrade that line. The two essential questions for the Project are:
 - (a) whether the upgrade proposed for the Project is "replacement" or "upgrade" in terms of s 23 of the Act; and
 - (b) whether the works would result in injurious affection to private land.

Replacement or upgrade

6. The details of the transmission line upgrade are still being developed. However, the upgrade is likely to involve replacing or adding additional conductors and replacing poles.
7. “Replacement” or “upgrade” are not defined terms in the Act. Reading the terms on their face and in light of the purpose and context of the Act,¹ we consider that the upgrades required for the Project are plainly “replacement” or “upgrade”, in accordance with the Act.

Injurious affection

8. The term “injuriously affected” is also not defined in the Act. However, a number of cases have applied the term or discussed its meaning in the context of s 23(3), including *Kapiti High Voltage Coalition v Kapiti Coast District Council* [2012] NZHC 2058.
9. *Kapiti High Voltage* is the leading case on this issue. The case involved a direct challenge to Transpower’s ability to rely on s 23 of the Act for a reconductoring project. That reconductoring project included replacing conductors with larger conductors, replacing poles with larger poles in different locations and increasing the width of support bars on the poles.
10. In *Kapiti High Voltage*, the Court found that injurious affection is:

a permanent adverse effect on the owner’s land which is substantial enough to affect the owner’s use and enjoyment of the land and, hence, value of the land
11. Changes to height, width, alignment and the like are relevant considerations when assessing injurious affection, but it will always be a question of degree assessed in the particular circumstances of each case.²
12. In *Kapiti High Voltage*, the Court found that the vast majority of the reconductoring project could occur under s 23 of the Act. However, the Court found that one property was injuriously affected. For that property, the previous transmission lines swung into airspace above the property occasionally. Following the reconductoring, a line would be over the property permanently. The Court concluded that a permanent line in the airspace of that property would diminish the value of the land.
13. In our opinion, *Kapiti High Voltage* is directly relevant to the Project and demonstrates that s 23 can be relied upon without landowner approval. Knowing the issue that arose for a single property in *Kapiti High Voltage*, the upgrades required for the Project can be designed to avoid the risk of injurious affection.
14. The High Court’s findings in *Kapiti High Voltage* are consistent with other cases that we have reviewed.³ The High Court also expressly overruled a more absolutist approach to injurious affection set out by the Environment Court in *Fernwood Dairies Ltd v Transpower NZ Ltd* [2007] NZRMA 190.⁴

¹ As required by section 10 of the Legislation Act 2019.

² *Kapiti High Voltage Coalition v Kapiti Coast District Council* [2012] NZHC 2058.

³ Including *Electricity Ashburton v Brook* ENC Christchurch C169/05, 25 November 2005 and *Grey District Council v Graham* (2007) 9 NZCPR 32 (HC).

⁴ In *Fernwood Dairies*, the Environment Court identified four possible categories of injurious affection: encroachments, the effects of carrying out the maintenance, effects on amenities that affect the underlying land and the stigma effect. The High Court in *Kapiti High Voltage* disagreed with the

Conclusion

15. For the reasons above, our opinion is that the powers under s 23(1)(a) of the Act can be relied on to upgrade Counties Energy's existing 33kV transmission line.⁵ On that basis, we do not consider that approval from landowners is required. However, if following detailed design that view changes, there are alternative transmission options proposed for the Project.
16. Please contact us if you have any further questions or would like to discuss this further.

Yours faithfully
Wynn Williams



Mike Doesburg

Partner

s 9(2)(a) [REDACTED]

s 9(2)(a) [REDACTED]

absolutist conclusion reached by the Environment Court in *Fernwood Dairies* and concluded that the only limitation on upgrade and replacement under s 23(3)(b) is injurious affection, which is a matter of valuation rather than law.

⁵ Subject to the finalised detailed design of the proposed works.