



## Briefing Note

### English Case highlights potential areas of challenge to planning permission for wind farms

The English High Court recently rejected an appeal by campaigners against a wind farm development near Kendal in Cumbria. Although an English case, it is interesting from a Scottish perspective as it highlights potential areas of challenge to planning permissions for wind farms and the importance of well-drafted noise conditions. It also illustrates that noise conditions vary between appeal decisions and that any scope for inconsistency is undesirable.

#### Background

Planning permission was granted on Appeal, after an initial refusal by the local authority for a six-turbine wind farm plus control room, anemometer mast and access roads.

A couple living within 600 metres of one turbine then appealed to the High Court seeking to overturn the decision under Section 288 of the Town and Country Planning Act 1990.

Section 288 provides a right of review on a point of law, similar to a judicial review, for 'persons aggrieved' by the decision of the Secretary of State's Planning Inspector. 'Persons aggrieved' includes the developer, someone who had a sufficiently active role in the planning process (e.g. a person who pursued a substantial objection) and someone with a relevant interest in the land in question.

The process does not allow an appeal against the merits of the decision and is confined to considering whether the Inspector's decision was wrong in law because it was 'ultra vires' i.e. outside the powers of the Inspector to make that decision or because of a procedural error such as a failure to take into account all material considerations. .

The claimants used Section 288 to appeal on the following six grounds:

**(i) Failure by the Planning Inspector to impose a condition limiting turbine size and capacity**

The condition relating to turbine size and output imposed by the inspector on the planning permission said: *"The erection of the wind turbines shall not commence until the final specification and design of the turbines has been submitted and approved in*

*writing by the local planning authority (LPA). The specification shall include details of the matt pale grey colour of the turbines. Thereafter the turbines shall be erected in accordance with the agreed specification. No symbols or lettering shall be displayed on any of the turbines without the prior approval of the LPA.”*

This type of condition is commonplace in consents for onshore wind development. The claimants argued that failure to impose a condition limiting turbine size and capacity was an error of law, as it would enable the developers to propose turbines of a different size and capacity.

The Court held that the Inspector had not erred in law. The local planning authority, when approving the turbine specification and design, could not approve turbines that differed in their dimensions, other than insignificantly, from the dimensions set out in the Environmental Statement.

In relation to capacity, the Inspector had stated that the benefits of the proposal included a considerable quantity of electricity from a renewable source and this outweighed the adverse effects. The Inspector did not, however, suggest that his conclusion was dependent on the precise output of the turbines being 2.5MW and there was nothing to indicate that the developer might install turbines of lesser capacity. The High Court considered that the Inspector did not leave out any material considerations and the absence of a capacity condition was not an error of law.

**(ii) Information relied upon by the Inspector was withheld from the claimants**

Objectors asked the developer to exhibit certain wind speed data. The developer refused on the grounds of commercial confidentiality. The claimants argued that this was procedurally unfair as the accuracy of figures used to calculate the potential turbine noise generated could not be verified.

The Court found that there had been no procedural irregularity – concerns on noise had been addressed and subsequently rejected by the Inspector.

**(iii) Conditions imposed by the inspector in respect of noise**

The Inspector imposed five noise conditions on the planning permission. The claimants considered that two conditions were unlawful, as the methodology used to assess compliance was insufficiently defined. E.g. the conditions did not define the time of day measurements should be taken nor what type of sound meter should be used or how background noise should be accounted for.

The Court found for the developers and stated that the conditions imposed were not unlawful.

**(iv) The inspector had failed to have regard to the guidance in ETSU-R-97**

Here the claimants argued that background noise levels in the environmental statement noise assessment had not been measured in accordance with recommendations in the ETSU Report.

There was no suggestion that ETSU was not the appropriate standard for measurement of noise from onshore wind turbines. In England, Planning Policy Statement 22 confirms that ETSU is the appropriate standard. In Scotland it is recommended as best practice in PAN 45.

The Court held that the Inspector had recognised that the claimants had concerns about measurement of background noise, however the claimants' technical evidence was limited and was not given by a noise expert. The Inspector was entitled to give weight to the fact that the local planning authority was satisfied that the noise assessment followed the correct procedures.

**(v) The impact of the turbines on those working in nearby fields was not considered**

The claimants argued that the Inspector's overall conclusions failed to take into account the impact on those working in fields near the turbines.

The Court rejected that argument and held that the Inspector had clearly given regard to the turbines' impact on those working nearby in the body of his decision, and that it was not expected that the overall conclusion issued by the Inspector, would require to repeat all individual matters previously mentioned in the planning decision letter.

**(vi) The issue of safety was not addressed in the Environmental Statement**

The Court held that, under paragraph 3(2) of the EIA regulations 1999, the requirement was to provide a description of likely significant effects of development and that there is nothing to suggest that physical hazards to those in nearby fields were a likely significant effect or that information on safety was reasonably required.

Having rejected all six grounds of appeal, the Judge - George Bartlett QC - said it was "most unfortunate" that after many years of wind farm development there were still no generic noise conditions for councils and planning inspectors to impose.

This lack of clarity means developers, local planning authorities and objectors spend time and money in agreeing, or disputing, what noise conditions should contain. Then, if appealed, inspectors have to devote time, both at the inquiry and afterwards, to resolving the matter.

Challenges can be made, as in this case, to imposed conditions. Appeal decisions vary, producing different answers on each occasion, so leading to huge scope for inconsistency.

In this particular case, the claimants are to appeal and we will keep you posted on the outcome.

### **Practical Implications**

What does this mean for developers in Scotland?

Although this is an English decision, it is likely that a Scottish Court would refer to this case and would be likely to reach the same conclusions.

The key point to take from this case is to ensure that your planning conditions are carefully drafted, particularly when it comes to matters touching on the requirements of the EIA Regulations and noise issues.

In relation to the latter, ETSU-R-97 is generally accepted as being the appropriate standard for the measurement of noise from onshore wind. However the manner in which this standard is reflected in the conditions imposed on planning consents varies from one authority to the next.

Cases like this underscore the need to pay very close attention to the wording of conditions – a failure to do so could lead to a costly challenge to your planning consent and further delays.

WJM have extensive experience of negotiating and drafting appropriate planning conditions and advising on EIA matters both at the pre-application stage and in Appeals and can assist at any stage in ensuring your consent is as robust as possible.

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