THE LAW SOCIETY
OF NEW SOUTH WALES

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Policy, Planning Systems and Reform
Department of Planning and Infrastructure
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Dear Sir/Madam

Draft NSW Planning Guidelines – Wind Farms (Draft Guidelines)

The Law Society appreciates the opportunity to comment on the draft guidelines.

The draft guidelines have been reviewed by the Law Society's Environmental Planning and Development Committee (Committee). Membership of the Committee is drawn from experienced professionals whose expertise has been developed variously in representing the interests of local government, government instrumentalities, corporate and private clients.

The Committee does not support the proposed gateway process as currently contemplated by the draft guidelines for the reasons set out below.

Appeal against decision to refuse a Site Compatibility Certificate (SCC)

The draft guidelines do not contemplate that an applicant for a SCC will be granted any appeal rights in the event that the SCC is refused. The proposed gateway process seeks to prevent wind farms which are located within 2 km of a residence, and which are otherwise permissible development, from being assessed in the same way as other wind farm proposals under the NSW planning system unless either:

- written consent is obtained from the owner of each residence within 2 km of a turbine; or
- a SSC is obtained on the basis of a preliminary assessment of the project.

Against this background, in the event that a requirement for a SCC is triggered and the SCC is ultimately refused, it is imperative that proponents be given a right to appeal against the merits of the decision to refuse the SCC.

Level of assessment required for SCC

It is proposed that applications for a SCC must include details of:

- the predicted noise levels at any neighbour's house within the 2km zone;

- photomontages showing the visual impact of the turbines from each home within the 2km zone;

- impact on landscape values; and

- the potential for blade glint or shadow flicker.

It is unclear from the draft guidelines exactly what level of assessment will be required to support this. However, it is noted that any meaningful assessment of these issues would require that both the final project design and proposed mitigatory measures be fully developed. Neither the final project design nor the proposed mitigatory measures are likely to be available at a preliminary stage before:

- any detailed consultation has occurred;

- Director General's Requirements (DGRs) have been issued for the project; and

- the project assessment has commenced under the development assessment process.

Further, in any event, there would seem to be no public policy reason why potential impacts in these areas should block a project at the gateway stage, when a full assessment, based on review of a complete environmental impact statement prepared under the NSW planning system, may disclose acceptable impacts.

Determining authority

The draft guidelines contemplate that the decision as to whether or not to issue a SCC will be made by the Joint Regional Planning Panel (JRPP). The JRPP is unlikely to have wind farm specific expertise and, if a SCC is issued, the application for State Significant Development Consent will be determined by the Planning and Assessment Commission (PAC). Accordingly, in the event that the gateway process is retained, it should be the PAC, and not the JRPP, which should determine applications for SCCs.

"Gateway" – 2 km requirement

There is no rationale given in the draft guidelines for the basis of the 2 km requirement (which is applied both in the gateway process and throughout the draft guidelines). Senior Commissioner Moore and Commissioner Fakes of the NSW Land and Environment Court (LEC) in *King & anor v Minister for Planning; Parkesbourne-Mummel Landscape Guardians Inc v Minister for Planning; Gullen Range Wind Farm Pty Limited v Minister for Planning [2010] NSWLEC 1102 (7 May 2010)* were very critical of a development control plan (DCP) adopted by a local council which sought to impose a 2 km setback requirements for wind farms from residences and held (at 92 to 93) that:

"…. we have no basis upon which we could establish the provenance or derivation of the numerical controls contained in the DCP. Absent such provenance or derivation, we are left with only the conclusion that what is colloquially described as "the streaker's defence" – it seemed like a good idea at the time – could be applied to these numerical controls in the DCP. This is not a proper basis upon which to found

numerical controls that relate to structures of the type that are not commonly dealt with through such controls (unlike, for example, conventional building heights or floor-to-ceiling distances within built structures where there is a widely understood general numerical range for such controls).

As a consequence, on this second basis, we do not consider it is appropriate to pay particular regard to the numerical controls in the DCP and we propose to proceed to deal with an individual assessment of the impacts on specified properties having regard to topography, orientation of dwellings, distances to and numbers of visible turbines and the like."

Like the DCP under consideration in this decision, the 2 km requirement appears to be arbitrary and does not provide a consistent level of amenity protection as the level of turbine noise and visual impact at this distance will depend on turbine layout and type as well as topographical features and screening.

Landowner's consent

Even if the gateway process is considered to be appropriate from a policy perspective it will not necessarily provide any benefit to the owners of residences at the time the project is operational. This is because the gateway process is triggered at the pre-assessment stage, before DGRs have been obtained for a wind farm project. Given the time frames required for the preparation of an environmental impact statement, project consultation and assessment, the grant of development consent and the initiating and completion of construction works, an approved wind farm may not become operational until more than 10 years have passed from the date on which the then owner of the residence consented to the wind farm. It is highly likely that the ownership of the residence will have changed during this time, meaning that the owner who consented to the project (and who will have obtained the benefit of any monetary compensation paid in return for that consent) may well not be the same as the owner who will be required to live alongside the project.

In addition, there is no mechanism whereby a written consent can be registered on the title to the property so as to bind future owners of the residence. It is not clear, either, how potential purchasers of such a residence might obtain appropriate information, prior to purchase, in relation to such written consents provided by a vendor or a vendor's predecessor in title.

It is imperative that these issues are addressed before the draft guidelines are adopted.

The Committee appreciates the opportunity to comment on the draft guidelines.

Yours faithfully,

Justin Dowd
President