England and Wales High Court (Administrative Court) Decisions

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Case No: CO/17111/2013

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

Royal Courts of Justice
Strand, London, WC2A 2LL
20 June 2014

B e f o r e :

Mr Justice Lindblom

Between:

Lark Energy Limited	**Claimant**
- and -	
(1) Secretary of State for Communities and Local Government	
(2) Waveney District Council	**Defendants**

Mr Andrew Newcombe Q.C. (instructed by DLA Piper UK LLP) for the Claimant
Mr Stephen Whale (instructed by the Treasury Solicitor) for the First Defendant
Hearing date: 10 April 2014

HTML VERSION OF JUDGMENT

Mr Justice Lindblom:

Introduction

1. Proposals for the production of renewable energy on sites in the countryside can be controversial. This case is about such a proposal, a scheme for a solar farm at Ellough Airfield, near Beccles in Suffolk.

2. By an application under section 288 of the Town and Country Planning Act 1990 the claimant, Lark Energy Limited ("Lark Energy"), challenges the decision of the first defendant, the Secretary of State for Communities and Local Government ("the Secretary of State"), on 16 October 2013, to dismiss its appeal against the refusal by the second defendant, Waveney District Council ("the Council"), of its application for planning permission for the installation of a 30MW solar farm – later reduced to 24MW – on a site of about 46 hectares at the airfield. It had sought a temporary permission, for a period of 25 years. The appeal was recovered by the Secretary of State because it involved a proposal of major significance for the delivery of the Government's climate change programme and energy policies. In April 2013 the Council granted planning permission for a 14.1MW solar farm on about 29 hectares in the northern part of the same site. An inquiry into Lark Energy's appeal was held by the Secretary of State's inspector, Mr Neil Pope, in June 2013. In his report, dated 8 July 2013, the inspector recommended that the appeal be allowed. But that recommendation was rejected by the Secretary of State in his decision letter.

   The issues

3. There are four issues:

   (1) whether the Secretary of State erred in law in the way he dealt with the permitted scheme, which he regarded as a fallback position for Lark Energy, and thus failed to consider the proposal on its own merits (ground 1 of the application);

   (2) whether the Secretary of State failed to fulfil his duty, under section 38(6) of the Planning and Compulsory Purchase Act 2004 ("the 2004 Act"), to make his decision on Lark Energy's proposal in accordance with the development plan unless material considerations indicated otherwise, and whether in this respect the decision was perverse (ground 2);

   (3) whether the Secretary of State failed to consider the appeal scheme in accordance with government policy in the National Planning Policy Framework ("the NPPF"), in particular paragraph 14 (ground 3); and

   (4) whether the Secretary of State exaggerated the limited harm the development would cause to the character and appearance of the area, by giving weight to the fact that objections on this ground had been made by local residents, and thus failed to apply the advice in the Government's practice guidance for renewable energy and low carbon energy (ground 4).

   On each of those four issues Lark Energy complains that the Secretary of State failed to give adequate and intelligible reasons for his decision.

   Development plan policy

4. Two policies of the Council's Development Management Policies Development Plan Document, which it adopted in January 2011, are important in this case. They are Policy DM03, "Low Carbon and Renewable Energy", and Policy DM27, "Protection of Landscape Character".

5. Policy DM03 states:

   "Proposals for stand alone energy generation … will generally be supported. The District is seeking new renewable energy generation capacity to deliver an appropriate contribution towards the UK Government's binding renewable energy target. Therefore targets for Waveney District include:

   - Approximately 30% electricity from renewable sources by 2021
   - Approximately 12% heat from renewable sources by 2021.

   Renewable energy schemes will be permitted where:

- There are no significant adverse effects or cumulative adverse effects upon the landscape, townscape and historic features;
- There are no significant adverse effects on the amenities of nearby residents by way of noise, dust, odour or increases in traffic; and
- The wider environmental, economic, social and community benefits directly related to the scheme outweigh any potentially significant adverse effects.

In areas of national importance, large-scale renewable energy infrastructure will not be permitted unless it can be demonstrated that the objectives of the designation are not compromised. …

When the technology is no longer operational there is a requirement to decommission, remove the facility and complete a restoration of the site to its original condition.

…".

6. The explanatory text introducing Policy DM03 begins in paragraph 3.21, which says that the district of Waveney is "likely to be disproportionately affected by climate change". The effects "include rises in sea and river levels, frequent summer droughts and winter flooding". Changes are also said to be likely in "the landscape, biodiversity, agricultural land use, recreation, tourism and cultural heritage". It is recognized that "[measures] to mitigate and adapt to climate change will need to be implemented through a combined approach of planning policy and other delivery mechanisms". Paragraph 3.29 refers to the "binding renewable energy target of 15% of total energy to be generated from renewable sources by 2020" and the Government's strategy for renewable energy. Paragraph 3.30 says that the setting of a target of "215GWh of renewable electricity by 2021 (around 30% of total electricity demand in Waveney)" is "challenging but deliverable". It refers to the role that "stand-alone installations" of various kinds and "medium and small-scale wind, solar photovoltaics and other technologies" will play in meeting the local targets. Paragraph 3.31 says the Council "will seek to support and promote the development of low carbon and renewable energy in principle, to mitigate climate change and protect the distinctive environment of the District". Paragraph 3.32 says this:

   "Visual, landscape and biodiversity impacts will be important considerations when deciding planning applications. In particular, proposals will be directed away from Natura 2000 sites and areas of national importance such as the Area of Outstanding Natural Beauty and where they could have an adverse impact on the Broads Authority landscape. The Landscape Character Assessment (April 2008) and Conservation Area Appraisals will be among key tools in assessing impacts."

7. Policy DM27 states:

   "Proposals for development should be informed by, and be sympathetic to, the distinctive character areas, strategic objectives and considerations identified in the Waveney District Landscape Character Assessment ["the WLCA"].

   Development proposals should demonstrate that their location, scale, design and materials will protect and where possible, enhance the special qualities and local distinctiveness of the area.

   Proposals that have an adverse effect will not be permitted unless it can be demonstrated that they cannot be located on alternative sites that would cause less harm and the benefits of the development clearly outweigh any adverse impacts.

   Development affecting the Broads Area and Suffolk Coast and Heath Areas of Outstanding Natural Beauty and their settings, Rural River Valley and Tributary Valley Farmland areas will not be permitted unless it can be demonstrated that there is an overriding national need for development and no alternative site can be found."

   The NPPF

8. The NPPF was issued in March 2012. It contains the Government's policy for planning in England.

9. Paragraph 14 of the NPPF refers to the "presumption in favour of sustainable development, which should be seen as a golden thread running through both plan-making and decision-taking". For development control decisions this presumption – where it is engaged and unless material considerations indicate otherwise – requires development proposals in accordance with the development plan to be approved "without delay"; and, where the plan is "absent, silent or [its] relevant policies are out of date", that planning permission is granted unless either "any adverse impacts of doing so would significantly and demonstrably outweigh the benefits, when assessed against the policies in this Framework taken as a whole", or "specific policies in this Framework indicate development should be restricted".

10. In the section of the NPPF headed "Meeting the challenge of climate change, flooding and coastal change" paragraphs 97 and 98 state:

    "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;

    … .

    98. When determining planning applications, local planning authorities should:

    - not require applicants for energy development 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. …".

    The Government's practice guidance on proposals for renewable energy

11. In July 2013 the Government issued its "Planning practice guidance for renewable energy and low carbon energy". Paragraph 5 of this document said that the NPPF "explains that all communities have a responsibility to help increase the use and supply of green energy, but this does not mean that the need for renewable energy automatically overrides environmental protections and the planning concerns of local communities". It added:

    "As with other types of development, it is important that the planning concerns of local communities are properly heard in matters that directly affect them."

    Paragraph 8 related to the identification of suitable areas for renewable and low carbon energy development. It emphasized the need for local planning authorities to ensure that they take into account "the requirements of the technology … and, critically, the potential impacts on the local environment …", adding that the "views of local communities likely to be affected should be listened to."

    The inspector's report

12. In his report the inspector said the main issue in the appeal was "whether the benefits of the scheme, including the production of electricity from a renewable source, [outweigh] any harmful impacts, having particular regard to the effect upon the character and appearance of the countryside, including the likely impact upon the [Hundred Tributary Valley Farmland Landscape Character Area ("the HTLCA")]" (paragraph 37).

13. In his "Conclusions" the inspector said the proposal gained "considerable support from 'the Framework' when read as a whole" (paragraph 81). He agreed with Lark Energy and the Council that "the most relevant" policies of the development plan in the appeal were Policy DM03 and Policy DM27. But he

went on to say this:

"Whilst DM03 is consistent with the provisions of 'the Framework' there is some tension between paragraph 113 of this national planning policy guidance and DMP policy DM27. The last paragraph of policy DM27 blurs the distinction between nationally and locally designated areas. As set out in paragraph 215 of 'the Framework' the closer the policies in the plan to the policies in 'the Framework', the greater the weight that may be given. I concur with the appellant that the WLCA should be given moderate weight in determining this appeal. …".

14. As for the "Benefits of the Scheme", the inspector said the proposed development would "add to the Council's good progress in meeting its renewable energy target", would "assist in meeting national targets", and would "make a valuable contribution to cutting greenhouse gas emission and help tackle climate change". These were "important wider environmental benefits of the scheme that should be given significant weight in the overall planning balance" (paragraph 82). There were also "local environmental benefits", particularly to biodiversity, which were "important considerations that carry much weight in the planning balance" (paragraph 83). And there were "economic benefits", including an increase in "the security and diversity of electricity supply", which were, in the inspector's view, "important considerations that also carry significant weight in this appeal" (paragraph 84).

15. The inspector dealt with the likely effect of the development on the character and appearance of the countryside in paragraphs 86 to 94 of his report.

16. He found that "the landscape and visual impact" of the development would be "confined to a distance of about 1km from the boundaries of the site". The proposed planting and strengthening of hedgerows, the topography and the distance between the site and both the Norfolk Broads and the Suffolk Coastal Area of Outstanding Natural Beauty "would ensure that there was no harmful impact upon these nationally important landscapes" (paragraph 86).

17. As the Council and Lark Energy had agreed, "the greatest effects on landscape character would be on the character of the site itself". The landscape character of the HTLCA was "of high sensitivity to the proposed development", but the Saints Plateau East Landscape Character Area ("the SPLCA") was "of much lower sensitivity". The likely impact of the development on the HTLCA had to be assessed "in accordance with DMP policy DM27" (paragraph 87).

18. While the development was in place "the arable character of the site would be replaced by a rather utilitarian form of development with very many arrays of solar panels and the associated infrastructure". This, said the inspector, "would considerably change the character of the site and detract from its largely unspoilt rural qualities". But the topography of the site would be undisturbed, its trees and hedgerows retained, the pattern of field boundaries reinforced by the new planting, and the "landscape structure" enhanced. All of this would "assist in mitigating the impact of the development" (paragraph 88).

19. In paragraph 89 of his report the inspector concluded that within a distance of about a kilometre from the northern, eastern and western boundaries of the site the development "would have a very limited adverse effect upon the mixed and varied character of this part of the district", and that this harm "would be no greater than that which has already been accepted by the Council when it approved a 14.1MW solar farm on this part of the site in April 2013". The development "would not significantly harm the landscape character of this part of the district and there would be no conflict with the strategic objectives of the SPLCA. …".

20. The inspector found that "[overall]" the development "would have a limited adverse effect upon the character of the site and would not undermine the strategic objectives of the HTLCA", but that the "harmful change in character of the site" to which he had referred "weighs against granting permission" (paragraph 90). Within a kilometre of the southern boundary of the site "the strong rural character and network of fields" would be "maintained" (paragraph 91). The "greatest visual impact of the development" would be on views from the bridleway crossing the site – "BR2" – and Jay's Hill Road. For most users of the bridleway the development "would be likely to erode their enjoyment of the unspoilt qualities of this part of the countryside". But it would not interfere with views across the surrounding countryside, including the view to the south towards the Hundred River valley. This harm

would be "limited" (paragraph 92). Though the development would be visible from some sections of Jay's Hill Road, the "overall impression would continue to be that of a pleasant rural scene". There would be "no cumulative adverse effects upon the landscape" (paragraph 93).

21. Concluding this part of his report the inspector said, in paragraph 94:

"The harm to the character and appearance of the area that I have identified above would not, in the context of the most relevant development plan policies or 'the Framework', amount to significant adverse effects."

22. At the end of his report, under the heading "The Planning Balance/Overall Conclusion", the inspector drew his conclusions together. In paragraph 105 he said this:

"I do not set aside lightly the concerns of those parish councils or local residents who have objected to the scheme. However, when all of the above matters are weighed, the significant benefits of the proposal outweigh the limited harm to the character and appearance of the countryside. The scheme would accord with the most relevant provisions of the development plan (DMP policies DM03 and DM27) and the provisions of 'the Framework'."

Finally, in paragraph 106 of his report, the inspector concluded that in view of the benefits of the development there would be no unacceptable harm to "designated heritage assets".

23. The inspector recommended that planning permission be granted for the proposed development, subject to 14 conditions, including a condition limiting the life of the development to 25 years and one which required the submission of a restoration scheme for approval by the Council. The inspector said, in paragraph 98 of his report, that these conditions were necessary "[to] safeguard the character and appearance of the area".

The Secretary of State's decision letter

24. In paragraph 3 of his decision letter the Secretary of State said he disagreed with the inspector's recommendation and had decided to dismiss the appeal and refuse planning permission. He went on to say, in paragraph 10, that in deciding the application for planning permission he had "had regard to section 38(6) of [the 2004 Act], which requires that proposals be determined in accordance with the development plan unless material considerations indicate otherwise". He said he agreed with the inspector's formulation of the main issue in the appeal in paragraph 37 of his report (paragraph 16). He also agreed with the inspector that "the most relevant development plan policies" for the determination of the appeal were Policy DM03 and Policy DM27, and that "with regards to policy DM27, policies relevant to the WLCA should be given moderate weight" (paragraph 19).

25. The Secretary of State considered the benefits of the scheme in paragraphs 20 to 22 of his letter:

"20. The Inspector considers the proposal to offer wider environmental benefits by providing a considerable amount of clean, renewable and sustainable electricity, which would contribute to national and local targets for renewable energy (IR82). Reflecting the Framework, the Guidance recognises that all communities have a responsibility to help increase the use and supply of green energy (paragraph 97 of Framework and paragraph 5 of Guidance); however, the Guidance makes it clear that this does not mean that the need for renewable energy automatically overrides environment [sic] protections and the planning concerns of local communities (paragraph 5 of the Guidance). Although the Secretary of State agrees with the Inspector that the wider environmental benefits should be afforded significant weight (IR82), taking account of the Guidance, he recognises that new renewable and low carbon energy infrastructure should only be provided in locations where the local environmental impact is acceptable (paragraph 3 of the Guidance).

21. The Secretary of State agrees with the Inspector that, for the reasons given at IR83, the local environmental benefits of the scheme resulting from the new hedgerow planting are important considerations that carry much weight. In coming to this conclusion he notes that the Guidance encourages biodiversity improvements such as these. However, he considers that the scheme already permitted by the Council will provide comparable benefits to the local environment whilst having less of

an environmental impact and considers this a material consideration in the determination of this appeal.

22. The Secretary of State has had regard to the Inspector's conclusions regarding the economic benefits of the scheme at IR84 and his view that these benefits should be afforded significant weight. Whilst he recognises that the construction of the development would support around 100 jobs and that this would benefit the national economy, he has also taken into consideration that the employment created would not be local and that the benefit to local services, businesses and facilities would be limited to the construction phase of the development. Notwithstanding this, the Secretary of State agrees that this would support the Government's objective of promoting a strong rural economy and would have a positive impact on the electricity supply (IR84). Overall, he agrees with the Inspector that the economic benefits of the scheme are important considerations but given they are limited the Secretary of State affords them only moderate weight in support of the proposal."

26. In paragraphs 23 to 25 the Secretary of State considered the likely effects of the development on the character and appearance of the countryside:

"23. The Secretary of State has carefully considered the Inspector's conclusions regarding the impact of the proposal upon the character and appearance of the countryside at IR86-94. Like the Inspector, he agrees that there would be no harmful impact upon the Norfolk Broads and the Suffolk Coastal Area of Outstanding Natural Beauty (IR86). He also agrees that the harm to the character of the district within a kilometre of the northern, eastern and western boundaries of the northern part of the appeal site would be no greater than that of the permitted scheme, which has already been accepted by the Council (IR89).

24. The Secretary of State, like the Inspector, considers that the impact of the scheme upon the HTLCA must be assessed in accordance with DMP policy DM27 (IR87). He notes the Inspector's view that the scheme would only have a limited adverse effect upon the character of the site and that it would not undermine the strategic objectives of the HTLCA. He agrees with the Inspector that the scheme would considerably change the character of the site and would detract from its largely unspoilt rural qualities, which weighs against granting permission (IR90). He has also taken into account the Inspector's view that the proposal would erode the enjoyment of this unspoilt part of the countryside for users of the public bridleway and, although he notes there would be no interference with views across the HTLCA, he has taken into account that from some sections of Jay's Hill Road, the development would contrast awkwardly with the appearance of the area. Like the Inspector, he agrees that this harm also weighs against granting permission (IR92).

25. The Secretary of State agrees with the Inspector that the harm to the character and appearance of the area would not amount to significant adverse effects but, nevertheless, considers the effect on the character of the site, although limited, would be adverse (IR90). The Secretary of State also notes that the impact upon the character and appearance of the area is a concern raised in representations made by the local community (IR64). In line with paragraphs 5 and 8 of the Guidance, he has carefully considered these representations and has given weight to them in his determination."

27. The Secretary of State went on to say he agreed with the inspector that the development would not give rise to any "significant adverse effects or cumulative effects" on listed buildings, on their settings, on any features of special architectural or historic interest they had (paragraph 26), or on "the amenities of nearby residents", and would be unlikely to compromise the safety of existing road users or inconvenience those living within the surrounding area (paragraph 27).

28. The Secretary of State's "Overall Conclusions" are in paragraphs 29 and 30 of his decision letter:

"29. The Secretary of State has carefully considered the planning balance in this case and the Inspector's view that the significant benefits of the proposal outweigh the limited harm to the character and appearance of the countryside. In coming to his conclusion the Secretary of State has taken into account that a scheme in the northern part of the site has already been approved by the Council. The permitted scheme, he considers to provide an important 'fall back' position and to be a material consideration in his determination of this appeal. Bearing in mind his conclusions that the local environmental benefits of the appeal scheme are comparable to those provided by the permitted scheme, and the economic benefits are limited, the Secretary of State considers there to be two key

differences between the appeal scheme and permitted proposals. Firstly, he recognises that the appeal scheme would generate a larger amount of renewable electricity, although he has also taken into consideration that this should not automatically override environmental protections and the planning concerns of local communities, as set out in paragraph 5 of the Guidance. Secondly, the Secretary of State recognises that the limited harm caused by the appeal scheme is greater than the very limited harm that would be caused by the permitted scheme, and, in addition, would include harm to the character and appearance of the HTCLA, which policy DM27 of the development plan seeks to protect. He is aware that the impact on the character and appearance of the area, in particular the HTCLA, was commonly referred to in the representations of local residents and, in line with paragraphs 5 and 8 of the Guidance, he has had regard to these concerns.

30. Overall, the Secretary of State considers that, in this case, the increase in the amount of renewable energy generated by the appeal scheme does not outweigh the additional harm caused to the character and appearance of the area, including the harm to the character and appearance of the HTCLA, which is protected by development plan policy. Given this, and the concerns of local residents, he considers this harm to be unacceptable."

Issue (1) – the fallback position

29. The essential question here is whether the Secretary of State failed to assess the appeal proposal on its own merits. Mr Andrew Newcombe Q.C., for Lark Energy, submitted that he did not, and that he gave the fallback position a false significance. He only balanced the disadvantages of the development when compared with the development already permitted against its advantages over that development, concluding that the balance fell in favour of the proposal for which planning permission had already been granted. He did not consider whether the proposed development was nevertheless acceptable, which he had to do if he was to determine the application before him on its own merits. In any event he failed to give adequate or intelligible reasons for concluding that, despite the absence of any significant harm, and despite its benefits, the appeal proposal should be rejected.

30. Mr Newcombe also submitted that the Secretary of State failed to have regard to the duty in regulation 3 of the Promotion of the Use of Energy from Renewable Sources Regulations 2011 ("the 2011 regulations"), which imposes on him the duty to ensure that in 2020 the United Kingdom's "renewables share" – the share of energy from renewable sources – is "at least 15%". That need is "unconstrained", and the ability of a development to address it weighs for approval whatever the comparative planning merits of another proposal might be.

31. For the Secretary of State Mr Stephen Whale submitted that Mr Newcombe's argument on this ground is based on a misreading of the conclusions in paragraphs 29 and 30 of the decision letter. The Secretary of State did not confine himself there to a comparison between the two schemes. He used the permitted scheme as a "benchmark" or "yardstick" when considering the proposed development. He judged the appeal proposal by balancing the harm likely to be caused by the development against its benefits, including, but not only, its advantages over the scheme already approved. When he did this he found the likely harm to the character and appearance of the HTLCA unacceptable. This was a straightforward exercise of planning judgment, and the court should not interfere with it. The Secretary of State's reasons are clear and sufficient.

32. I think those submissions of Mr Whale are essentially right. On a fair reading of the decision letter the Secretary of State did consider the proposal before him on its own planning merits, and not merely by comparing it with the proposal which the Council had already permitted. Whether he did this in the way that section 38(6) requires is another question, and that is not what I am considering here.

33. The Secretary of State agreed with the inspector that the main issue in the appeal involved a balance between benefit and harm – between the benefit of a development which would produce energy from a renewable source and any harm it would cause to the character and appearance of the countryside, including its effect on the HTLCA. This required the Secretary of State to judge both the contribution the development would make to meeting the national need for renewable energy and its likely effects on the local and wider landscape. These were planning judgments, in which there was ample scope for disagreement between the parties in the appeal and between the inspector and the Secretary of State.

34. This was not the typical fallback case, in which a developer seeks to persuade the decision-maker that his scheme would be "the lesser of two evils" – the concept referred to by the Court of Appeal in *Snowden v Secretary of State for the Environment* [1980] J.P.L. 749 (at pp.749 and 750). Lark Energy was not arguing that the planning permission granted for the smaller scheme in April 2013 was enough to justify a decision to allow its appeal. Its case was simple. It was contending that the appeal scheme was acceptable in its own right because the development would not harm the local or wider landscape.

35. Clearly, however, the permitted scheme was a material consideration in the appeal, and the Secretary of State was entitled to decide how much weight it should have. He did not refer to it as a "benchmark" or "yardstick" of the acceptability of the appeal scheme. He compared the two developments, considering both their benefits and their likely harm and, in effect, balancing the difference in benefit against the difference in harm. There is nothing wrong with that exercise in itself. However, as Mr Newcombe submitted, the Secretary of State had to reach a conclusion on the acceptability of the appeal proposal on its own merits, and not solely on a comparison between it and the scheme which had planning permission. And in my view he did that. His "Overall Conclusions" in paragraphs 29 and 30 of his letter do not stand in isolation. They must be read together with his conclusions on the benefits of the proposed development, in paragraphs 20 to 22, and its likely effect on the character and appearance of the countryside, in paragraphs 23 to 25.

36. There are three main conclusions in paragraph 29: first, that the proposed development would have an advantage over the permitted scheme in that it would generate a larger amount of renewable electricity, a conclusion apparently based on the finding in the first sentence of paragraph 20 of the decision letter – that the development would provide a considerable amount of renewable energy, contributing to local and national targets; secondly, that although the harm likely to be caused by the proposed development was only "limited", it was nevertheless greater than the "very limited" harm which would be caused by the development already permitted – a conclusion that seems to follow from the Secretary of State's analysis of the likely impact on the countryside in paragraphs 23 to 25; and thirdly, that "in addition" there would be harm to the character and appearance to the HTLCA, which Policy DM27 seeks to protect. Those three conclusions underpin the final conclusion in paragraph 30 of the decision letter, where the Secretary of State balanced the "increase" in renewable energy which would be generated by the proposed development against the "additional" harm the development would cause to the character and appearance to the area, including harm to the character and appearance of the HTLCA.

37. I can see no possible criticism of those conclusions, as far as they went. But Mr Newcombe pointed to the final sentence of paragraph 30, which begins with the words "Given this". Those two words, he submitted, can only sensibly be read as referring to the Secretary of State's comparison between the two schemes, rather than to the merits of the appeal scheme itself.

38. I disagree. The words must be read sensibly in their context, remembering that decision letters should not be construed in an overly rigorous way, but rather, as Lord Bingham C.J. said in *Clarke Homes Ltd. v Secretary of State for the Environment* (1993) 66 P. & C.R. 263 (at pp. 271 and 272), "without excessive legalism or exegetical sophistication".

39. I accept that the words "Given this" could mean "Because of this" or "As a result of this". The Secretary of State would then have been saying nothing more than that the appeal scheme was unacceptable because it compared unfavourably with the one already permitted. That, of course, was not the crucial question. The crucial question was whether the scheme was acceptable when judged on it own merits.

40. There is, however, another way to read the expression "Given this". It could simply mean "In the light of this", or "Having regard to this", or "Taking this into account". If that is what it means, the Secretary of State's comparison of the two schemes in paragraph 29 of his letter can be seen as one aspect, but only one, of his conclusions on the main issue in the case, which he had described in paragraph 16 as a balance between "the benefits of the scheme" and "any harmful effects". Thus the second sentence of paragraph 30 completes the Secretary of State's answer to the question he had posed as the main issue in paragraph 16 and repeated in the first sentence of paragraph 29. He was not saying that in his view the proposed development was unacceptable because it was not as good as the scheme already permitted. He was saying that it was unacceptable because its benefits would not outweigh the harm it would cause.

41. I would be prepared to give the Secretary of State the benefit of any doubt as to what he meant in his "Overall Conclusions". In my view his reasons in paragraphs 29 and 30, when taken together with the reasoning in paragraphs 20 to 25, are not to be read in the narrow way for which Mr Newcombe contended. The conclusions in paragraphs 29 and 30 are not confined merely to the Secretary of State's comparison between the appeal scheme and the smaller development already permitted. They relate to the merits of the appeal scheme itself, including but not limited to its advantages and disadvantages when compared with the smaller proposal.

42. I see nothing in Mr Newcombe's point on regulation 3 of the 2011 regulations. The requirement for at least 15% of the nation's energy to be generated from renewable sources by 2020, which Mr Newcombe described as an "unconstrained" need, does not dictate the outcome of an application for planning permission. The Secretary of State was clearly aware that the proposal attracted the support of government policy in paragraph 97 of the NPPF and the practice guidance on renewable and low carbon energy. In taking his decision in the light of that policy and guidance he was, in effect, acknowledging the requirement in regulation 3. The fact that he did not explicitly refer to regulation 3 is not a flaw in his decision.

43. Ground 1 of the application therefore fails.

Issue (2) – section 38(6)

44. Mr Newcombe submitted that the Secretary of State failed to answer a basic question which he was required to answer – whether the proposal was in accordance with the development plan. Of the two most relevant policies of the plan, Policy DM03 and Policy DM27, the former was the dominant one in this case, because it relates specifically to development of the kind proposed. The Secretary of State's conclusion in paragraphs 25 and 26 of his decision letter was, in effect, that the proposal complied with Policy DM03. If he concluded in paragraphs 29 and 30 that there was conflict with Policy DM27, one is left with an unresolved tension between the two policies, the proposal complying with one but not with the other. The Secretary of State never attempted to resolve that tension, or even showed that he was conscious of it. Unless he resolved it he could not do what section 38(6) required of him. If he really was saying that the prospect of insignificant harm to the character and appearance of the area was enough to put the proposal in conflict with the development plan, this was a perverse conclusion. But at the very least, the reasoning in this critical part of the decision does not show that he performed his duty under section 38(6).

45. Mr Whale submitted that the Secretary of State clearly discharged his duty under section 38(6). He referred to that duty in paragraph 10 of his letter. In paragraph 24 he noted but did not agree with the inspector's view that there would be no harm to "the strategic objectives of the HTLCA". Whilst the harm he referred to in paragraph 24 would not in his view amount to "significant adverse effects", contrary to Policy DM03, it was nevertheless harm to interests protected by Policy DM27. This is clear from paragraphs 25 and 30 of the decision letter. As the Secretary of State said in paragraph 30, this "harm" was, "unacceptable" in spite of the benefits of the scheme. That was as good as saying that the proposal did not accord with the development plan and that material considerations did not indicate a decision to grant planning permission contrary to the plan. The absence of any specific conclusion on the proposal's compliance or conflict with Policy DM03 was not fatal to the decision.

46. The relevant legal principles are clear. Section 38(6) embodies the statutory presumption in favour of the development plan (see the speech of Lord Hope of Craighead in *City of Edinburgh Council v Secretary of State for Scotland* [1997] 1 WLR 1447. at pp.1449 and 1450, and the speech of Lord Clyde at p.1458). That presumption is the cardinal principle of the plan-led system of development control. If it is to be properly applied the decision-maker must understand the relevant provisions of the plan (see the judgment of Lord Reed in *Tesco Stores Ltd. v Dundee City Council* [2012] UKSC 13, at paragraphs 17 and 18).

47. As Lord Reed said in *Tesco v Dundee* (at paragraph 19), "development plans are full of broad statements of policy, many of which may be mutually irreconcilable, so that in a particular case one must give way to another". What the decision-maker must do, however, is decide whether the proposal complies with the development plan when the plan is considered as a whole. There may be provisions in the plan that support the proposal and others that go against it (see the speech of Lord Clyde said in

City of Edinburgh, at p.1459 E-F). In *R. v Rochdale Metropolitan Borough Council, ex parte Milne* [2000] EWHC 650 (Admin) Sullivan J., as he then was, said (in paragraph 48 of his judgment), it is "not at all unusual for development plan policies to pull in different directions", and "there may be no clear cut answer to the question: "is this proposal in accordance with the plan?"". It is then for the decision-maker to "make a judgment bearing in mind such factors as the importance of the policies which are complied with or infringed, and the extent of compliance or breach". Sullivan J. therefore rejected as "untenable" the idea that if there is a breach of a particular policy in a development plan the proposal cannot be said to be in accordance with the plan (paragraphs 49 and 50). As Ouseley J. said in *R. (on the application of Laura C.) v Camden London Borough Council* [2001] EWHC (Admin) 1116 (in paragraph 162 of his judgment), it may be necessary for an authority "in a case where policies pull in different directions to decide which is the dominant policy: whether one policy compared to another is directly as opposed to tangentially relevant, or should be seen as the one to which the greater weight is required to be given".

48. In this case, as the Secretary of State said in paragraph 19 of his letter, Policy DM03 and Policy DM27 were the "most relevant" policies of the development plan. There is no issue about that. It is also common ground that there is a degree of tension or conflict between these two policies, or at least that there will be cases in which this is so.

49. Policy DM03 deals specifically with proposals for the development of "Low Carbon and Renewable Energy". It is not merely a policy which promotes such development or presumes in its favour. It says that such proposals "will generally be supported", for the reasons it gives. But it also explains how proposals for renewable energy development will be approached. For development other than large-scale schemes in areas of national importance it sets out the criteria by which the proposal will be judged. It says, in effect, that permission will be granted if there are no "significant adverse effects" of the various kinds to which it refers, which include harm to the "landscape". If the development would not have "significant adverse effects upon the landscape [etc.]" it does not have to be justified by "wider … benefits". The concept of permitting such proposals where there are "no significant adverse effects" clearly implies that some "adverse effects", including such effects on the landscape, can be accepted. And the concept of balancing benefits against any "potentially significant adverse effects" indicates that even if "significant adverse effects" are likely they will not automatically lead to a refusal of planning permission. They must be put into a balance against any relevant benefits, which may be strong enough to outweigh them.

50. The approach in Policy DM27 is quite different. The purpose of that policy is to protect "the distinctive character areas, strategic objectives and considerations identified in the [WLCA]". It is a general policy. It does not apply only to one particular type of project. It is distinctly less supportive of development than Policy DM03. It carries a presumption against planning permission being granted unless there would be no harm to the relevant area. The criterion of harm is not "significant adverse effects", as in Policy DM03, but simply "an adverse effect" or "any adverse impacts". If there would be such an effect, whether or not it would be "significant", the developer has to show two things: first, that the same development could not be promoted on another site where it would cause less harm, and secondly, that the harm it would cause on the application site would be clearly outweighed by its benefits.

51. It follows that a proposal for renewable energy development may satisfy Policy DM03 but not Policy DM27. There are potentially competing policy presumptions: the presumption in Policy DM03 in favour of such development even if it would harm the landscape, so long as the harm would not be "significant", and the presumption against such a proposal in Policy DM27.

52. In this case the inspector concluded, in paragraph 105 of his report, that Lark Energy's proposal complied with both policies. The Secretary of State did not say explicitly whether in his view the scheme conflicted or complied with either policy. He did not refer to the inspector's conclusion in paragraph 105. But I think there can be no doubt that he found the proposal to be in conflict with Policy DM27. He referred to that policy in paragraphs 24 and 25 of his letter when considering the likely impact of the development on the HTLCA. The conclusions in those two paragraphs are not favourable to the proposal, even though the Secretary of State explicitly agreed with the inspector's view that the harm to the character and appearance of the area would not be "significant". The same conclusions appear again in paragraphs 29 and 30. In paragraph 29 the Secretary of State referred to the harm he thought the development would cause to the character and appearance of the HTLCA, "which policy DM27 of

the development plan seeks to protect". And in paragraph 30 he weighed the increase in renewable energy which would be generated by the development against the harm he had identified. In those parts of his letter he was considering the balance referred to in Policy DM27, which was simply the balance between "the benefits of the development" and "any adverse effects".

53. That leaves Policy DM03.

54. Mr Whale did not suggest that one can find in the decision letter any express conclusion on the proposal's compliance or conflict with that policy. Mr Newcombe submitted that the first sentence of paragraph 25 – where the Secretary of State agreed with the inspector that the harm to the character and appearance of the area "would not amount to significant adverse effects" – is consistent only with the conclusion that the proposal did comply with Policy DM03. I agree. The reference in that paragraph to the absence of "significant adverse effects" corresponds to the relevant requirement in Policy DM03 – that there should be "no significant adverse effects … upon the landscape …". The further requirement in the policy that there be no "significant adverse effects" on "historic features" or on "the amenities of local residents" is dealt with in paragraphs 26 and 27, where the Secretary of State agreed with the inspector that there would be no such harm in either of those respects. It follows, as Mr Newcombe submitted, that the appeal proposal had earned the presumption in Policy DM03 that planning permission would be granted.

55. Thus the decision letter contains an assessment of the planning merits which is clearly at odds with the inspector's. It is an assessment in which the proposal is found to comply in substance with one of the two most relevant policies in the development plan and to conflict with the other. The policy offended – Policy DM27 – is a general policy, which is concerned with the protection of landscape character. The policy complied with – Policy DM03 – is the one the Council has deliberately produced for proposals for renewable energy, recognizing the importance of such development both nationally and in Waveney. It does not make other policies irrelevant. But it is, on its face, a comprehensive policy for proposals of this kind. And it includes tests relating to the effects of development on the landscape.

56. In these circumstances I think the Secretary of State had to explain how he would reconcile his conclusions relating to those two policies when he considered whether the proposal complied with the relevant provisions of the development plan. Because he was disagreeing with the inspector he could not rely on the inspector's reasoning. He had to ask himself whether the proposal was or was not in accordance with the plan, read as a whole, and he had to provide clear reasons for the view to which he had come on that question. Otherwise, his decision would be vulnerable to the criticism that he did not ask himself, and answer, that important question, and therefore that he failed to perform the duty imposed upon him by section 38(6).

57. Nowhere in his letter did the Secretary of State say that in his view the proposal was in accordance with the development plan or that it was not. He did not acknowledge any tension between Policy DM03 and Policy DM27, or between the conclusions he had reached when applying each of those two policies to the proposal before him. I think his own assessment of the planning merits made it necessary for him to decide which approach to the balance between harm and benefit should be followed, the more generous approach in Policy DM03 or the more demanding one in Policy DM27. Should he give precedence to Policy DM03 or should he regard Policy DM27 as dominant? He could have taken the view that in this case Policy DM27 should prevail. But if this was his view the reasons for it are not clear in his decision letter, and I think they should have been.

58. In my view, therefore, the Secretary of State's reasons leave genuine doubt that he made his decision on the appeal in the way section 38(6) required. Bearing in mind the jurisprudence on reasons challenges – summarized by Lord Brown of Eaton-under-Heywood in *South Bucks District Council v Porter (No.2)* [2004] 1 WLR 1953, at p.1964 B-G – I believe this is a fatal flaw. It goes to a fundamental part of the decision on the appeal. And it does cause Lark Energy substantial prejudice. It may be that in a properly reasoned decision the outcome will be no different. But I cannot be sure of that. I do not regard this as a case in which the court's discretion should be exercised against quashing the decision.

59. Ground 2 of the application therefore succeeds.

Issue (3) – paragraph 14 of the NPPF

60. Mr Newcombe submitted that the Secretary of State failed to apply to Lark Energy's proposal the presumption in favour of sustainable development in paragraph 14 of the NPPF, and failed to heed the emphasis in paragraphs 97 and 98 of the NPPF on the importance of increasing the supply of renewable energy.

61. I cannot accept those submissions.

62. As Mr Whale submitted, the Secretary of State clearly had in mind the relevant national planning policy. It is true that he did not refer to paragraph 14 of the NPPF, or to the presumption in favour of sustainable development. But I do not think he had to. It was not Lark Energy's case that the development plan was "absent" or "silent" or that the relevant policies of the plan were "out-of-date". On the contrary, it was arguing, and the inspector accepted, that the development would be in accordance with an up-to-date plan.

63. The Secretary of State did not find that the plan was lacking in relevant policy by which to judge the proposal. As I have said, I think he failed to explain clearly how he had applied the policies which were relevant, and that failure invalidates his decision. The salient part of paragraph 14 of the NPPF in this case was the familiar principle that proposals which accord with the development plan should be approved without delay. This takes one back to the presumption in favour of the development plan in the plan-led system, and, in this case, the application of Policy DM03 and Policy DM27. The policy in paragraph 14 underscores the decision-maker's duty in section 38(6). But it does not give Lark Energy an additional ground of challenge.

64. The submission that the Secretary of State failed to have regard to the policy in paragraphs 97 and 98 of the NPPF is untenable in the light of what he said in paragraph 20 of his decision letter. He referred to paragraph 97. He did not refer to paragraph 98. But he did not make the mistake of requiring Lark Energy "to demonstrate the overall need for renewable … energy". I accept that the second point in paragraph 98, that a proposal for renewable energy development should be approved "if its impacts are (or can be made) acceptable", is effectively the same principle as one sees in Policy DM03. It might have been seen as a good reason to give that policy greater weight than one which was less welcoming to development for renewable energy. But I do not think the Secretary of State's failure to refer to it was an error of law.

65. For those reasons I reject ground 3 of the application.

Issue (4) – paragraphs 5 and 8 of the Government's planning practice guidance

66. Mr Newcombe submitted that in dealing with objections made by local people concerned about the likely effects of the development on the character and appearance of the area, the Secretary of State failed to apply the advice in paragraphs 5 and 8 of the Government's practice guidance document. The Secretary of State took into account the likely impact of the development on the landscape. This clearly was a material consideration. But he then treated the fact that some local people had objected on this ground as a separate consideration, to which he should give additional weight. This was either double-counting or taking into account an immaterial consideration. As is clear from paragraph 30 of the decision letter, it influenced the outcome of the appeal. It should not have done. The practice guidance document only requires that concerns raised by a local community be listened to – not that they be given extra weight simply because they have come from that community.

67. Mr Whale submitted that the Secretary of State followed the Government's advice in paragraphs 5 and 8 of the practice guidance. The advice recognizes that the voice of local communities should be heard when proposals such as this are being considered. In this case parish councils and some local residents had opposed the development because of the impact they feared it would have on the character and appearance of the area. The Secretary of State was entitled to bear in mind that those objections had come from local people when judging the weight they should have.

68. I think Mr Whale's submissions here are right.

69. There is nothing surprising about the advice in paragraphs 5 and 8 of the Government's practice guidance document. It emphasized the importance of the views of local communities on proposals for

the production of renewable and low carbon energy. It required the decision-maker to pay attention to those views. It need hardly have done so. The views of third party objectors to proposals for development of any kind will always be material in the decision on the application or appeal, so long as they are relevant to the planning issues involved.

70. The context for the advice in those two paragraphs of the practice guidance is the policy in paragraph 97 of the NPPF, which refers to the responsibility of "all communities" to contribute to the generation of energy from renewable and low carbon sources. This imperative was repeated in the first sentence of paragraph 5 of the practice guidance. But it was not absolute. The need for renewable energy does not automatically override "… the planning concerns of local communities". The final sentence of paragraph 5 made it plain that for this type of development, as for others, the concerns of local communities should be taken into account when planning decisions affecting them are being made. The advice in paragraph 8, though not directed to the making of a development control decision, was in similar terms.

71. Decisions on applications for planning permission are made in the public interest. Sometimes the general public interest in permitting or rejecting a proposal which is opposed or supported by a local community will override the views of that community. The fact that objections have been made by local people does not compel the decision-maker to accept those objections. There will be many occasions when a planning permission is properly granted despite strong local opposition. The practice guidance reminded the decision-maker to pay attention to local views. It did not give those views a significance they would not otherwise have had, beyond the fact that they are the views of people who will have to live with the development if it goes ahead. The guidance left it to the decision-maker to judge how much weight should be given to local objections.

72. I do not believe that in this case the Secretary of State misunderstood or misapplied the practice guidance. Neither in paragraph 25 of his letter nor in paragraph 29 did he say that in his view the development would harm the character and appearance of the area because some members of the local community had said it would, or that he was giving weight to this harm only because local people were anxious about it. At the end of paragraph 29 he said he had "had regard" to the concerns of local residents about the impact on the character and appearance of the area. And there is no reason to think he meant anything different in paragraph 25 from what he said in paragraph 29. At most, he was saying that he had given more weight than he might otherwise have done to what he believed to be a sound objection, because local people were evidently troubled by the likely effect of the development on the local landscape. This was not to depart from the advice in the practice guidance. The Secretary of State was following that advice. He was entitled to give the weight he did to the likely effects of the development on the character and appearance of the area. It is impossible to regard this as unreasonable in the *Wednesbury* sense, which is the only basis upon which the court could interfere.

73. I therefore reject ground 4 of the application.

Conclusion

74. For the reasons I have given the application succeeds on ground 2. The Secretary of State's decision will therefore be quashed and the appeal remitted to him for redetermination.
