Neutral Citation Number: [2013] EWHC 3958 (Admin)

Case No: CO/7605/2012

**IN THE HIGH COURT OF JUSTICE**
**QUEEN'S BENCH DIVISION**
**ADMINISTRATIVE COURT**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12/12/2013

**Before** :

**MR JUSTICE LEWIS**

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**Between :**

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| | **R (on the application of) MR WILLIAM CORBETT** | **Claimant** |
| | **- and -** | |
| | **CORNWALL COUNCIL**<br><br>**REG WINDPOWER LIMITED** | **Defendant**<br><br>**Interested Party** |

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**Ms S Sheikh and Mr D Graham** (instructed by **Sharpe Pritchard LLP**) for the **Claimant**
**Mr J Clay** (instructed by Richard Williams, Head of Legal, Democratic and Procurement Services, Cornwall Council) for the **Defendant**
**Mr V Fraser QC** (instructed by **Squire Sanders (UK) LLP**) for the **Interested party**

Hearing dates: 27th-28th November 2013

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# Judgment

Mr Justice Lewis :

## INTRODUCTION

1. This is a claim for judicial review of a decision of Cornwall Council ("the Council") to grant planning permission to the Interested Party, REG Windpower Ltd. ("the developer") , for five wind turbine generators with a maximum height of 100 metres, and related infrastructure, at Higher Denzell Farm, St Mawgan in Cornwall.

## BACKGROUND

### The Legislative and Policy Framework

2.Planning permission is required for development including, as here, development involving the erection of turbine generators: see section 57 of the Town and Country Planning Act 1990 ("the 1990 Act"). The provisions of section 70 (2) of that Act in force at the time, provided, so far as material, that that where an application for planning permission is made to a local planning authority, then:

> "(2) In dealing with such an application the authority shall have regard to
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> (a) the provisions of the development plan, so far as material to the application,
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> …
>
> (c) any other material considerations."

3.The development plan is defined in section 38(3) of the Planning and Compulsory Purchase Act 2004 ("the 2004 Act"). Further, section 38(6) of that Act provides that:

> "(6) If regard is to be had to the development plan for the purpose of any determination to be made under the planning Acts the determination must be made in accordance with the plan unless material considerations indicate otherwise".

4.The relevant development plan here included the Cornwall Structure Plan 2004 ("the Structure Plan") and the Restormel Borough Council Local Plan 2001-2011 ("the Local Plan"). National policy may be a material consideration to which a local planning authority may have regard when considering an application for planning permission. At the time that the Council resolved to grant planning permission on 22 September 2011, the relevant national planning policies relating to development generally, and renewable energy developments such as wind farms in particular, were contained in a variety of planning documents. These included Planning Policy Statements (referred to as a "PPS"), National Policy Statements (referred to as an "NPS") and other documents. Potentially relevant national policy documents in this case included (but were not limited to) PPS1 "Delivering Sustainable Development", the Supplement to PPS1 on Planning and Climate Change, PPS4 "Delivering Sustainable Growth", PPS7 "Sustainable Development In Rural Areas" and PPS22 "Renewable Energy". There was a Companion Guide to PPS22 which offered practical advice on how the policies of encouraging the appropriate development of renewable energy schemes in urban and rural locations were to be achieved. That gave advice, amongst other things, on how to approach applications for planning permission for renewable energy schemes including, in section 5, advice on how to assess issues of landscape and visual impact. There were also an Overarching National Policy Statement for Energy ("EN-1") and an NPS for Renewable Energy Infrastructure ("EN-3").

5.In September 2011, a Draft National Planning Policy Framework ("the Draft Framework") had also been published, but not then adopted, by the Department of Communities and Local Government.

The Application for Planning Permission

6.The application for planning permission was received by the Council on 28 February 2011. The application was accompanied by an Environmental Statement prepared in accordance with the Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999 ("the EIA Regulations").

7.The application was the subject of comment and objections by local residents and others. Prior to consideration of the application, the developer entered into correspondence with bodies such as Natural England and English Heritage, individuals (or their representatives), and individual officers of the Council such as the conservation officer and the archaeological officer. The developer carried out further studies on certain matters, such as, for example, an archaeological trial trench. In essence, the developer sought to respond to the concerns that had been raised.

The Officer's Report

8.On 22 September 2011, the relevant Council Committee considered the application. The Committee had a report which had been prepared by officers prior to that meeting. That report identified the main issues as follows:

> "The main issues concerning this application are i) the impact of the development on landscape character and the appearance of the surrounding area; ii) the cumulative impact of the proposed development along with the adjacent Bears Down Wind Farm and; iii) the extent to which the proposal would have a detrimental impact on the amenities currently enjoyed by the occupiers of nearby residential properties."

9.The report set out the international, European and national policies relevant to the consideration of renewable energy developments, including agreements to reduce emissions from greenhouse gases, and the aim of ensuring that a greater proportion of energy requirements would be met from renewable energy sources.

10.The report then considered the relevant national planning policies, including PPS22 and other planning documents which indicated that the environmental and economic benefits of renewable energy projects should be given significant weight as material considerations for the determination of planning applications. The report then considered the proposed development. The report referred to relevant Structure Plan polices which referred to facilitating or encouraging renewable energy schemes. The report also referred to, amongst others, Local Plan Policy 10 which says:

> "(1) In determining renewable energy proposals the Council will have regard to their benefits, including the reduction of $CO_2$ emissions.
>
> (2) Proposals for renewable energy generation schemes such as wind, water and wave power, Biomass, Biogas, and energy produced from waste, will be permitted, unless they would cause

> demonstrable harm to designated or protected landscapes, habitats, features of heritage importance, Area of Outstanding Natural Beauty, Area of Great Landscape Value and the countryside in general.
>
> (3) All renewable energy proposals will need to be capable of being constructed, operated and serviced without harm to the amenity of nearby habitations."

11. The report noted that previous targets for achieving a certain proportion of the energy required from renewable sources had been met and said this:

> "As of September 2011 the County of Cornwall has achieved a collective total of 116 MW of installed electrical energy and 15MW of installed heat energy from a range of renewable energy developments (a further 157 MW of electrical energy and 136 MW of heat energy has been permitted in Cornwall though has yet to be 'installed' i.e. built; these figures result from the recent planning permission granted for large scale solar PV facilities as well as the Cornwall Energy Recovery Centre). The figure for installed electricity capacity in Cornwall would therefore confirm that the previously-set 2010 target for Cornwall as set out in the draft RSS has been met, albeit in 2011 after the target year. However, it is clear from Government advice (see extract from paragraph 4 of PPS22 below) that such targets should be interpreted as a minimum, and any future targets should be revised upwards to enable the further development of renewable energy developments where the potential exists:
>
> > "Targets should be reviewed on a regular basis and revised upwards (if they are met) subject to the region's renewable energy resource potential and the capacity of the environment in the region for further renewable energy developments. The fact that a target has been reached should not be used in itself as a reason for refusing planning permission for further renewable energy projects."
>
> While a specific target for Cornwall has not been set for 2020, the broad thrust of policy in both national and local planning policy provides a 'direction of travel to secure, wherever appropriate and practicable, opportunities for additional renewable energy developments. The current data for installed and permitted but not installed electrical and heat energy in Cornwall is set out in the Appendix to this report."

12. The report summarised the responses that had been made during the consultation exercises and the objections that had been received The report then addressed the principle of the development and noted that there was strong support from national, regional and local level planning policies for the proposal in principle. Notwithstanding that, the report recognised that each application had to be assessed on its own individual merits and due regard given to other relevant material considerations. These were then considered. For present purposes, it is particularly relevant that the report analysed in

detail landscape and visual impacts. It noted that the proposed development was outside the Cornwall Area of Outstanding National Beauty and was outside any area of landscape policy constraint. The report noted that the development would be prominent. There were, however, already existing tall structures in the landscape and the introduction of the proposed turbines was not considered to be uncharacteristic development or to alter unacceptably the fabric of the landscape character. The report's conclusion on these matters was as follows:

> "In summary on this issue, it is accepted that the proposed wind farm would give rise to a visual and landscape impact; principally by the introduction of several tall turbines into the landscape. The application has been assessed against the relevant LCA key characteristics and it is concluded that while there would be adverse effects these are not considered so harmful as to render the scheme unacceptable. While the magnitude of the additional change that would be experienced by this scheme is appreciable it should be acknowledged that wind farm developments are already an established feature in the landscape. The applicant's proposed measures to minimise visual and landscape impact by locating the turbines outside any protected areas and away from the summit of the ridge and as far as possible achieve the same heights as the adjacent smaller turbines is a positive step and should be welcomed. It is considered that the scheme would not fundamentally alter localised landscape character features such as field areas or hedge lines. Further, it is not considered that there would be any unacceptable impacts on landscapes of national importance such as the AONB."

13. The report then addresses a number of other considerations and concludes as follows:

> "120. The application has been carefully considered against the existing policy framework for determining planning applications. There is an identified need to provide renewable energy initiatives to help bring about a reduction in Carbon emissions. There is no disputing that 100 metre wind turbines would, if built appear to be substantial structures in the countryside.
>
> 121. The fact remains that wind turbines do impact upon the landscape; however, the visual harm from the turbines must be balanced against their ability to harness renewable energy. The renewable energy agenda is at the forefront of the planning system. Policy directions, at both international and local levels encourage the promotion of renewable energy schemes. The reality is that wind turbines form the most likely technology which is readily available to come forward in the short term to meet regional and local energy targets. Therefore, if the adopted renewable energy targets are to be met we must accept that land based turbines will have a key role in achieving these targets. This will inevitably change the character and appearance of the countryside and presence of wind farms on undesignated landscapes will become increasingly common and this will need to be accepted in pursuit of renewable energy. There is no disputing that for the energy targets to be met the development of wind farms, in addition to alternative renewable energy generation systems, will be necessary. In reaching this conclusion, regard has been given to the recent' published draft National Planning Policy Framework (NPPF), which is a material consideration and sets out a presumption in favour of sustainable

development. The NPPF also seeks to protect the natural and built environment.

122. The cumulative impact of the proposed turbines adjacent to the existing turbines at Bears Down has been assessed and it is considered that although there would be an increased landscape and visual impact, it is not so significant as to render the scheme unacceptable.

123. In considering the adverse impacts of the wind farm this has been set against the benefits of the development; which are that the development would contribute to the achievement of targets for renewable energy at national, regional and local levels, the site falls outside any designated landscape areas, would secure significant savings in Carbon emissions and would accord with Restormel Local Plan saved policies 10, 11, 19, 27 and 37 as well as Cornwall Structure Plan saved Policies 3 and 7. It is considered that other than the visual impact many of the other issues set out in this report can be mitigated to an acceptable extent and planning conditions are recommended to be used to ensure that no unidentified impacts arise from this development.

124. All the objections expressing concern about the impact upon the appearance of the countryside, the setting of villages, the setting of nearby listed buildings, and the residential amenity experienced from properties in the locality have been taken into account. Furthermore, the impact upon residential amenity from noise generation and shadow flicker has been considered. The welfare of wildlife, protection of flora and fauna, the recording of archaeological remnants are all accounted for within the application.

125. The identified adverse impacts generated by the proposed wind turbines, as set out in this report, are not considered to be so great that they outweigh the identified benefits of the scheme which accords with the principles of PPS22 and the Climate Change Supplement to PPS1. Notwithstanding this and after careful consideration of all the information available it is considered that, having regard to national and local policy for renewable energy development, and on the basis that the proposed wind turbines would not unacceptably harm the landscape character and visual appearance of the area as a whole, this planning application is recommended for approval. This is subject to a satisfactory Unilateral Undertaking being submitted to and approved by the Local Planning Authority in respect of securing a community benefit package."

14. The recommendation was that planning permission be granted subject to conditions and to a satisfactory unilateral undertaking being submitted and approved.

The Committee Meeting

15. At the meeting further responses from consultees were provided to councillors. In view of one of the grounds of challenge, it is appropriate to set out the written information on the submissions of two bodies, Natural England and the Cornwall Wildlife Trust, dealing with the question of mitigation and possible injury to bats from the turbines. The

additional further responses recorded were as follows:

> "Natural England
>
> The revised habitat management proposals provide greater clarity. We recommend that these are delivered through a section 106 agreement. Where habitat management is dependent on action by a third party (for example, on-going hedge management, skylark plots) we advise Cornwall Council ascertains that enforceable arrangements are in place to secure delivery for the lifetime of the development.
>
> *[Planning Officer comments: This is considered to be satisfactory. The applicants have agreed to include habitat management actions in the proposed Unilateral Undertaking.]*
>
> Cornwall Wildlife Trust
>
> We strongly advise a precautionary approach is adopted whereby turbines are 'feathered' at an appropriate wind speed to minimise any risk of injury to bats, and the site is monitored as proposed. If there is very little bat activity found under monitoring, the feathering of the blades could be revisited.
>
> *[Planning officer Comments: Natural England do not consider this to be necessary and the planning application as submitted with the proposed mitigation is considered to be adequate, and therefore the planning officer does not consider a condition to be necessary]*"

16. At the meeting, the relevant officer, Mr Ellis Compton-Brown, also said, in answer to a question, that:

> "Yes we've had discussions with the Cornwall Wildlife Trust and they're now satisfied in respect of how we will deal with the issues in relation to ecology, and I think that was in the, Chris' recommendation in terms of a 106 Agreement which is part of the recommendation. So, yes Cornwall Wildlife Trust are satisfied that we can mitigate it to a suitable extent."

17. At its meeting on 22 September 2011, the Committee resolved to grant planning permission subject to conditions and the submission and approval of a satisfactory unilateral undertaking.

Subsequent Events

18. After the meeting, the Claimant, Mr Corbett, contacted the planning officer, Mr Crompton-Brown, and asked if he could inspect the file. He was asked to wait a week and inspected the file on 3 October 2011. The Claimant also wished to see copies of e-mails relating to the matter and Mr Crompton-Brown indicated that he was content to provide copies of

all e-mails, which numbered over 100, and which were to be put on the public access system (which I understand to be the Council's planning website) in any event. Mr Corbett was subsequently provided with copies of all the information that he wished to see.

19. In March 2012, the National Planning Policy Framework ("the Framework") was published in its final form. That Framework revoked, amongst other documents, PPS1 on Delivering Sustainable Development and the Supplement on Planning and Climate Change, PPS4 on Planning for Sustainable Economic Growth, PPS 7 on Sustainable Development in Rural Areas and PPS 22 on Renewable Energy. It did not revoke the Companion Guide to PPS 22. The Framework also provided, in footnote 17, that when identifying suitable areas for renewable and low carbon energy sources, and supporting infrastructure, planning authorities should follow the approach set out in EN-3 read with the relevant sections of EN-1.

20. On 18 April 2012, having received a satisfactory unilateral undertaking, conditional planning permission was granted. A summary of reasons was issued. That set out, amongst other matters, the reason for approval. They largely reflect the wording of paragraphs 121 to 125 of the officers' report set out above at paragraph 13. The report referred to and summarised the content of the international and national policy statements, national planning policy and relevant development plan policies from the Structure Plan and Local Plan Polices 10, 11, 19, 27 and 37.

THE ISSUES

21. Permission to apply for judicial review was granted on 27 February 2013 on six grounds. At the hearing, counsel for the Claimant abandoned the sixth ground of challenge. The five remaining grounds are expressed in the schedule to the order in the following way:

> "1. That the Defendant failed to have regard to relevant material considerations in that it failed to reconvene its Strategic Planning Committee to reconsider the application in the light of the policy changes in March 2012 which included the publication of the National Planning Policy Framework and the cancellation of a raft of national planning policies.
>
> 2. That the Defendant failed to comply with the requirements of the Town and Country Planning (Development Management Procedure)(England) Order 2010 in that it failed to:
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> 1. Provide an adequate summary of their reasons for the grant of permission;
>
> 2. Include an adequate summary of the policies and proposals in the development plan which were relevant to the decision to grant permission.
>
> 3. That the Defendant failed to have any, or any proper, regard to Policies 10, 14 and 33 of the Restormel Local Plan and failed to acknowledge the supremacy of the development plan

> 4. That the Defendant failed to disclose and make available to the public all relevant documents;
>
> 5. That the Defendant failed to have proper regard to and/or comply with the Habitats Directive and Habitats Regs with regard to its treatment of bats."

22. In fact, Ms Sheikh, who appeared with Mr Graham, for the Claimant reformulated the issues in her skeleton argument and again in oral argument. I deal in turn with the five issues as they emerged in argument.

## THE FIRST GROUND – FAILURE TO HAVE REGARD TO MATERIAL CONSIDERATIONS

23. The essential point in the first ground was that the Framework had been adopted after the Council committee resolved to grant planning permission (on 22 September 2011) but before the relevant planning official issued the planning permission (on 18 April 2012). The Claimant contended in his skeleton argument that, in accordance with case law, if the planning officer became aware before the grant of planning permission of some new factor that might cause the relevant decision-making committee to take a different view, the officer must refer the matter back to that committee. In the skeleton argument, Ms Sheikh essentially put the argument in the following way as appears from paragraphs 21 to 22 and 35 of that skeleton argument:

> "21. In this case, between the resolution to grant permission in September 2011 and the grant of planning permission in April 2012 there were a number of highly significant and material changes in circumstances."
>
> 22. The National Planning Policy Framework (NPPF) came into effect on the date of its publication in March 2012. This signalled a sea change in the Government's approach to national policy. The NPPF also cancelled and expressly revoked inter alia Planning Policy Statement 1 (Delivering Sustainable Development), the Supplement to PPS 1 (Planning for Climate Change), PPS 7 (Sustainable Development in Rural Areas), PPS 22 (Renewable Energy) and PPS 24 (Planning and Noise) which were all national policy statements relied upon by the Committee when making its resolution in September 2011. None of these were extant when the decision was made and the notice issued in April 2012.
>
> …
>
> 35. Officers failed to take the Application back to Committee for reconsideration in the light of the changes in planning policy in March 2012. The officer's Report recommending approval had heavily relied upon the policies in PPSs and PPGs which had been revoked (particularly relating to targets being treated as minima, and to renewable energy being approved wherever possible), as well as a draft NPPF which was less protective of

heritage assets and the environment, and more heavily skewed towards promoting development, than the final version of the NPPF. The Committee failed to have regard to these highly relevant policy developments and it was unlawful for the officer who had been authorised by the Committee to issue a decision on the basis of the former policy to go ahead and issue the Decision based (if this was done at all) on his own reassessment of the policies without reverting to Members. In doing so, he usurped the function of the elected politicians who were supposed to be the decision makers."

24. In oral argument, Ms Sheikh focussed on what she submitted were material differences between the Draft Framework and the Framework. She submitted that the two documents had to be read as a whole but identified particular paragraphs that she submitted reflected the difference in approach between the two. Her essential submission was that the message in the Framework provided for a more softened emphasis on economic growth and a greater emphasis on protection of the environment especially the countryside.

25. Dealing first with the law, the relevant authority is *R (Kides) v South Cambridgeshire District Council* [2002] 1 P & C.R. 19. There the local planning authority resolved to grant planning permission but it was not until almost five years later that a relevant planning agreement had been signed and the decision notice granting permission was issued. The claimant contended that material changes had occurred between the resolution to grant, and the actual grant of, planning permission and the matter should have been referred back to the relevant committee. Jonathan Parker L.J., with whom the other members of the Court agreed, said this:

> "122 In my judgment, an authority's duty to "have regard to" material considerations is not to be elevated into a formal requirement that in every case where a new material consideration arises after the passing of a resolution (in principle) to grant planning permission but before the issue of the decision notice there has to be a specific referral of the application back to committee. In my judgment the duty is discharged if, as at the date at which the decision notice is issued, the authority has considered all material considerations affecting the application, and has done so with the application in mind—albeit that the application was not specifically placed before it for reconsideration.
>
> "123 The matter cannot be left there, however, since it is necessary to consider what is the position where a material consideration arises for the first time immediately before the delegated officer signs the decision notice.
>
> "124 At one extreme, it cannot be a sensible interpretation of S.70(2) to conclude that an authority is in breach of duty in failing to have regard to a material consideration the existence of which it (or its officers) did not discover or anticipate, *and could not reasonably have discovered or anticipated* , prior to the issue of the decision notice. So there has to be some practical flexibility in excluding from the duty material considerations to which the authority did not *and could* not have regard prior to the issue of the decision notice.
>
> "125 On the other hand, where the delegated officer who is about to sign the decision notice becomes aware (or ought reasonably to have become aware) of a new material consideration, S. 70(2) requires that the authority have regard to that consideration before finally determining the application. In such a situation, therefore, the authority of the delegated officer must be such as to require him to refer the matter back to committee for reconsideration in the light of the new consideration. If he fails to do so, the authority will be in breach of its statutory duty.

> "126 In practical terms, therefore, where since the passing of the resolution some new factor has arisen of which the delegated officer is aware, and which might rationally be regarded as a "material consideration" for the purposes of S. 70(2) it must be a counsel of prudence for the delegated officer to err on the side of caution and refer the application back to the authority for specific reconsideration in the light of that new factor. In such circumstances the delegated officer can only safely proceed to issue the decision notice if he is satisfied (a) that the authority is aware of the new factor, (b) that it has considered it with the application in mind, and (c) that on a reconsideration the authority *would reach* (not *might* reach) the same decision.
>
> "127 In substance, therefore, I accept the submission made by Mr Drabble in paragraph 12 of his skeleton argument (quoted in para.115 above), but with the proviso (which may in any event be implicit in his formulation of the statutory duty) that the test of a "material consideration" is an objective one in the sense explained in para.121 above. It is not for the delegated officer to decide what is a material consideration within the meaning of S. 70(2). Hence it is no defence to a claim that an authority has breached its S. 70(2) duty for the authority to assert that in issuing the decision notice the delegated officer did not consider the consideration to be "material". Accordingly, I respectfully agree with the judge's observation (in para.71 of the judgment) that "[t]he delegation of the consideration of new material considerations is no answer to the … claim".
>
> "128 Having identified the nature and extent of the Council's duty under S. 70(2), I now turn to the facts of the instant case in order to determine whether, on those facts, the duty was discharged.
>
> "129 In my judgment the lengthy recital of the planning history which I set out earlier in this judgment admits of only one answer to that question. It seems to me plain on the facts that not only was the Council was fully aware of the five new factors on which the appellant relies, but it considered them (had regard to them) with the 1995 application specifically in mind, in that the 1995 application was one (and a prominent one) of a number of matters which together set the context in which the new factors were considered and assessed. In the light of the decisions which the Council took, and the policies it adopted, it is entirely clear, in my judgment, that had the planning officer taken it upon himself to refer the 1995 application back to committee for reconsideration immediately before issuing the planning permission, the Council's decision would have been the same. Indeed, it goes further than that, in my judgment. Given the very considerable period which had elapsed since the passing of the 1995 resolution, and the understandable concern of members at the continuing delay in negotiating the terms of a S. 106 agreement, the inference which I draw is that it would have come as a considerable and unwelcome surprise to members had they been told at the beginning of October 2000 that although the s.106 agreement was finally in place it was nevertheless necessary for them specifically to reconsider the 1995 application before a decision notice could be issued pursuant to the 1995 resolution.
>
> "130 Accordingly I consider that the judge was right to conclude (in para. 88 of his judgment) that in granting planning permission pursuant to the 1995 resolution the Council discharged its duty under s.70(2)."

26. The submissions to which reference was made in paragraph 127 in essence say this: the officer with authority to issue the decision remains entitled to act on the resolution so long as there has not been a change of circumstances "of a kind that means the committee should be invited to form a fresh judgment". In particular,

> "He is not obliged to go back to committee if his mandate remains good, as it will if the changes are small or if the original resolution remains consistent with the policy views of the council, albeit expressed in a different context. If it is clear that the council as a whole (including the officers holding delegated powers) are alive to the various changes of circumstances, the council will have regard to all material considerations at the date of issue; express reconsideration by the original committee is not necessary."

27. In my judgment, the critical issue is whether or not there is a material change between the earlier relevant policies and the later policies included in the Framework. If there were no material change, it would be lawful for the officer to act upon the earlier resolution. As a practical matter, it may be a "counsel of prudence" to refer a matter back if the officer considers there has been a relevant change. As a matter of law, however, a failure

to refer back to the committee will be unlawful if there was a change which was material on the facts. That, in my judgment is clear from the decision of the Court of Appeal in *R (Hinds) v Blackpool Borough Council* [2012] J.P.L. 1365 at paragraph 31 where Pitchford L.J., with whom the other members of the Court agreed, said this:

> "31. The present appeal must be resolved on very different facts. It is not suggested that the planning authority ever did, in meeting, consider the change of national policy announced by the department, nor is it suggested that Mr Johnston had the delegated authority of the planning committee to make the planning decision. The issue is whether the change of policy was material on the facts of this case."

28. I turn next to the relevant policies that need to be considered to determine if there has been a material change. In my judgment, the relevant documents to consider here are primarily the relevant national planning policies in force at the time and the Framework: that is, various Planning Policy Statements, the Companion Guide to PPS 22, and EN-1 and EN-3, as compared with the Framework. The Draft Framework was an emerging policy and not in force at the time of the decision and would be given limited weight. The real focus for consideration, therefore, is the alleged difference between the earlier national planning policy and the later Framework rather than focussing on a comparison between paragraphs in the Draft Framework as compared with the later published Framework. As will become clear, however, I do not consider that consideration of the Draft Framework as against the later published Framework would lead to any different conclusion in this case.

29. In my judgment, it was clear that the change from the various Planning Policy Statements to the Framework was not intended to bring about a change in the substance of planning policy either generally, or specifically, in relation to developments intended to secure renewable energy. I reach that conclusion for the following reasons.

30. First, that is clear from a comparison between the earlier policy documents and the Framework. By way of example only, it is clear from earlier policy documents such as paragraph 9 of PPS4, that, in general terms, the government's "overarching objective is sustainable growth". The government wished to help achieve sustainable economic growth by, amongst other things, building prosperous communities, reducing the gap in economic growth rates between regions, delivering more sustainable patterns of development, promoting the vitality and viability of town and other centres and by raising the quality of life and the environment in rural areas by "promoting thriving inclusive and locally distinctive rural communities whilst continuing to protect the open countryside for the benefit of all" (see paragraph 10 of PPS4). That is reflected in the aims, and to a large extent the wording, of the Framework. That Framework too indicates that the purpose of the government's policies for England is the achievement of sustainable development. Such development had three broad roles or components, an economic role to contribute to building a strong economy, a social role to support strong, vibrant and healthy communities and an environmental role to contribute to protecting and enhancing the natural and built environment (see paragraphs 6 and 7 of the Framework).

31. The similarities in policy in relation, in particular to renewable energy developments, is equally apparent from a comparison of earlier planning policies such as the supplement to PPS1 and the Framework. The supplement to PPS1 encouraged local authorities to

provide a framework that promoted and encouraged renewable and low carbon energy generation. It indicated that planning authorities should not require applicants for planning permission to demonstrate the overall need for renewable energy and should ensure that any local approach to protecting landscape, amongst other matters, did not preclude the supply of renewable energy. A similar approach, and similar language, appears in the Framework. Encouragement to use renewable resources by the development of renewable energy is one of the core planning policies set out in paragraph 17 of the Framework. Furthermore, paragraphs 97 and 98 of the Framework provide:

> "97. To help increase the use and supply of renewable and low carbon energy, local planning authorities should recognise the responsibility on all communities to contribute to energy generation from renewable or low carbon sources. They should:
>
> - Have a positive strategy to promote energy from renewable and low carbon sources;
> - Design their policies to maximise renewable and low carbon energy development while ensuring that adverse impacts are addressed satisfactorily, including cumulative landscape and visual impacts;
> - Consider identifying suitable areas for renewable and low carbon energy sources, and supporting infrastructure, where this would help secure the development of such sources;
> - Support community-led initiatives for renewable and low carbon energy, including developments outside such areas being taken forward through neighbourhood planning; and
> - Identify opportunities where development can draw its energy supply from decentralised, renewable or low carbon energy supply systems and for co-locating potential heat customers and suppliers.
>
> 98. When determining planning applications, local planning authorities should:
>
> - Not require applicants for energy developments to demonstrate the overall need for renewable or low carbon energy and also recognise that even small-scale projects provide a valuable contribution to cutting greenhouse gas emissions; and
> - Approve the application if its impacts are (or can be made) acceptable. Once suitable areas for renewable and low carbon energy have been identified in plans, local planning authorities should also expect subsequent applications for commercial scale projects outside these

areas to demonstrate that the proposed location meets the criteria used in identifying suitable areas."

32. Secondly, the conclusion that there was no material change in policy is further reinforced, in relation to renewable energy and windfarms in particular, by the fact that the Companion Guide to PPS 22, setting out practical advice on policies intended to encourage the appropriate development of renewable energy remained in force at the material times. Initially, the policies were set out in PPS 22. Now they are set out in the Framework. They remain essentially similar and consequently the practical advice on implementing the policies remained the same. Furthermore, the approach to assessing the likely impacts of wind energy development set out in EN-3, read with the relevant paragraphs of EN-1, which was in force at the time of the resolution in this case, are expressly adopted in the context of windfarms by footnote 17 to the Framework. The same Companion, and the same approach to assessing impact applied and could be followed at the material times, in my judgment, because essentially the same, unchanged policy for the encouragement of appropriate renewable energy developments continues to apply.

33. Thirdly, the foreword to the Framework itself recognises that the aim of the government is to replace and simplify, but not to change, the substance of the relevant national planning policy. As the foreword recognises, planning policy had become elaborate and forbidding. The aim of the Framework was to replace over a thousand pages of national policy with around "fifty, written simply and clearly" and to enable individuals and communities to become more involved in planning. That reinforces the view that the aim was simplification not change. Furthermore, if the intention had been to bring about change in relevant national planning policy, for example, in relation to topics such as renewable energy developments, it is remarkable that neither the foreword nor the Framework itself refers to that fact.

34. Ms Sheikh submitted that the consultation responses to the draft Framework called for better environmental protection and the Draft Framework was amended accordingly. The Claimant did not adduce in evidence any consultation response which indicated that the Draft Framework was considered to be deficient in terms of protection of the environment. Ms Sheikh did rely on a series of statement by ministers in the House of Commons or in newspaper articles as demonstrating that that is what the consultation responses said, and that is why the Draft Framework was amended. The documents relied upon are the following: (1) a brief written statement on the role civic societies were expected to play made, it seems, on 26 January 2011 (2) an article by the Secretary of State in the Guardian newspaper (3) a page apparently dated 17 September 2011 from a government website on planning (4) a statement in Parliament on the Localism Bill dated it seems 5 September 2011 and a statement on planning reform (5) a statement in Parliament on house building statistics and (6) a joint article by the Secretary of State and the Chancellor on how planning reform was key to economic recovery and would not put the countryside in peril. None of that material indicates that the government amended the Draft Framework to include additional protection for the environment. Some of the statements are relevant to other topics, not the Draft Framework. Those that relate to the Draft Framework indicate that the aim is to simplify planning law, not to change it, and that people were mistaken if they considered that the changes involved putting the countryside at risk. The material relied upon goes nowhere near to establishing that the Draft Framework was amended to include additional protection for the countryside or the environment generally.

35.Ms Sheikh also relied upon specific factors as indicating that there had been a change between the national planning policy in force in September 2011 and the Framework. First, she submitted that the removal of targets being treated as minima for renewable energy was such a change. The implication is that the Council committee resolved to grant planning permission because of the need to meet targets and, given that the targets had now been revoked, there would not be the same impetus to grant permission. However, the previous policy advice was that targets were the minimum to be achieved and should be revised regularly and revised upwards if targets were being met. Further, the fact that a target had been reached was not in itself to be used as a reason to refuse planning permission for further renewable energy projects (see paragraph 3 of PPS 22). In the present case, the Council had already met its targets as is clear from the officers' report. The Council were not granting planning permission to meet its targets. It was acting in accordance with the former national planning policy aimed at encouraging appropriate renewable energy development. That policy is no different from that contained now in the Framework.

36.Secondly, Ms Sheikh submitted that the earlier national planning policies referred to renewable energy developments being approved wherever possible and, by implication, indicated that that was different from the position in relation to the Framework. Ms Sheikh did not identify the particular provisions in the earlier national planning policy on which she relied. It appears that the thrust of that earlier policy was to encourage the grant of planning permission for such developments where appropriate. That, in my judgment, is not materially different from the position under the Framework which, for example, provides in paragraph 98 that planning authorities should approve the application if its impacts are or can be made acceptable.

37.In summary, therefore, there is, in my judgment, no material change between the planning policies contained in the earlier national planning policy guidance, and in particular those dealing with the encouragement of appropriate renewable energy schemes, and the later Framework. The Council Committee considered the relevant national planning policy guidance when it took its decision to grant planning permission. The relevant planning officer was not, therefore obliged to refer the matter back to the Committee so that it could consider the application again.

38.For completeness, I consider the position in relation to the alleged differences between the Draft Framework and the Framework. As Ms Sheikh submits, in my judgment correctly, it is important to read the whole of the document. In my judgment, there is no material change between the Draft Framework and the Framework. There is certainly no such change in relation to the assessment of applications for renewable energy schemes such as windfarms which are the subject matter of this case. The differences in my judgment reflect changes in wording rather than changes in substance or changes in the organisation of material (so that, for example, material originally included in the section on core policies are included in the section on decision-taking where they are considered to be appropriate).

39.Ms Sheikh did identify some particular changes which were submitted to be of importance. First was the absence of a definition of sustainable development in the Draft Framework. In fact, there is such a definition at paragraph 10 and it is in materially identical terms to that at paragraph 7 of the Framework. Secondly, paragraph 19 of the Draft Framework and the definition of core planning principles is substantially redrafted. It is correct that

there is a difference between paragraph 19 of the Draft Framework and paragraph 17 of the Framework and some parts of paragraph 19 appear in other places in the Framework. In terms of the significance of the changes, Ms Sheikh relied on the fact that the reference to the default position being approval at paragraph 19 of the Draft Framework was removed. In fact, the default principle was said to be approval "except where this would compromise the key sustainable development principles". That is not materially different, in my judgment, from paragraph 187 of the Framework which provides that "decision-takers at every level should seek to approve applications for sustainable development wherever possible". It is correct that paragraph 17 of the Framework includes a reference to recognising the intrinsic character and beauty of the countryside as one of the core planning principles. Paragraph 19 of the Draft Framework did however refer to the need to protect and enhance environmental and heritage assets in a manner appropriate to their significance. Both the Draft Framework and the Framework have sections, in substantively similar terms, dealing with the natural environment. There is, in truth, no material difference between the substance of the policy in the Draft Framework and the Framework itself in this regard. Ms Sheikh also relied upon the absence of paragraphs similar to paragraphs 124 and 138 of the Framework. Paragraph 124 is included in materially identical terms at paragraph 180 of the Draft Framework. Paragraph 134 does not appear but reflects the earlier national planning policy (policies HE10.1, read with HE 9.2 of PPS5). Furthermore, comparison of the whole of the section on conserving heritage assets in the Draft Framework and the section on conserving and enhancing the historic environment in the Framework does not suggest that there was, or was intended to be, any material change in policy. For all those reasons, in my judgment, there is no material difference between the relevant applicable policies in the Draft Framework and the Framework.

40. Consequently, the planning officer did not err by relying on the resolution as authorising him to issue the planning permission. There was no material change in relevant national planning policy between the date of the Committee resolution and the issue of the planning permission.

GROUND TWO – FAILURE TO GIVE SUMMARY REASONS

41. Ground 2 alleges that there was a failure to give summary reasons as required by Article 31 of the Town and Country Planning (Development Management Procedure) (England) Order 2012 ("the Order"). That provided that where planning permission was granted, the notice shall

> "i. include a summary of their reasons for grant of planning permission
>
> ii. include a summary of the policies and proposals in the Development Plan which are relevant to the decision to grant permission; and
>
> iii. where the permission is granted subject to conditions state clearly and precise their full reasons for each condition imposed, specifying all policies and proposals in the Development Plan which are relevant to the decision.

42. Summary reasons may be brief where the relevant committee agree with the reasoning of the report: see *R (Siraj) v Kirklees Metropolitan Borough Council* [2011] J.P.L. 571 at

paragraph 16. Article 31 of the Order has now been revoked

43. The summary reasons given in this case, in my judgment, clearly set out the reasons for granting the application. There was an identified need to provide renewable energy sources. There would be an increased landscape and visual impact but not such as to be so significant as to render the scheme unacceptable. The Claimant contends that the reasons do not explain why permission should be granted given what is said to be the entirely changed national context. For the reasons given above, there has been no material change in policy and the reasons explain in substance why planning permission has been granted for the development.

44. Secondly, it is said that the relevant policies have not been summarised. In my judgment, the reasons do summarise the key policies relevant to the grant of planning permission. They refer, for example, to the policies in the Structure Plan. They refer to the Local Plan policies considered to be relevant to the grant of planning permission, in particular Local Plan Policies 10 on energy supply, 11 on heritage, 19 on species protection, 27 on archaeological assessment and 37 on noise. So far as it is said in the skeleton argument that there is no reference to Local Plan Policy 10, that is in fact, incorrect. The reasons do not refer to Local Plan Policies 14 or 33. Both of those, if applicable would have provided reasons for not granting permission. Local Plan Policy 14 provides that development should not be permitted which would cause harm to the landscape, features and characteristics of areas of great landscape value. However, Denzell Down, where the proposed development is to be situated is no longer within an area of great landscape value. The officers' report clearly did not regard the policy as applicable as the development lay outside any area of landscape policy constraint (see paragraph 68 of the report). The Claimant contended that Local Plan Policy 14 could apply even if development occurred outside an area of great landscape value if it had a detrimental effect within that area. The fact is that the officers' report considered the visual impact of the proposed development and did not regard it as significant. Local Plan Policy 33 restricts development if it conflicts with the preservation or enhancement of the setting of a listed building. The officers' report considers that the proposed development does not conflict with the setting of a listed building as appears from the report. It may be that the Claimant disagrees with that conclusion. But that is a matter of planning judgment ultimately for the Council. In my judgment, the absence of a reference in the summary to two local plan policies which, in the judgment of the relevant Committee are not applicable, does not constitute a failure to give reasons contrary to Article 31 of the Order.

45. Furthermore, even if there were a breach of that Article, I would refuse to quash the decision to grant planning permission on this ground. Article 31 of the Order has now been revoked. First if the decision were quashed, planning permission could be granted again without the need to give summary reasons. Secondly the actual reasons for the decision appear clearly from the report in any event. It would be excessive formalism to quash the grant of planning permission because of the absence of summary reasons when those reasons were clearly set out in the report. Nor does the fact that regulation 31 of the EIA Regulations applies lead me to a different conclusion. That requires that there be a statement of, among other things, the main reasons and considerations on which the decision is based. That requirement has been met. What the Claimant seeks here is to quash the decision because the summary of reasons does not, in his view, include a summary of relevant policies because it does not specifically refer to two which he (but not the Council) considers applies and justified refusal. In my judgment, even if there

had been a breach of Article 31 of the Order (and I do not consider that there has been), it would not be appropriate in the circumstances of this case to quash the planning grant of permission.

GROUND 3 – FAILURE TO HAVE REGARD TO THE DEVELOPMENT PLAN

46. The Claimant next contends that the decision maker failed to have regard to the development plan. In particular, Ms Sheikh submits that the decision-maker must identify the provisions of the development plan that are relevant, whether the grant of planning permission would conflict with the development plan and whether other material considerations outweigh that consideration. As Lord Clyde said in *City of Edinburgh v Secretary of State for Scotland* [1997] 1 W.L.R. 1447 at page 1459 dealing with section 18A of the Town and Country Planning (Scotland) Act 1972, which is materially similar to section 38(6) of the 2004 Act:

> "…it will obviously be necessary for the decision-maker to consider the development plan, identify any provisions in it which are relevant to the question before him and make a proper interpretation of them. His decision will be open to challenge if he fails to have regard to a policy in the development plan which is relevant to the application or fails properly to interpret it. He will also have to consider whether the development proposed in the application before him does or does not accord with the development plan. There may be some points in the plan which support the proposal but there may be some considerations pointing in the opposite direction. He will require to assess all of these and then decide whether in light of the whole plan the proposal does or does not accord with it. He will also have to identify all the other material considerations which are relevant to the application and to which he should have regard. He will then have to note which of them support the application and which of them do not, and he will have to assess the weight to be given to all of these considerations. He will have to decide whether there are considerations of such weight as to indicate that the development plan should not be accorded the priority which the statute has given to it. And having weighed these considerations and determined these matters he will require to form his opinion on the disposal of the application. If he fails to take account of some material consideration or takes account of some consideration which is irrelevant to the application his decision will be open to challenge. But the assessment of the considerations can only be challenged on the ground that it is irrational or perverse."

47. However, the precise way in which an officer preparing a report or a committee reaching a decision expresses themselves may differ. As Lord Clyde recognised in *City of Edinburgh v Secretary of State for Scotland* [1997] 1 W.L.R. 1447 at page 1460

> In many cases it would be perfectly proper for the decision-maker to assemble all the relevant material including the provisions of the development plan and proceed at once to the process of assessment, paying of course all due regard to the priority of the latter, but reaching his decision after a general study of all the material before him. The precise procedure followed by any decision-maker is so much a matter of personal preference or inclination in light of the nature and detail of the particular case that neither universal prescription nor even general guidance are useful or appropriate. "

48. In the present case, there was, in my judgment, no failure to have regard to the development plan. First, one would expect a planning committee to be familiar with the principle underlying section 38(6) of the 2004 Act. In the present case, however, the report expressly refers at paragraph 62 to section 38(6) of the 2004 Act and to the need to determine the application in accordance with the development plan unless material considerations indicate otherwise. Secondly, in the present case, the report had regard to

the fact that the development plan (and relevant national planning policy which was a material consideration) encouraged renewable energy developments whilst minimising any adverse local impacts (see e.g. policy 7 of the Structure Plan). Local Policy 10 also favoured the grant of proposals for renewable energy schemes unless they would cause demonstrable harm to, amongst other things, designated or protected landscapes such as Areas of Outstanding Natural Beauty, areas of great landscape value and the countryside in general. The fact that relevant policies pointed in favour of permitting renewable energy developments providing that, amongst other things, it did not amount to demonstrable harm in terms of landscape is reflected in the report. The report looks at the principle of development. It looks at the landscape and visual impact. The proposed development did not impact on an Area of Outstanding Natural Beauty or an area of great landscape value. It would be visible but would not alter the landscape character given the presence of other tall structures (see paragraphs 64 to 74 of the report). In the conclusion, the report accepts that policy at both national and local (i.e. the development plan) level encouraged the promotion of such schemes. It considered that, although there would be an increased landscape and visual impact, that was not so significant as to render the scheme unacceptable. The conclusion was that that accorded with Local Plan policies, including Policy 10, and the Structure Plan Polices 3 and 7.

49. There is no basis, in my judgment, for concluding that the Committee failed to have regard to the development plan in these circumstances. The natural reading of the report is that the development plan requires a weighing up of the benefits of encouraging renewable energy schemes against any affects to assess if those affects involved demonstrable harm. Here, the affects were not so significant as to be unacceptable. The development did therefore comply with the development plan. Even if that reading of the report were wrong, the fact is that the officers who drafted the report (and the Committee) were well aware of the need to balance the benefits of renewable energy schemes against any adverse effects. Even if the decision were better characterised as one where the proposed development did not comply with the development plan, nevertheless, it is clear that other material consideration in terms of the benefits of promoting renewable energy were considered to outweigh those adverse affects.

GROUND FOUR – FAILURE TO PUBLICISE DOCUMENTS

50. The Claimant contends that there was a failure to disclose certain specified documents and make them available to the public or a failure to notify the public of the existence of the documents. Ms Sheikh's essential submission on this was that the documents constituted environmental information which needed to be made available to the public prior to the decision.

51. In my judgment, it is important to distinguish between the different statutory regimes applicable to access to information. The different legal regimes have different definitions of environmental information. They also impose different obligations. In some instances, it is an obligation to provide access to certain types of information when requested. In others, it is an obligation to publicise the fact that certain specified information has been received. In the present case, the Claimant, in fact, relies on three separate legal regimes.

52. First, there is the regime governing the entitlement of a member of the public to access to environmental information on request. That obligation is derived, in international law

terms, from the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters ("the Aarhus Convention"). Article 4 of that Convention is concerned, amongst other things, with giving an individual access to environmental information (as defined in that Convention) as soon as possible and at the latest within one month of the request. Article 5 of the Convention deals with the dissemination of information. Then there are specific obligations relating to publication of information in relation to decisions to permit activities listed in Annex 1 to the Convention.

53. The relevant European Union institutions have enacted Directive 2003/4/EC on public access to environmental information ("the Information Directive"). That gives a specific definition of environmental information. Article 3 provides that Member States shall give access to environmental information on request. Article 7 provides that Member States shall take the necessary steps to organise information with a view to its active and systematic dissemination to the public.

54. Those two obligations are implemented in the United Kingdom by the Environmental Information Regulations 2004 ("the Information Regulations"). Regulation 2 provides a definition of environmental information for the purposes of the Information Regulations. Regulation 5(1) and (2) provide that:

> "(1) Subject to paragraph (3) and in accordance with paragraphs (2), (4), (5) and (6) and the remaining provisions of this Part and Part 3 of these Regulations, a public authority that holds environmental information shall make it available on request.
>
> "(2) Information shall be made available under paragraph (1) as soon as possible and no later than 20 working days after the receipt of the request".

55. In the present case, the Claimant has been given access to all the information to which the Information Regulations entitle him. So far as one can tell, that was done within 20 working days. But if not, he has had access to the information and no remedy would be appropriate. Ms Sheikh submits that this occurred after the decision of the Committee on 22 September 2011. However, that is the consequence of the fact that access to information under this regime is provided upon request, and the Claimant did not make his request until after the Committee had made its decision.

56. Regulation 4 of the Information Regulations provides that a public authority shall progressively make environmental information (as defined) available by electronic means and take reasonable steps to organise the information with a view to active and systemic dissemination to the public. There appears to be no complaint that the time taken to transfer information to the Council's website involved a breach of regulation 4 of the Information Regulations. There is certainly not sufficient information before me to enable me to determine whether there has, or has not, been a breach of Regulation 4 (even assuming it is a justiciable obligation). In any event, given that the Claimant has had access to the information (and any other member of the public would be entitled to access), and the decision in the present case was taken in September 2011 and the planning permission issued in April 2012, I would not, as a matter of discretion consider

it appropriate to grant any remedy in relation to Regulation 4 if that was being sought.

57. The second regime concerns the legal provisions applicable to environmental impact assessments of developments for which planning permission is sought. In particular, during the course of the hearing, it became clear that the Claimant's primary case now is that there was a breach of regulation 19(3)(d)(f) and (j) of the EIA Regulations which require the recipient of certain defined information to publish a notice in a local newspaper stating that that information has been provided, giving details of where it may be inspected and the right of any person to make representations in respect of it. The Claimant also relies upon regulation 19(7) of the EIA Regulations which require the planning authority to suspend the determination of an application for planning permission for 21 days from the publication.

58. The starting point is Directive 85/337/EEC of 27 June on the assessment of the effects of public and private projects on the environment ("Directive 85/337/EEC"). That was amended by Directive 2003/35/EC ("the Amending Directive"). Directive 85/337/EEC was replaced (after the decision of the 22nd September 2011 but before the planning permission was issued on 18 April 2012) by Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 ("the EIA Directive").

59. In essence, certain projects had to be the subject of an environmental impact assessment prior to the grant of planning permission. Article 5 of Directive 85/337/EEC required the developer to supply, in an appropriate form, the information specified in Annex III to Directive/85/337/EEC (see now Article 5 and Annex IV to the EIA Directive). The developer had to include at least a description of the project, a description of the measures envisaged to avoid, reduce or remedy the possible adverse affects, the data required to identify and assess the main effects which the project was likely to have on the environment and a non-technical summary of that information.

60. Article 6.2 and 6.3 of Directive 85/337/EEC was amended by the Amending Directive which provided that they should be replaced by the following:

> "2. The public shall be informed, whether by public notices or other appropriate means such as electronic media where available, of the following matters early in the environmental decision-making procedures referred to in Article 2(2) and, at the latest, as soon as information can reasonably be provided:
>
> (a) the request for development consent;
>
> (b) the fact that the project is subject to an environmental impact assessment procedure and, where relevant, the fact that Article 7 applies;
>
> (c) details of the competent authorities responsible for taking the decision, those from which relevant information can be obtained, those to which comments or questions can be submitted, and details of the time schedule for transmitting comments or questions;
>
> (d) the nature of possible decisions or, where there is one, the draft decision;

(e) an indication of the availability of the information gathered pursuant to Article 5;

(f) an indication of the times and places where and means by which the relevant information will be made available;

(g) details of the arrangements for public participation made pursuant to paragraph 5 of this Article.

3. Member states shall ensure that, within reasonable time-frames, the following is made available to the public concerned:

(a) any information gathered pursuant to Article 5;

(b) in accordance with national legislation, the main reports and advice issued to the competent authority or authorities at the time when the public concerned is informed in accordance with paragraph 2 of this Article;

(c) in accordance with the provisions of Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information, information other than that referred to in paragraph 2 of this Article which is relevant for the decision in accordance with Article 8 and which only becomes available after the time the public concerned was informed in accordance with paragraph 2 of this Article."

61. Article 8 of Directive 85/337/EEC referred to information gathered pursuant to Articles 5, 6 and 7. The relevant provisions now are contained in Article 6 and 8 of the EIA Directive.

62. Pausing there, it is clear that the amended version of Articles 6.2 and 6.3 contemplated two separate sets of obligations. First, under Article 6.2., the public were to be informed by a public notice of certain specified information including the fact that the application was subject to an environmental impact assessment, the details of the competent authorities and an indication of the availability of information gathered pursuant to Article 5 – that is, the information that the developer was required to provide. Secondly, the Member State was to ensure certain other information was to be made available, that is the information gathered under Article 5 itself, the main reports and advice of the competent authorities, and information relevant to the decision and becoming available after the publication of the public notice referred to in Article 6.2. That information had to be made available to the public. There was no requirement that Member States had to ensure that a further public notice had to be issued notifying the public that it had received relevant information after the publication of the original public notice.

63. Those provisions were implemented in the United Kingdom by the EIA Regulations. It was those regulations (the 1999 Regulations) that applied to this application for planning permission as it was submitted before 24 August 2011: replacement regulations apply to applications received after that date. Parts III and IV of the EIA Regulations deal with situations where an environmental statement needs to be submitted with a planning application and the preparation of such statements. An environmental statement is defined in Regulation 2 as:

" a statement

(a) that includes such of the information referred to in Part I to Schedule 4 as is reasonably required to assess the environmental effects of the development and which the applicant can, having regard in particular to current knowledge and methods of assessment, reasonably be required to compile but

(b) includes at least the information referred to in Part II of Schedule II.

64. Those provisions implemented Article 5 of Directive 85/337/EEC and, in particular ensure that the information required to be provided under Article 5 and the relevant Annex, is included in an environmental statement.

65. There were procedures for publicising, amongst other things, the fact that an application for planning permission had been made and the place at which a copy of the application and the environmental statement could be inspected. These are contained in part in the Order and in part in Part V of the EIA Regulations. The relevant regulation in the present case is Regulation 19 which provides:

"(1) Where the relevant planning authority, the Secretary of State or an inspector is dealing with an application or appeal in relation to which the applicant or appellant has submitted a statement which he refers to as an environmental statement for the purposes of these Regulations, and is of the opinion that the statement should contain additional information in order to be an environmental statement, they or he shall notify the applicant of appellant in writing accordingly, and the applicant or appellant shall provide that additional information; and such information provided by the applicant or appellant is referred to in these Regulations as "further information".

(2) Paragraphs (3) to (9) shall apply in relation to further information and any other information except in so far as the further information and any other information is provided for the purposes of an inquiry or hearing held under the Act and the request for the further information made pursuant to paragraph (1) stated that it was to be provided for such purposes.

…

(3) The recipient of further information pursuant to paragraph (1) or any other information shall publish in a local newspaper circulating in the locality in which the land is situated a notice stating –

…

(d) that further information or any other information is available in relation to an environmental statement which has already been provided;

(e) that a copy of the further information or any other information and of any statement referred to as an environmental statement for the purpose of these Regulations which relates to any planning permission or subsequent application may be inspected by members of the public at all reasonable hours;

(f) an address in the locality in which the land is situated at which the further information or any other information may be inspected and the latest date on which it will be available for inspection (being a date not less than 21 days later than the date on which the notice is published);

…

(j) that any person wishing to make representations about the further

> information or any other information should make them in writing, before the date specified in accordance with sub-paragraph (f), to the relevant planning authority, the Secretary of State or the inspector (as the case may be);
>
> …
>
> (7) Where information is requested under paragraph (1) or any other information is provided, the relevant planning authority, the Secretary of State or the inspector, as the case may be, shall suspend determination of the application or appeal, and shall not determine it before the expiry of 14 days after the date on which the further information or any other information was sent to all persons to whom the statement to which it relates was sent or the expiry of 21 days after the date that notice of it was published in a local newspaper, whichever is the later."

66. "Any other information" is defined as:

> ""any other information" means any other substantive information relating to the environmental statement and provided by the applicant or the appellant as the case may be;"

67. Thus there is the environmental statement as defined in regulation 2(1) of the EIA Regulations. There is further information, as defined by regulation 19(1) of the Regulations and is, in effect, information required by the planning authority in order to ensure that the environmental statement contains the required information. There is also any other information as defined in regulations 2(1) of the EIA Regulations

68. These three sets of information form part of what is described as environmental information. That is defined in regulation 2 in the following terms:

> ""environmental information" means the environmental statement, including any further information [and any other information], any representations made by any body required by these Regulations to be invited to make representations and any representations duly made by any other person about the environmental effects of the development;
>
> "environmental statement" means a statement –
>
> (a) that includes such of the information referred to in Part 1 of Schedule 4 as is reasonably required to assess the environmental effects of the development and which the applicant can, having regard in particular to current knowledge and methods of assessment, reasonably be required to compile, but
>
> (b) that includes at least the information referred to in Part II of Schedule 4"

69. There are obligations which apply to environmental information as defined. Regulation 3 of the EIA Regulation provides that planning permission may only be granted if the relevant decision-maker has taken the environmental information into account. There are other obligations – such as those imposed in regulation 19 - which apply only to part of that environmental information, that is which apply to the "further information" and

"any other information" as defined.

70. The issue in the present case is what information constitutes "any other information" for the purposes of Regulation 19 of the EIA Regulations. The Claimant submits that any other information includes any other substantive information provided by the applicant for planning permission which relates to, that is refers to or deals with, matters that are covered in an environmental statement. There are approximately 17 sets of information which the Claimant says constitutes any other information. Ten of these are listed at paragraph 51 of the Claimant's skeleton argument and the remainder were relied on by Ms Sheikh in argument. Broadly, the information can be placed in the following categories: (1) correspondence between the developer and third parties responding to the concerns of third parties or points raised by them and copied by the applicant to the Council (2) information and studies provided by the Claimant to address the concerns of particular Council officers, such as the archaeological officer and the conservation officer, who were advising the Council on the application (3) information submitted by third parties to the Council and (4) information generated by the Council itself. The Claimant submits that all these categories of information are any other information as they are substantive information relating to the environmental statement and provided by (or copied by) the applicant to the Council. The Claimant contends, therefore, that the fact that that information has been received must be the subject of a notice published in a local newspaper in accordance with Regulation 19(3) of the EIA Regulations and the Council must suspend determination of the application for planning permission for 21 days after the publication of the notice.

71. In my judgment, information is "any other information" within the meaning of Regulations 2(1) and 19 of the EIA Regulations if it is substantive information provided by the applicant to ensure that the Council is provided with the information required for inclusion in an environmental statement as required by Schedule 4 to the EIA Regulations. Thus, if the original document comprising the environmental statement was considered not to include all the information required by Schedule 4, then additional information provided at the direction of the Council to make it an environmental statement would be "further information". If such information were provided voluntarily by the applicant, it would be "any other information". Conversely, the phrase "any other information" in Regulations 2 and 19 does not include comments or responses made by the applicant in response to the concerns of, or points raised by, third parties or Council officers. Still less does it include documents submitted by third parties or generated by the Council. I reach that conclusion for the following reasons.

72. First, the phrase "any another information" must be read in context and in the light of the EIA Regulations as a whole. Regulation 19 is dealing with situations where the environmental statement that was originally produced may not satisfy the requirements of Schedule 4 to the EIA Regulations. The local planning authority may require additional information be provided in order, in the words of regulation 19(1) of the EIA Regulations, for it "to be an environmental statement". Alternatively, an applicant may voluntarily provide such information rather than being required to provide it. In context, therefore, "further information" and "any other information" is intended to be the information needed to ensure that the requirements for an environmental statement are met.

73. Secondly, that interpretation accords with Directive 85/337/EEC as amended by the

Amending Directive. The purpose of the EIA, and the amendments to it, was to implement the Directive. There is no suggestion that the EIA Regulations were amended to impose greater or additional obligations than those imposed by the relevant provisions of EU law. Article 6.2 and 6.3 as amended draw a clear distinction between information obtained under Article 5 and the relevant Annex – what, in domestic law, is known as the environmental statement, that is the statement of the information required under Schedule 4 to the EIA Regulations – and information obtained under other Articles. The availability of the former – the environmental statement information – must be the subject of public notice. The latter is not subject to a requirement that there must be a public notice of its availability. It must, however, be made available, on request. That distinction – between the information forming an adequate environmental statement and information arising during the planning process – is maintained in the EIA Regulations. The former is subject to the requirements for public notification. The latter is subject to rights of access. The definition of any other information in regulation 2 is to be read accordingly and means any other substantive information provided by the applicant for planning permission to ensure that the information required for an environmental statement by Schedule 4 to the EIA Regulations is provided.

74. Thirdly, that interpretation is fully in accordance with the policy underlying both the regime governing access to environmental information, broadly defined, and the regime governing assessment of the environmental impacts of particular projects. The aim, broadly, of the former regime is to ensure access to information and public participation in decision-making as appears from the recitals to the Aarhus Convention and the recitals to the Information Directive. The recitals to the Amending Directive similarly refer, amongst other things, to the importance of effective public participation in decisions taken which may have a significant effect on the environment. That policy will be achieved if (1) the applicant for planning permission provides an environmental statement meeting the relevant legislative requirements (2) the fact that there has been an application for planning permission and an environmental statement is available is published (3) members of the public have a right of access to information and (4) are able to comment on those matters. The interpretation of the EIA Regulations that I consider to be correct is fully consistent with that policy.

75. Fourthly, the Claimant's interpretation could lead to such odd or absurd consequences that it is unlikely that those drafting the relevant regulations intended them to be interpreted as the Claimant submits should be done. On the Claimant's analysis, the provision of substantive information in response to a concern raised by a third party must be the subject of a notice in a local newspaper. Each time that occurs, the Council must suspend determination of an application for 21 days to allow time for further comment on the information provided. There are likely to be many occasions when additional information is provided in response to points raised. On the Claimant's case, there must be a publication in a local newspaper of the fact that that information has been provided and a suspension of the determination of the application each time. Furthermore, if a person were opposed to a planning application, there would be ample opportunity to raise a point, receive a response from the application for planning permission and then claim that that was substantive information provided by the applicant which required publication and a suspension of determination. In my judgment, the regulations were not intended to produce such results. That is neither required by, nor in my judgment, consistent with effective public participation, in environmental decision making.

76. Furthermore, I have considered the decision of the Court of Appeal in *Finn-Kelcey v Milton*

*Keynes Borough Council* [2009] Env. L.R. 17. That decision deals with the EIA Regulations prior to their amendment to refer to any other information. The decisions deal with the question of how further information requested by the local planning authority is to be made available. The Court of Appeal decided that the methods for making information available will vary and considered that the information had been made available, even though kept separately from the planning file by the planning authority, as the information available clearly indicated the existence and availability of the further information. There is nothing in that judgment which indicates that any other information should be given a different interpretation from that given above.

77. In those circumstances, therefore, the Council complied with its statutory duties and there was no breach of Regulation 19 of the EIA.

78. Finally, the Claimant's skeleton argument contends that the information in question was also part of the application for planning permission within the meaning of article 36 of the Order. That Article requires that the relevant planning register shall contain a copy of the application "together with any accompanying plans and drawings". In my judgment, the information here was not part of the application for planning permission. It was material produced during the course of the planning process and commenting upon the application but was not part of it. I therefore reject the Claimant's submission that the phrase "the application" in Article 36 means all the documents which will be considered when deciding whether or not to approve it.

GROUND FIVE – THE OBJECTIONS RELATING TO BATS

79. The Claimant's essential challenge on ground 5, as it developed at the hearing was that the Council's planning officer wrongly summarised the responses made by Natural England and the Cornwall Wildlife Trust.

80. In relation to Natural England, the fact is that the response (recorded in writing and reproduced at paragraph 15 above) does reflect their position. The information given is taken verbatim from an e-mail dated 20 September 2011. In relation to the Cornwall Wildlife Trust, their position was summarised in the body of the officers' report. Additional information, reproduced above, was provided to the meeting and set out the further consultee comments received. The further comments are set out in paragraph 15 above and are taken from an e-mail dated 19 September 2011. The information provided relates to a process referred to as "feathering" windturbines at an appropriate speed which the Cornwall Wildlife Trust considered appropriate to minimise the risk of injury to bats. I do not consider that the comments made by the planning officer that the Cornwall Wildlife Trust were satisfied that adverse effects could be mitigated to a suitable extent would have misled the Committee. It is clear what the Cornwall Wildlife Trust were saying and what they wanted by way of mitigation, namely feathering of windturbines. The real question is: was that necessary? Natural England did not consider that to be necessary. Nor did the Council. That was a matter for the Council to decide. I do not consider that the Committee were misled as to the position of either Natural England or the Cornwall Wildlife Trust.

81. In any event, I would not, as a matter of discretion, quash the decision to grant planning permission on this ground. The comments from Cornwall Wildlife Trust were, broadly,

concerned with the protection of bats and whether or not there remained issues relating to bats which warranted the refusal of planning permission. Given the advice of Natural England, who have statutory responsibility with respect to bats, that the proposed mitigation was adequate, there is no possibility that the limited comments of the Cornwall Wildlife Trust would have resulted in a different decision.

82. Finally, Ms Sheikh, in reply, relied on two new authorities which, she submitted, meant that the Council should not grant planning permission if it were not certain that there were would be no adverse effects in relation to bats. The concern appeared to be based on the fact that the unilateral undertaking originally provided referred to the habitat management plan but did not provide a mechanism for ensuring compliance with the management plan. The point was not developed fully. In short, the Council were, in my judgment fully satisfied that appropriate measures could be taken to safeguard bats and did not act unlawfully in granting planning permission. So far as ensuring that the appropriate mitigation measures are enforced, the current unilateral undertaking expressly deals with the need for submission, approval and implementation of a habitat management plan.

83. For completeness, I note that a large number of documents were referred to and a large number of points made in the skeleton argument or referred to by the Claimant's counsel during the hearing. I have in this judgment sought to deal with what I consider to be the principal points raised. The Claimant can be assured that I have, however, carefully considered all the other matters and documents referred to on his behalf.

## CONCLUSION

84. The decision of the Council to grant planning permission for this particular development is, in my judgment, lawful. The officer was fully entitled to act on that decision and to issue the planning permission. The claim for judicial review is therefore dismissed.