

[Seal] NACKA DISTRICT COURT
Land and Environment Court

JUDGMENT
15 May 2014
Issued at
Nacka Strand

APPELLANTS in case no P 635-12

1. Johan Andersson, Väla gård, Helgarö, SE-645 92 Strängnäs
2. Lennart Andersson, c/o Gun Lövgren, Rällinge, SE-645 92 Strängnäs
3. Karin Asplund, Knutsberg 6, SE-645 92 Strängnäs
4. Torsten Johansson, Östgötagatan 42, SE-116 64 Stockholm
5. Birgitta Jönsson, Östgötagatan 42, SE-116 64 Stockholm
6. Bernd Stümer, Väla Gård, Helgarö, SE-645 92 Strängnäs
7. Kerstin Stümer, Väla Gård, Helgarö, SE-645 92 Strängnäs
8. Göran Zetterlund, Knutsberg 6, SE-645 92 Strängnäs

Representative of 1 and 7: Bernd Stümer, Väla Gård, Helgarö, SE-645 92 Strängnäs

Representative of 2: Gun Lövgren, Rällinge, SE-645 92 Strängnäs

APPELLANTS in case no P 1924-12

1. Kerstin Karlsson, c/o Wilhelm Thornefors, Member of the Swedish Bar Association, Birger Jarlsgatan 42, SE-114 29 Stockholm
2. Apinunt Thornefors, c/o Wilhelm Thornefors, Member of the Swedish Bar Association, Birger Jarlsgatan 42, SE-114 29 Stockholm
3. Wilhelm Thornefors, c/o Wilhelm Thornefors, Member of the Swedish Bar Association, Birger Jarlsgatan 42, SE-114 29 Stockholm

Representative of 1 and 2: Wilhelm Thornefors, Member of the Swedish Bar Association, Advokatfirman Wilhelm Thornefors AB, Birger Jarlsgatan 42, SE-114 29 Stockholm

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OPPOSITE PARTIES in case no P 635-12 and case no P 1924-12

1. Planning and Building Committee in the Municipality of Strängnäs, SE-645 80 Strängnäs
2. Diocese of Strängnäs, Prästlönetillgångar, Box 84, SE-645 84 Strängnäs

Representative of 2: Tove Andersson, Member of the Swedish Bar Association, Wistrand Advokatbyrå, Box 11920, SE-404 39 Gothenburg

DECISION APPEALED

The decision of the County Administrative Board of Södermanland of 4 January 2012 in matter no 403-4718-2010, see annex 1, and the decision of the County Administrative Board of Södermanland of 23 March 2012 in matters no 403-993-2012 and no 403-994-2012, see annex 2

MATTER

Building permit under the Planning and Building Act (1987:10) for two wind turbines on the properties Näs 1:4 and Strängnäs Knutsberg 1:2

RULING

1. The Land and Environment Court rejects Bernd Stümer's and Kerstin Stümer's appeals in case no P 635-12.
1. The Land and Environment Court varies the decisions of the County Administrative Board of Södermanland of 4 January 2012, reg. no 403-4718-2010, and of 23 March 2012, reg. no 403-993-2012 and reg. no 403-994-2012 and sets aside the decision of the Planning and Building Committee of the Municipality of Strängnäs of 3 November 2010, § 276, granting a building permit for wind turbines on the properties Strängnäs Näs 1:4 and Strängnäs Knutsberg 1:2.



BACKGROUND

The Planning and Building Committee of the Municipality of Strängnäs, called the Committee below, decided to grant a building permit under the Planning and Building Act (1987:10) for the construction of two wind turbines, with a power of 2 MW, that have a maximum hub height of 95 metres and a rotor diameter of 90 metres.

In addition, the Committee issued a decision in a notification matter under the Environmental Code.

The decisions of the County Administrative Board have been appealed to the Land and Environment Court. The Court is also deciding case no P 129-12 today.

CLAIMS AND POSITION

Case no P 635-12

Johan Andersson, Bernd Stümer and Kerstin Stümer, called Johan Andersson and others below unless otherwise stated, have, as their appeal must be understood, presented a claim that the building permit decision be set aside.

Lennart Andersson has, as he must be understood, presented a claim that the building permit decision be set aside.

Karin Asplund, Torsten Johansson, Birgitta Jönsson and Göran Zetterlund, called Karin Asplund and others below, have, as they must be understood, presented a claim that the building permit decision be set aside.

The Planning and Building Committee of the Municipality of Strängnäs, called the Committee below, and the Diocese of Strängnäs have opposed a variation.

Case no P 1924-12

Kerstin Karlsson and Apinunt Thornefors and Wilhelm Thornefors have presented a claim that the Land and Environment Court, varying the decision appealed, set aside the building permit granted by the Planning and Building Committee of the Municipality of Strängnäs for two



wind turbines on the properties Strängnäs Näs 1:4 and Strängnäs Knutsberg 1:2. Alternatively that the Court refer the matter back for the further processing required.

The Committee and the Diocese of Strängnäs have opposed a variation.

PRESENTATION OF ACTIONS

In support of their actions the parties have, in all essential respects, stated what is set out in the decisions appealed and referred to documents previously submitted. In addition the parties have, in summary, made the following additional comments and clarifications.

Johan Andersson and others

The establishment of two wind turbines beside Lake Mälaren will affect a large number of residents around Lake Mälaren. The wind turbines will also have a negative impact on outdoor recreation and tourism.

The location of the wind turbines risks causing harm to the landscape of Rällinge [*Rällingelandskapet*] which, for instance, displays high geological and botanical values. There is no condition stipulating how this sensitive environment is to be protected.

In its decision the County Administrative Board has only taken account of Swedish legislation, i.e. the Planning and Building Act and the Environmental Code. The County Administrative Board has ignored EU law, including the Machinery Directive, and other laws as well as fundamental legal principles concerning ownership and access to land, encroachment on the activities of others and equal treatment, etc. that take precedence to or are on an equal footing with the Planning and Building Act and the Environmental Code.

The decision also contains incorrect information about the distance from the wind turbines to the closest buildings since no coordinates are given for the siting of the turbines. Nor is information given about the size, type and other features of the turbine. In addition the County Administrative Board has given a very brief account of the comments received on the building permit decision.



The County Administrative Board has stated that the wind turbines will be in an area identified by the Swedish Energy Agency as a national interest for wind farming. However, this is not an area specified under the Environmental Code. But the County Administrative Board has not stated that there are, in the area, areas of national interest for outdoor recreational exercise and for fisheries in the first place. The area was also identified previously as a Natura 2000 site.

The reference by the County Administrative Board to the comprehensive plan and the thematic supplement cannot be sufficient to approve the siting of the wind turbines on the site. This is on account of the fact that these documents are not legally binding.

The County Administrative Board did not take any special measures to examine or investigate the very extensive objections made by the public affected in their appeals. Instead the County Administrative Board based its examination on the deficient supporting information presented by the Diocese of Strängnäs that had been the basis of the Committee's decision. For example, this supporting information does not contain any reference to there not being easements to use existing roads or to the property Näs 1:4 having been identified as a bird protection area.

In its examination the County Administrative Board did not take account of objections made about inadequate consultations, about the siting and size of the wind turbines, about examinations of encroachment on biotopes and animal life worthy of protection as well as bird protection areas, about noise pollution and about the encroachment of the wind turbines on an area covered by shore protection.

Even though investigations of flora and fauna and of noise, sound and light pollution have been asked for, the County Administrative Board has not taken a closer look at these issues. These investigations ought to be an obvious part of the supporting information for assessing the encroachment on nature and the habitat and living environment.

In its examination the County Administrative Board has disregarded the applicable requirements concerning safety devices in the use of machinery. These safety provisions are set out in the Planning and Building Act, the Environmental Code and the Machinery Directive.



Previously submitted accounts of the presence of white-tailed eagle [Translator's note: also called sea eagle], osprey, etc, have not been taken into account. Nor has the information provided about routes taken by migrating birds between Sörfjärden and Rällingeviken straight over the properties concerned been taken into account. The previous request for a bat inventory has not been taken into account either.

Lennart Andersson

Lower property value and restricted land use

The sitings of the two wind turbines on the properties Knutsberg 1:2 and Näs 1:4 are such that they will restrict the economic land use of the property Strängås Helgarö-Våla 1:1 since it will not be possible to build on the property adjacent to Liljelund and Annelund. In addition, the attractiveness of the property for stays and building development will be reduced close to the area of detached houses at Skoga and the land area facing Rällingeviken.

Lower quality of life in the residential environment

The farm house building on the property Helgarö-Våla 1:1 is about 2 km from the wind turbine on the property Näs 1:4. The wind turbine is sited high in the topography and is clearly visible from the house. Few heights in the field of vision limit the obtrusive experience of the wind turbine. This entails visual disturbances from an unsettled horizon with rotating wings and warning lights.

Given the high siting of the wind turbine on the property Näs 1:4 and considering the open landscape and the prevailing wind direction, sound pollution will reduce quality of life. Low-frequency noise reaches further than is covered and shown by the measurements in the db(A) octave band. Injuries have been demonstrated to people with long-term exposure to low-frequency sound, but they have still not been investigated and should, according to international reports, be respected by applying satisfactory consideration distances. In Sweden research is being conducted at Lund University and elsewhere.

Deficiencies in the environmental impact statement (EIS)

The property Helgarö-Våla 1:1 risks being affected by demands for encroachment on several parts of the property involving extensive road construction for access to the erection of wind turbines.



No solution for a possible transport route has been presented as yet. The EIS presents incorrect/arbitrary assumptions and conditions.

Neither the need nor the route for drawing lines and cables has been presented in the EIS. In the light of these shortcomings in the EIS, no assessment can be made what encroachment or level of damage the development may cause in the landscape either.

These three points demonstrate the need for encroachment on the management of the property Helgarö-Väla 1:1 that will restrict and limit ownership and economic land use. This can be equated with a violation of fundamental principles of ownership.

Major environmental objective conflicts rule out wind farming as the best use of the area and good management of valuable natural resources

In an opinion to the Committee with reference to the application for a building permit for the wind turbines the County Administrative Board has stated that “[I]t is assumed that the assessment of the suitability of the site and the balancing of private and public interests will be carried out by the Municipality of Strängnäs”. In the assessment of the Committee the public interest regarding good management takes precedence to the preservation of all the values of the land area.

The area of national interest for wind farming has been weighed against the opposing interests such as preservation of the following values found in area 2, namely:

- the national interest for outdoor recreation exercise on the islands and shore areas of Lake Mälaren and the national interest of commercial fishing;
- high values in key biotopes, ancient monuments and shoreline protection;
- very high values represented by an area of regional interest for the preservation of the cultural environment;
- high values such as a restriction area under Chapter 3, Section 2 of the Environmental Code for unaffected areas (in addition there are nature conservation agreements and nature assets); and
- the County Administrative Board’s nature conservation programme.



[This processing] allows these unique values to be harmed to varying degrees and jeopardised for a planned and initiated long-term over-production of electricity for export. For-profit multinational companies are allowed, with the support of legislation biased in their favour, to develop the landscape and harm the living environments and habitats of people, animals and nature. There is no way that this can be consistent with “the public interest and good national management”. Our national production of electricity is almost free from emissions of carbon dioxide, and wind turbines do not produce at lower emissions than the Swedish average of 18 g of CO₂/kWh, according to Swedenergy [*Svensk energi*]. No exchange of production is planned in Sweden’s growing electricity production. So the windpower programme is being planned/forced (compulsory quota) in during a twenty-year period when the basic production of electricity from nuclear-hydro-thermal power is expected to be more than sufficient to supply the nation’s needs. The Government’s planning target requires the development of a further 5–6 thousand wind turbines for the export of electricity. This will cause the country to increase its greenhouse gas emissions by 0.6–0.7 million tonnes of CO₂ per year up until 2020, when, in its work on environmental objectives, Sweden has instead committed to the largest reduction in the EU.

The processing of this matter incorrectly assigns a higher value to the environmentally harmful over-production of electricity for export than to the protection of the high natural and cultural values that are part of the Lake Mälaren area and that are unique environments for people’s homes and outdoor recreation. This is particularly true from an international perspective.

The area has breeding osprey and white-tailed eagles. Large flocks of greylag geese, brent geese and barnacle goose pass over the proposed site of the wind turbines in the late summer in their flight from grazing meadows to overnight stays in Rällingeviken. The judgment of the Land and Environment Court of Appeal of 4 July 2012 in case no M 8344-11 states that the minimum distance between an eagle nest and a wind turbine has to be at least 2000 metres.

Considering national interests, the establishment of wind turbines at that site breaches the right to be in the area that everyone has through the right of common access.

A new road is to be built to the windpower area bordering on the property Väla 1:1. The route of the road and its consequences for the property have not been investigated and presented. Drainage in connection with the establishment of the wind turbines has not been investigated and presented.



The impact on water courses and water discharge in the forest has not been investigated and presented. The examination of the risks to health and safety has not been investigated and presented. The northern wind turbine fails to clear the shoreline protection area of 100 metres. The County Administrative Board has the intention of adopting expanded shore protection areas in Lake Mälaren in the Municipality of Strängnäs. Over the long term, the purpose of this measure is to secure possibilities of public access to shore areas and to maintain good living conditions for animal and plant life on land and in water in areas that have not already lost importance on account of development.

Karin Asplund and others

Views on the actual construction and the location

The two wind turbines can essentially be compared with two industrial buildings with large-scale dimensions that are to be sited in an agricultural and natural environment.

The documents that have been available at the Committee do not have descriptions of what consequences the construction and operation of the wind turbines will have on the local environment and it is not reasonable not to be given information about this when a decision has to be made in such an important question. Local residents should, at any rate, be able to see the environmental impact statements that must be drawn up under the Environmental Code for such major construction projects as these.

The two planned wind turbines, whose height will be at least 140 m and a maximum of 160 m, corresponding to the height of the Kaknäs Tower in Stockholm, will be placed very close to the properties Knutsberg 1:9 and Knutsberg 1:10. If the wind turbines are erected, they will have a very great effect on the living space with their constantly rotating blade shadows over the open fields that the properties look on to.

Building and managing the wind turbines requires infrastructure. The documents attached to the building permit show that SEVAB has a grid to link up with 5 km away. However, the documents do not show what route will be used for the cables from the wind turbines, so they do not show how the cable routes will affect the local environment, either.



The building permit documents do not show how all the building material and machines will be brought to the construction site, and this is even though several instances have asked for information about this. The drawings only show the access route between the wind turbines and not the access route up to them.

It is claimed that the access routes are supposed to be described in the environmental impact statement; but that it has not been possible to view. According to the description in the decision of the County Administrative Board the transportation of building material will take place on "existing local roads, a new road will be built to the wind turbines and it will be built on forest land on the property Näs 1:4 continuing from an existing road".

If by "existing roads" the County Administrative Board means the generally tarmacked roads on Fogdön, they will have difficulty coping with the heavy traffic that would be required by construction work like that. The roads closest to the wind turbines are private roads, i.e. gravel and earth roads that cannot stand up to heavy traffic.

Have the committee and the developer contacted the owners of the properties where the private roads run and obtained their approval for the use of their roads by the transports? The properties Knutsberg 1:9 and Knutsberg 1:10 are located alongside one such road that may be affected by the construction work. If the construction work gets started, we assume that the construction traffic will not impede access to and from the properties and that the traffic will not cause disturbance.

The properties Knutsberg 1:9 and Knutsberg 1:10 are in the downwind direction of the wind turbines. The din produced by blades, gears and generators will be carried in the direction of these properties. It is highly likely that there will be constant background sound around the wind turbines. This cannot be reasonable. Research results show that such disturbances can lead to health problems such as fatigue and impaired performance. The Committee has ordered certain precautions for the wind turbines. According to the decision of the County Administrative Board the distance to the nearest buildings is about 680 m and this means that the siting of the wind turbines cannot be deemed to result in significant nuisance to the existing housing.



The County Administrative Board's decision can be read as meaning that the wind turbines will cause a nuisance. It feels strange that it is acceptable in a decision granting a permit for construction work on this scale to use terms that are hard to define and to not set out exact values that can be measured as a check in the event of a dispute. This must be taken to mean that the County Administrative Board considers that the safeguards ordered by the Committee are fully sufficient.

A report from Aalborg University in Denmark from 2010 shows, among other things, that people living close to wind turbines risk being disturbed indoors by the low frequency noise they produce. A building permit ought to contain clearly specified limits for what sound levels the turbines are allowed to produce, rules for check measurements and rules about what will happen if the limits are exceeded.

The visual and sound impressions that would be caused by these two wind turbines will have a harmful effect on people exposed to them. Two adjacent wind turbines have a negative effect on one another in terms of sound levels. Together the turbines generate more sound than each of them does separately. With their high placing, the warning lights will produce a strong and disturbing glare over a wide area around the sites. This is not satisfactory, either for people living far away from the wind turbines or for people living close to them.

It is not clear what the consequences will be for people using the countryside and for animal life and nature since the wind turbines are going to be sited in an area that is identified as a national interest for outdoor recreation in the present comprehensive plan.

The County Administrative Board's decision states that "(n)or will the wind turbines encroach to a degree worth mentioning on outdoor recreational exercise and they are not deemed to substantially damage the natural and cultural values of the area".

The County Administrative Board's decision must be understood as saying that the wind turbines will encroach on these values. But how they will do so is not clear. The decision does not say in what way the turbines will be allowed to encroach on these values. What does "worth mentioning" mean"? What is it that a potential developer will have to observe so as not to encroach.



The size of the planned wind turbines is so extensive that they will change the landscape in a negative way. It will not feel pleasant in the future to see these prominent 140–160 m high features rising above the treetops in the immediate vicinity. They will also affect airspace over a wide area, over Lake Mälaren and its islands and over a large land area in Södermanland.

Wind turbines usually require an open landscape to be able to achieve their maximum power. Since the sites designated are in heart of the forest, any establishment of wind power will mean negative change to the landscape itself since the turbines must rise above the treetops to achieve their maximum power. How big are the areas that the operation of these two turbines requires on the surrounding land? How much of the forest must be laid waste in order to provide possibilities of access. According to the County Administrative Board, there are key biotopes that should be protected on the properties now proposed for building development. You can also wonder when an enquiry about the property Knutsberg 1:2 shows that according to decisions by the County Administrative Board of Västmanland and the County Administrative Board of Södermanland parts of the property are designated as nature reserves.

Any construction work and the establishment of such large wind turbines will make demands on infrastructure in the area: access roads, electricity grids and power lines and so on. This will result in substantial changes not only for the people living closest to the site but also for the whole of the north of Fogdön, including the community of Åsby. The material sent out does not contain any information about how electricity is to be conducted away from the turbines and about how this will affect the surrounding area.

[There is] concern about what effect the wind turbines will have on the rich animal life in the district. Large quantities of migratory birds fly over these areas every year; white-tailed eagles breed here in the winter and osprey, which are protected under protection class 3 according to the species data bank at the Swedish University of Agricultural Sciences (SLU), breed in this very area.

The Species Protection Ordinance prohibits the intentional killing of eagles and protected species. While the construction of the wind turbines will not led to intentional killing, the outcome of the construction work will be that eagles will be killed. For this reason the wind turbines cannot be accepted.



Moreover, taken together, these changes to the worse in the local environment will also have a negative effect on the value of the properties.

In a letter to the Committee the developer notified that the wind turbine on the property Knutsberg 1:2 is going to be moved 35 m to the south. This would mean that the wind turbine would be erected only 105 m from the shoreline and only 5 m from a shore protection area.

The Committee's processing of the matter

The processing of the matter by the Committee has not been good. It has not been easy to get the opportunity to express your opinion. This is so even though the people living closest to the site have a democratic right to be allowed to present their opinions, be heard and be respected for the concern they feel.

It has also been difficult to get the opportunity to present opinions at the meetings there have been. The discussions have been led into a consideration of the future energy policy of the Municipality of Strängnäs on a more general plane and not of the concrete plans for the construction of wind turbines.

In April 2009 we commented the building permit at the Committee in a letter containing a number of questions that needed to be answered. The Committee has not been in touch, not even to confirm that the letter had been received. It was not until the Committee issued its building permit decision

It is remarkable that the people living closest to the site are not given answers to questions they have asked in the matter. The building permit documents show that a request for a developer opinion was sent to the developer and that, according to the documents sent out, the consulting company is supposed to have addressed all the opinions received. However, the replies from the developer were not enclosed with the documents that were communicated. It is difficult to see what is reasonable about this: one party is allowed to address questions; the other is not given replies to the questions they ask. This way of handling a matter cannot be reasonable.



The decision record from the Committee also stated that a written reservation was supposed to be attached to the record. However, it was not among the documents sent out.

The documents sent out now were not complete and the questions asked have not been answered. In view of the nonchalance with which the Committee has treated [input in this matter], it has not acted in an open, accommodating and understanding way to municipal residents in this issue.

Eagles were observed over the fields of Näs on several occasions in September and October 2013. An investigation conducted on Gotland shows that more birds than previously believed collide with wind turbines each year. According to that investigation, every wind turbine claims 18 bird victims each year and the bigger the wind turbine is, the more bird lives it takes.

Kerstin Karlsson and Apinunt Thornefors and Wilhelm Thornefors

The County Administrative Board's decision is wrong and should be varied. The site is not suitable for the construction of wind turbines. The investigation in the matter is deficient. In their examination of the matter, both the Committee and the County Administrative Board have failed to investigate the matter as required and to fully examine the grounds and facts stated.

It has long been well known to local residents that white-tailed eagles are abundant in the district and that they also stay and breed in the immediate vicinity of the planned turbines. For many years the feeding of white-tailed eagles in the winter has taken place on the ice of Lake Mälaren in the area around Hässelbyholm, a number of kilometres from the planned wind turbines. A large number of white-tailed eagles make regular visits to the feedings sites. The sites alongside the shore of Lake Mälaren where the wind turbines are planned to be erected are located in the white-tailed eagle's foraging areas. The distance between a current eagle's nest where a pair of white-tailed eagles breed regularly and the planned wind turbines is only about 1 km. The eagles can also be observed regularly close to the sites where the two wind turbines are planned to be erected.



The planned wind turbines would seriously disturb breeding and have a considerable negative effect on the white-tailed eagle population.

However, nothing in the building permit application is related in substantive terms to the presence of white-tailed eagle or other bird populations in the area concerned.

The building permit application contains significant deficiencies. For example, the application does not contain the supporting information necessary to assess the effect of the planned wind turbines on white-tailed eagles, osprey and bats. The proposed sites are unsuitable in view of the protection of white-tailed eagles and osprey. The effect on other bird species and on bats must also be investigated.

A white-tailed eagle nest has been documented just over 1 km from the planned wind turbines. Two young were ringed in the nest in 2013. Other white-tailed eagle nests have been documented at a distance of a couple of kilometres. Residents in the area and fishermen have understood that there may be additional, as yet undocumented, eagle nests in the vicinity. In addition, it has been well known for a long time that a large number of white-tailed eagles gather in the winter on Granfjärden outside the planned wind turbines.

There is an osprey nest a few hundred metres from the planned wind turbines. Osprey have bred in the nest since, at any rate, 1980 with some breaks. Other osprey nests were also observed in the area in earlier years, and there are likely to be further osprey nests in the area.

The required safeguarding distances to both white-tailed eagle nests and [an] osprey nest make the construction of the planned wind turbines completely impossible. There are no substantive reasons for departing from these safeguarding distances that are established in practice.

The planned construction of the wind turbines so close to an osprey nest and a white-tailed eagle nest is probably also contrary to the Species Protection Ordinance. There is no investigation at all of this question.



The need to have a bird inventory in the examination of a wind turbine is stated in the handbook issued by the National Board of Housing, Building and Planning. The need for a bird inventory and especially for an investigation concerning birds of prey in every single building permit matter relating to wind turbines in the area concerned is also made clear in the Municipality's own document Theme Windpower [*Tema Vindkraft*].

The Diocese of Strängnäs has submitted a document regarding the effect of the wind turbines on white-tailed eagles and osprey in Knutsberg-Näs. This investigation was carried out in June 2013, i.e. more than five years after the application for a building permit was submitted. The document notes that the general safeguarding distance of 2–3 km around a white-tailed eagle nest cannot be achieved in this case. It also states that studies show that that a free zone of 1 km around active nests can be sufficient to hold the effect down to an acceptable level, providing that the wind turbines are not built in the directions in which white-tailed eagles mostly fly and hunt. But it does not say what is deemed to be an acceptable level. Then an argument is presented to the effect that it is highly [likely] that the white-tailed eagles fly in and out from Näsudden towards the Lake Mälaren side and do not do so over land where the wind turbines are planned. This is incorrect and local residents have observed white-tailed eagles flying and foraging in over land. The conclusions of the investigation seem to be mainly based on two short visits by the author(s) to the area and their own studies in the landscape. Nor has the concentration of a large number of overwintering white-tailed eagles in the area been taken into account.

Diocese of Strängnäs

The statements made by the appellants mainly consist of views on public interests.

The assessment made on the basis of foraging sites deemed suitable in relation to the white-tailed eagle nest concerned and the possible osprey nest, as well as the distance from the white-tailed eagle nest to the two wind turbines, is that it is not likely that the wind turbines will result in any great effect (white-tailed eagle) and will not constitute an increased collision risk (osprey). To confirm this assessment of probability an inventory and an investigation of flight corridors should be carried out in the spring or summer.



If the Court makes the assessment that the supporting information must be supplemented with an inventory regarding the presence of white-tailed eagles and osprey in the area, the Diocese is not opposed to such an inventory. It can be noted in this context that such a procedure regarding an investigation of the same scope and time scale has also recently been carried out by the Land and Environment Court at Vänersborg District Court in case no M 2613-13, after the company concerned expressed a willingness in a letter in November of one year to supplement the supporting information with an inventory of golden eagle if the Court considered that this was required and this was, in fact, done in the spring of the next year. If the Court now makes another assessment than that made by the Land and Environment Court in the ruling mentioned above, the Diocese is not opposed to the matter being referred back, setting aside the decision of the County Administrative Board, to the County Administrative Board for further processing following supplementary investigation. Apart from the possible effect on birds, no additional question of relevance for the examination of the matter has emerged at this court.

The site where the wind turbines are intended to be sited is not subject to bird protection, as has been alleged.

During the processing of the matter at the Land and Environment Court, the Swedish Energy Agency has continued its work on revising areas of national interest for wind farming. Following the revision, the area concerned in the case is not presented in the map layer on the Vindbrukskollen website that identifies national interests. However, it can be noted that the Swedish Energy Agency has made the assessment that national interest areas for wind farming in 2008 with ongoing project planning still have the same status as before, although the Agency has said this for projects requiring licences that have started public authority consultations, signed land lease agreements and carried out wind measurements with good results and where there is a willingness to invest in the further development of the project.

This project does not require a licence, but has long been approved with respect to an environmental notification made under the Environmental Code and is intended to be built on land owned by the developer itself. There is a willingness to invest in the continued development of the project and a building permit, which withstood a review by the County Administrative Board, was issued as long ago as November 2010.



As regards the supply of wind, it can be noted that most of the project planning area has a wind speed of 7.1–7.5 m/s at a height of 100 metres above the ground according to the new, more detailed wind survey that has been carried out. So the conditions for wind farming are very good.

The existence of a national interest for wind farming is not required before wind turbines can be erected. In view of the circumstances pointed out above and especially since the conditions at the site remain suitable for wind farming, an adjustment of the designation ought not to be of any importance for the outcome of the substantive examination of the case.

OPINIONS RECEIVED

The Land and Environment Court has ordered the County Administrative Board to state an opinion in the case. The County Administrative Board has submitted an investigation concerning the presence of white-tailed eagles and birds of prey in the area where the wind turbines are to be erected.

The following is stated in the investigation. There is a white-tailed eagle breeding site about 1.5 km from the establishment of wind power. The application for a building permit does not contain an account of the most common flight corridors for the breeding white-tailed eagle pair in the area. The effect on white-tailed eagles and any osprey can only be assessed if the flight corridors for the pair of white-tailed eagles are mapped. – As regards osprey, little is known in this part of Lake Mälaren. For other parts of Lake Mälaren there are inventory reports. It is not impossible that osprey also breed in the vicinity. – In the thematic supplement to its comprehensive plan the Municipality of Strängnäs has stated that it is the responsibility of the developer to, for instance, investigate important breeding and foraging areas for large birds of prey and important commuting routes and foraging areas for bats. The justification is to obtain an overall picture of the environmental impacts. This is very important supporting information and without such a description it is virtually impossible to assess any effects on the birds of prey in a specific case.

INVESTIGATION IN THE CASE

The parties have submitted certain written investigations.



The Land and Environment Court has held a hearing and viewed the site. At the hearing the Court heard Elisabeth Östlin and Urmas Bergfeld as witnesses.

REASONS FOR THE JUDGMENT

Points of departure for the examination

The matter was begun at the Committee before 2 May 2011. Under the transitional provisions to the Planning and Building Act (2010:900) the older wording of the Planning and Building Act shall be applied.

Under Chapter 8, Section 20 of the Planning and Building Act an application for a building permit shall be accompanied by the drawings, specifications and other relevant information needed for the examination.

Right to appeal

Bernd Stümer and Kerstin Stümer were not parties to the decision appealed. Therefore the decision cannot be deemed to have gone against them. Their appeals shall therefore be rejected.

The Land and Environment Court notes that Bernd Stümer's and Kerstin Stümer's appeals correspond to what has been stated by Johan Andersson and the substance of his appeal is examined below.

Building permits for wind turbines

In this case the Land and Environment Court has to consider whether the investigation that formed the basis for the decision to grant building permits for the wind turbines was sufficient for the balancing of interests to be carried out when assessing the suitability of the land for the measure applied for, Chapter 2, Section 1 of the Planning and Building Act. According to that provision, the provisions of Chapters 3 and 4 of the Environmental Code shall also be taken into account in the assessment.

Out of the provisions of the Environmental Code on the management of land and water areas it is Chapter 3, Section 3 that is of particular interest in the present case. This provision states that land and water areas that are particularly vulnerable from an ecological point of view shall, as



far as possible, be protected against measures that may damage the natural environment. The preparatory works to the Code state that one important purpose of this provision is to safeguard genetic diversity in nature by protecting species whose existence is threatened (see Govt Bill 1997/98:45, Part 2, p.668).

The site of the planned wind turbines is in an area identified in the thematic supplement for wind power to the comprehensive plan in force as an area of national interest for wind power. The thematic supplement states that, in part, the area coincides with four bird protection areas in the Rindö-Sundbyholm archipelago. The thematic supplement also underlines that it is part of the developer's responsibility to examine important breeding and foraging areas for large birds of prey.

However, the location of the wind turbines on the site in question means that they will be erected close to areas that have been deemed to be worthy of protection, partly in view of their bird life. During the processing of the building permit at the Committee information became known about there being bird species worthy of protection in the vicinity of the planned wind turbines. These are facts that, in themselves, indicate, in the view of the Land and Environment Court, that an investigation of the environmental impact of the wind turbines could be justified.

The information provided by the County Administrative Board in the case states that there is a white-tailed eagle nest close to the site where the wind turbines are intended to be erected. The County Administrative Board does not rule out the presence of osprey either. The presence of white-tailed eagle and osprey has been shown by the accounts given by the appellants. This information has not been contested by the Committee and the Diocese of Strängnäs. However, the Diocese of Strängnäs has questioned whether osprey bred in the area in 2013.

Elisabeth Östling and Urmas Bergfeld both stated that no special inventory or investigation of the presence of white-tailed eagle or osprey in the area concerned was carried out during the processing of the building permit matter by the lower instances. The Land and Environment Court has also been able to conclude that this was not done from the documents that were attached to the application for a building permit and that are available at the Court.



The facts that the Land and Environment Court has now pointed to mean, in the view of the Court, that the absence of a bird inventory for the specific area where the wind turbines are planned to be erected means that the application for a building permit does not fulfil the requirements stipulated in Chapter 8, Section 20 of the Planning and Building Act (see the judgment of the Land and Environment Court of Appeal of 9 October 2013 in case no P 9722-12). On account of this, the Court, varying the decision of the County Administrative Board, sets aside the decision of the Committee to issue a building permit for the measures applied for.

The Diocese of Strängnäs has made an undertaking in the Land and Environment Court to investigate the presence of birds of prey in the area in 2014 if the Court finds this necessary. If so, the Diocese of Strängnäs has also stated that the matter should be referred back to the County Administrative Board for further processing. However, the Court makes the assessment that the investigation needed to make a full assessment of the impact of the wind turbines on the area should have been submitted in connection with the application for a building permit or should, at any rate, have been submitted as a supplement to the Committee during the processing of the building permit there. In the assessment of the Court, a referral back to the County Administrative Board would be contrary to the principle of judicial hierarchy.

HOW TO APPEAL, see annex 3 (DV427)

Appeal no later than 5 June 2014. Leave to appeal is required.

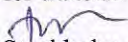
Claes-Göran Sundberg

Maria Backström Bergqvist

Chief Judge Claes-Göran Sundberg, presiding, and Technical Judge Maria Backström Bergqvist took part in the ruling of the Court. The rapporteur was Drafting Lawyer Alexandra Venander.



Translated from Swedish by Ian MacArthur, public translator authorised by the Swedish Legal, Financial and Administrative Services Agency for translation from Swedish to English (Stamp no 393).


Stockholm, 11 June 2015