Case No: CO/2981/2012

Neutral Citation Number: [2013] EWHC 2162 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19 July 2013

Before :

MR STEPHEN MORRIS QC
Sitting as a Deputy High Court Judge

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Between :

	(1) NEWARK & SHERWOOD DISTRICT COUNCIL **(2) EPPERSTONE PARISH COUNCIL**	**Claimants**
	- and -	
	(1) THE SECRETARY OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT **(2) NICHOLAS PEAKE**	**Defendants**

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Richard Harwood QC (instructed by **Chief Legal Officer, Newark & Sherwood District Council**) for the **Claimants**
Stephen Whale (instructed by **The Treasury Solicitor**) for the **First Defendant**
Graham Machin (instructed by **Langleys, Solicitors**) for the **Second Defendant**

Hearing dates: 13 and 19 April 2013

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Judgment

Mr Stephen Morris QC :

Introduction

1. This is an application under section 288 of the Town and Country Planning Act 1990 ("TCPA") by Newark and Sherwood District Council ("the District Council") and Epperstone Parish Council ("the Parish Council") (together "the Claimants") seeking to quash the decision dated 9 February 2012 ("the Decision") of Laura Graham BSc MA MRTPI, an inspector ("the Inspector") appointed by the Secretary of State for

Communities and Local Government ("the First Defendant"). By the Decision, the Inspector granted planning permission for the installation of a single wind turbine at Hill Farm, Chapel Lane, Epperstone, Nottinghamshire ("Hill Farm"). The application was issued on 20 March 2012.

2. The application for planning permission was made by Mr Nicholas Peake, the Second Defendant. The relevant business at Hill Farm is carried on by J S Peake & Sons, a partnership between Mr Nicholas Peake, and his father and mother, Richard and Kathleen Peake.

3. The District Council initially refused planning permission. The Second Defendant appealed to the Secretary of State and, by the Decision, was granted permission. The Parish Council opposed the grant of permission both at the application stage and on appeal.

4. The Claimants originally raised five grounds of challenge. By the time of the hearing two of these had been dropped. Their case now is that the Decision is invalid on each of three grounds (retaining the original numbering). *Ground (i)* relates to the volume of electricity to be generated by the wind turbine. *Ground (ii)* relates to the noise produced by the turbine. *Ground (v)* alleges that the permission granted was for a type of turbine (three-bladed) different from that which was applied for and assessed (two-bladed).

The Legal Framework

5. Before turning to the factual background, I set out the relevant legal framework, comprising legislative context, relevant legal principles and matters of planning policy.

Planning permission and appeals

6. Section 78 TCPA grants a right of appeal from a decision of a planning authority to the Secretary of State. On such an appeal, the Secretary of State can deal with the application for planning permission as if made to him in the first instance, and the provisions relating to conditions and s70 both apply to the Secretary of State as they apply in relation to the original application for planning permission: s.79(4) TCPA.

7. By virtue of ss. 288(1)(b) and (4), and 284(1) and (3) TCPA, any person who is aggrieved by any decision on a s.78 appeal to an inspector may apply to the High Court to challenge the validity of that decision on the grounds that the decision is not within the powers of the TCPA or that any relevant requirements have not been complied with: s.288(1)(b)(i) and (ii).

8. Regulation 16 of the Town and Country Planning (Appeals) (Written Representation Procedure) (England) Regulations SI 2009 No 452 provides that the inspector is entitled

to proceed to a decision on the appeal "taking into account only such written representations as have been sent within the relevant time limits".

9. A section 288 application is akin to a challenge by way of judicial review. In summary, a decision on a s.78 appeal may be quashed if the decision maker has acted perversely, taken into account irrelevant material, failed to take account of relevant material or failed to provide proper and adequate reasons: *Encyclopedia of Planning Law* ("*EPL*") §P288.16 summarising *Seddon Properties v Secretary of State* [1978] JPL 835.

10. The Court must be astute to ensure that a s.288 challenge is not a re-run of the arguments on planning merits. A challenge alleging a *Wednesbury* unreasonable conclusion on matters of planning judgment faces a particularly daunting task: *Newsmith Stainless Ltd v Secretary of State for the Environment Transport and the Regions* [2001] EWHC Admin 74 at §§5-8. Planning judgments are for the decision maker, and not the Court. The weight to be afforded to a material consideration is a matter of planning judgment for the planning authority: *Tesco Stores Ltd v Secretary of State for the Environment* [1995] 1 WLR 759 at 780F-H per Lord Hoffmann. The Court should look broadly at the findings and reasoning of the decision maker and not focus on minutiae: *Dartford BC v Secretary of State for Communities and Local Government* [2012] EWHC 64 (Admin) §20 , citing earlier authorities.

11. Whilst the decision maker must have regard to all material considerations, there is no need to *refer* in the decision to every material consideration, but only the main issues in dispute. The scope for drawing an inference that the decision maker has not fully understood the materiality of a particular consideration to the decision will necessarily be limited to the main issues, and then only when all other known facts and circumstances appear to point overwhelmingly to a different decision: see *Bolton MDC v Secretary of State for the Environment* (1996) 71 P & C R 309 at 314-315 per Lord Lloyd. As regards failure to take account of a relevant consideration, the seven principles in *Bolton MBC v Secretary of State for the Environment* (1991) 61 P & C R 343 at 352-353 are to be applied. These include the principle that the Court will only consider quashing if it is clear that there is a real possibility that consideration of the relevant matter would have made a difference to the decision: see also *Simplex (GE) Holdings v Secretary of State for the Environment* [1988] 3 PLR 25 at 41E-H and 42D-E(CA).

12. There is no bar to making an argument for the first time in a s.288 application. However the circumstances in which it can be done are limited and subject to the application of the approach in *Humphris v Secretary of State for Communities and Local Government* [2012] EWHC 1237 (Admin) §23, where Ouseley J identified four such circumstances: a point that has not been available to be taken; a point which becomes an error of law not known to the parties at the time; a point where it can be said to have arisen without the parties being given an opportunity to deal with it; and a pure point of law. Subject to these circumstances, if a point is not raised before the inspector, he cannot be said to

have omitted to consider a material consideration.

Substantive principles of planning law

13. By s. 70 TCPA, a planning authority may grant permission unconditionally or subject to such conditions as they think fit. Further, in dealing with a planning application, a planning authority must have regard, inter alia, to the provisions of the development plan and any other material considerations

14. The interpretation of planning policy is a matter of law for the Court: *Tesco Stores Ltd v Dundee City Council* [2012] UKSC 13. Where a planning authority is required to "have regard" to a policy, it need not follow that policy. But if it is going to depart from the policy, it must give clear reasons for doing so. Moreover the policy must be properly understood by the authority. See *Gransden & Co Ltd v Secretary of State for the Environment* (1987) 54 P & CR 86 at 94.

The approach to interpretation of a planning permission

15. The interpretation of a planning permission is a matter of law for the Court. As to the materials which the Court is entitled to consider in seeking to interpret a planning permission, the relevant principles are set out in *R v. Ashford BC ex parte Shepway DC* [1999] PLCR 12 at 19-20 as modified by *Barnett v Secretary of State for Communities and Local Government* (2010) 1 P&CR 8 (CA) per Keene LJ at §§16-21 approving Sullivan J [2009] 1 P & CR 24. The effect of these two cases can be summarised as follows.

16. First, whilst the starting point is that in construing a planning permission, regard may only be had to the permission itself, including the conditions and reasons for the conditions (*Ashford*, supra, proposition (1)), in the case of *full* planning permission for the construction, erection, or alteration, the *plans and drawings describing* the works are part of the description of what has been permitted and, as such, fall to be considered in construing the permission granted, *without* the need for express words of incorporation in the terms of the permission. This applies even where there is no ambiguity or suggestion of a mistake in the permission. See *Barnett* per Keene LJ at §§20 and 21, citing Sullivan J at §24.

17. Secondly, and in any case, materials extraneous to the permission itself (including the application) can be referred where either (a) there *are* express words of incorporation in the permission (i.e. words in the operative part of the permission sufficient to inform a reasonable reader that the materials are part of the permission) or (b) there is ambiguity in the wording of the permission or a challenge on grounds of mistake: *Ashford*, supra, propositions (2) to (5).

General principles of construction

18. General principles of construction fall to be considered. In appropriate circumstances, it is permissible, as a matter of construction, to read documentary provisions as being subject to addition, omission or even substitution. As regards substitution, Lord Reid in *Federal Steam Navigation Co Ltd v Department of Trade and Industry* [1974] 1 WLR 505 at 509B stated as follows:

> "*Cases where it has properly been held that a word can be struck out of a deed or statute and another substituted can as far as I am aware be grouped under three heads: where without such substitution the provision is unintelligible or absurd or totally unreasonable; where it is unworkable; and where it is totally irreconcilable with the plain intention shown by the rest of the deed or statute*."

This is an approach applicable to a "unilateral" document (deed or statute), as in this case.

19. As regards a contractual document, where there is a mistake, rectification is not necessary and in certain circumstances the mistake can be dealt with by way of construction: *Chitty on Contracts* (31st edn) Vol 1 §5-113, citing Brightman LJ in *East v Pantiles Plant Hire Ltd* (1982) EGLR 111 at 112:

> "*It is clear on the authorities that a mistake in a written instrument can, in limited circumstances, be corrected as a matter of construction without obtaining a decree in an action for rectification. Two conditions must be satisfied: first, there must be a clear mistake on the face of the instrument; secondly, it must be clear what correction ought to be made in order to cure the mistake*."

In *Chartbrook Ltd v Persimmon Homes Ltd* [2009] 1 AC 1101, Lord Hoffmann (at 1114 §§ 22 to 25) cited and approved this passage in *East*, subject to two qualifications: first, that correction of mistake by construction is just part of a single task of interpreting the agreement in context, in order to get as close as possible to the meaning which the parties intended. Secondly, in deciding whether there is a clear mistake, the court is not confined to reading the "face of the instrument", without regard to the background and context, which must always be taken into consideration. He went on to state that

> "*there is no limit to the amount of red ink or verbal rearrangement or correction which the court is allowed. All that is required is that it should be clear that something has gone wrong with the language and that it should be clear what a reasonable person would have understood the parties to have*

meant."

Planning Conditions

20. By section 72 TCPA, conditions may be imposed on the grant of planning permission for regulating the development or requiring the carrying out of works so far as appears to be expedient for the purposes of or in connection with the development authorised by the permission. The power to impose conditions is couched in broad terms but is not unfettered: *EPL* §P72.06. A condition may have the effect of modifying the development proposed by the application, provided that it does not constitute a fundamental alteration in the proposal: *EPL*, §P72.10. S.73 TCPA makes provision for an application to develop land without compliance with conditions subject to which a previous planning permission has been granted.

21. As regards conditions, an inspector is under no obligation to cast about for a condition not suggested before him, in order to mitigate or remove an objection to the development which the inspector has perceived: *Top Deck Holdings v Secretary of State for the Environment* [1991] JPL 961 at 963-965. In this situation, the onus is on the party to propose a condition.

22. The Court may in some circumstances sever a condition from the planning permission and allow the permission to stand; where the condition deals with some ulterior, collateral or trivial matter or if the bad part can be effectively severed from the good without altering the character of the permission. *EPL*, §72.21 and *Potato Marketing Board v Merricks* [1958] 2 QC 316 at 333. Finally, a local planning authority may adopt a flexible approach to the discharge of a condition precedent to development: *Agecrest v Gwynedd CC* [1998] JPL 325 at 334.

Relevant Planning Policy

Planning Policy Guidance 2: Green Belts (PPG 2)

23. PPG 2 deals with Green Belts and provides, in section 3, for a general presumption against "inappropriate development", which should not be approved "except in very special circumstances". Paragraph 3.2 continues:

> "*Inappropriate development is, by definition, harmful to the Green Belt. It is for the applicant to show why permission should be granted. Very special circumstances to justify inappropriate development will not exist unless the harm by reason of inappropriateness, and any other harm, is clearly outweighed by other considerations. In view of the presumption against inappropriate development, the Secretary of State will attach substantial weight to the harm to the Green Belt when considering any planning application or appeal concerning such*

development."

It is common ground that, in the present case, the proposed development constituted inappropriate development and that the Inspector had to be satisfied that there were very special circumstances which outweighed the harm. As it is a 1996 document, PPG 2 does not expressly address wind turbines. (Since the Decision, PPG 2 and PPS 22 (see below) have been repealed by the National Planning Policy Framework).

Planning Policy Statement 22 (PPS 22): Renewable Energy

24. PPS 22 sets out the Government's national policies for planning in relation to renewable energy. Paragraph 1 provides that planning authorities should adhere to a number of key policies in their approach to planning for renewable energy, including the following:

> "*1(iv) The wider environmental and economic benefits of all proposals for renewable energy projects, whatever their scale, are material considerations that should be given significant weight in determining whether proposals should be granted planning permission.*
>
> ...
>
> *1(vi) Small-scale projects can provide limited but valuable contribution to overall outputs of renewable energy and to meeting energy needs both locally and nationally. Planning authorities should not therefore reject planning applications simply because the level of output is small.*" *(emphasis added)*

Paragraph 13 of PPS 22 addresses "Green Belts" as follows:

> "*Policy on development in the green belt is set out in PPG2. When located in the green belt, elements of many renewable energy projects will comprise inappropriate development, which may impact on the openness of the green belt. Careful consideration will therefore need to be given to the visual impact of projects, and developers will need to demonstrate very special circumstances that clearly outweigh any harm by reason of inappropriateness and any other harm if projects are to proceed. Such very special circumstances may include the wider environmental benefits associated with increased production of energy from renewable resources*." *(emphasis added)*

Paragraph 22 addresses "Noise", stating that renewable technologies may generate small increases in noise levels, referring to the example of wind turbines. It continues:

> "*The 1997 report by ETSU for the Department of Trade and*

> *Industry should be used to assess and rate noise from wind energy development*."

The ETSU Report

25. ETSU-R-97 "The Assessment and Rating of Noise from Wind Farms" ("the ETSU Report") is a report of the findings of a Working Group on Wind Turbine Noise. It applies noise limits at residential neighbours to wind turbines. It sets noise limits for both daytime and for night-time, and permits greater noise levels at properties with a financial interest in the scheme.

26. The ETSU levels are as follows. At properties without a financial interest in the turbine, noise levels can be either a fixed level between 35 and 40 dB(A) during the daytime and 43dB (A) at night-time, or 5 dB (A) above the background level measured in the absence of the turbine. Where the occupier of a property has a financial interest in the scheme, then the limit is 45dB (A).

27. ETSU limits are based on a balance between harm to residential amenity and the benefits of wind energy. The ETSU Report states (at p.60):

> "*On balance it is considered that a margin of 5dB(A) will offer a reasonable degree of protection to both the internal and external environment without unduly restricting the development of wind energy which itself has other environmental benefits*."

Further the ETSU Report proceeds on the basis that the limits are suitable for the imposition of noise control by noise-related planning conditions.

<u>Factual Background</u>

The wind turbine and Hill Farm

28. The proposed site of the wind turbine ("the Site") is on land at Hill Farm and is in the Green Belt. There are three residential properties at Hill Farm - including Hill Farm Cottage - all owned by the Second Defendant and/or JS Peake & Sons. Of the three, Hill Farm Cottage is the closest to the proposed site of the wind turbine. There is another property in the vicinity, Cottage Farm. Apart from the Hill Farm properties, Cottage Farm is the nearest residential location to the Site.

The application for planning permission

29. On 18 March 2011 Mr Peake on behalf of J S Peake & Sons applied to the District Council for planning permission for the installation of a single 275kW wind turbine at Hill Farm, under reference number 11/00435/FUL. The application form expressly

referred to additional materials and information, including a Detailed Statement which described in its section 3 exactly what was proposed to be erected, a brochure for a Vergenet 275Kw turbine, a Site plan and a 55m wind Turbine Elevation drawing ("the application drawing"). It was this turbine, its performance and characteristics which were examined, first, by the District Council and subsequently by the Inspector.

30. It was a particular feature of the proposed turbine that it would have two, rather than three, blades, as described in these documents and illustrated in the brochure and in the application drawing. This is narrower than usual designs for turbines, as it is supported by guy ropes. The application drawing expressly showed a two-bladed turbine. Other application materials also referred to a two-bladed turbine. The particular model of turbine was identified in these materials, including the application drawing, as a "Vergenet GEV MP 275 Kw" machine. In the Detailed Statement, this was described as the "preferred" wind turbine. It was further stated expressly that the Vergenet GEV MP 275 Kw has "two rather than three blades" and is on top of a much narrower tower than is found on other turbines of similar capacity. These features were said significantly to reduce the visual impact of the wind turbine on the landscape**.** Paragraph 5.17 of the Detailed Statement stated that the turbine would generate approximately 481 MW of electricity per annum, sufficient to provide annual consumption of electricity to 112 residential dwellings, based on a minimum recognised efficiency of 20%. It was further stated that this figure could be higher.

Noise Impact Assessment Report

31. At Appendix 3 to the Detailed Statement, the Second Defendant submitted a Wind Turbine Noise Impact Assessment Report dated 15 September 2010, produced by Philip Dunbavin Acoustics Ltd on behalf of JS Peake & Sons ("the PDA Report"). The PDA Report stated, in its summary at para. 1.0, as follows:

> "*This assessment has demonstrated that the predicted noise levels generated by the wind turbine have met the criteria specified within ESTU-R-97 [sic] at the nearest residential receiver that does not have financial involvement in the turbine*."

At this point of the PDA Report, no reference was made to Hill Farm, the nearest residential accommodation which *does* have a financial interest.

32. The PDA Report then went on to set out the various ETSU limits, described above. Noise level assessments had been carried out for the two nearest noise sensitive locations to the proposed turbine. Hill Farm Cottage - said to have a financial interest in the turbine and 190 metres away from the Site - and Cottage Farm the nearest residential property that does not have a financial interest, 330 metres away. In section 7.0, the Report set out graphs, plotting noise levels against ETSU limits for each location, daytime and night-time and at wind speeds varying from 3 to 11 metres per second. For Hill Farm Cottage, the highest predicted noise levels were 48dB. For Cottage Farm the

highest predicted noise level was 42 dB at 9 m/s wind speeds**.** Due to background noise levels, the calculation was that turbine noise would be within ETSU limits at Cottage Farm. The ETSU limits for properties with financial interests would be exceeded at Hill Farm Cottage in day time and at night time, at wind speeds of around 7 m/s, but not at other speeds within the range of 3 to 11 m/s.

33. After setting out these results in graph form, the PDA Report continued at section 8.0 "Discussion of Results:

> "*The occupier of measurements at Receiver 1- Hill Farm Cottage has a financial involvement in the proposed wind turbine scheme and in accordance with ETSU-R-97 a 45dB(A) lower absolute limit is applicable. Our calculations indicate that this limit has been exceeded by 1 dB at 7 m/s wind speed for both quiet daytime and night-time.*
>
> *We would note however that our calculation methodology has made the assumption that the surface is completely reflective. This is a very conservative estimate for the noise propagation considering that the majority of the intervening ground is acoustically absorbent. As a consequence we would expect the calculations to overestimate the noise levels at this receiver location and it is likely that the resultant wind turbine noise levels will be below the limits detailed.*" *(emphasis added)*

34. The section continued by stating that noise at Cottage Farm was below the ETSU limits. The Detailed Statement in turn stated that there would be "*no detrimental noise impact on any third party residential dwellings*", but made no specific mention of the impact upon Hill Farm Cottage.

The District Council's officer report

35. The District Council's own officer report of May 2011 recorded that the District Council's Environmental Health Officer agreed with the conclusion in the PDA Report. That report considered noise impact upon the nearest sensitive dwelling, namely Cottage Farm bungalow. It did not regard as relevant the impact of noise on Hill Farm Cottage. It proposed a condition in relation to noise, namely that noise levels generated by the wind turbine would not exceed the predicted levels in the PDA Report. The District Council's officers at least were satisfied that permission should be granted up to the levels of noise predicted in the PDA Report, including the levels predicted at Hill Farm Cottage. That officer report recorded that the application was for the erection of a *two-bladed* turbine.

36. As regards electricity generation, the officer report did not raise issues relating to electricity generating potential. Rather it concluded that the proposal was entirely

consistent with the general policy presumption in favour of wind turbines and objections relating to issues of technical and commercial feasibility were not material considerations.

The Parish Council's objection to the application

37. The Parish Council objected to the application, in a substantial, 55-page, document dated 27 April 2011. The objection expressly referred to the fact that the turbine proposed was an unusual design with two blades and a massive base span. The Parish Council objected on a variety of grounds, including that the turbine was likely to be inefficient, as generating only a low proportion of its capacity, and that it would have an adverse noise effect on local residents and the applicant's house. As regards electricity generation, it stated that a 20% efficiency load factor was unlikely to be achieved, and that a load factor of 12% was more likely, and that the wind turbine would only power 47 homes. It contended that the Second Defendant had not provided factual data to demonstrate the contribution to renewable energy that the proposal would make. His figures were "no more than a wild estimate" and his case had been presented in an unprofessional manner.

Refusal of planning application

38. On 25 May 2011, the District Council's planning committee refused to grant planning permission, on the ground of significant harm to the visual amenity and appearance of the area. There were no overriding special circumstances that would overcome that harm. However, neither noise limits nor levels of electricity generation were grounds of the refusal.

Mr Peake's appeal to the Inspector

39. On 4 August 2011, the Second Defendant appealed to the Secretary of State, pursuant to s.78 TCPA, against the District Council's refusal of planning permission. The appeal was conducted by way of the written representations procedure.

Garrad Hassan Report

40. In support of that appeal, the Second Defendant submitted a report dated 22 July 2011, entitled "Indicative Assessment of energy production", prepared by Garrad Hassan, on the instructions of JS Peake & Sons ("the Garrad Hassan Report"). The Garrad Hassan Report was provided after, and in response to the criticism in, the Parish Council's objections in April 2011. Garrad Hassan's assessment was based on the two-bladed Vergenet GEV MP wind turbine. The Report provided an estimate as to the amount of energy that would be generated by the proposed turbine. The stated figure of 481MW reflected a cautionary reduction from a central estimate of 650MW.

Written representations on appeal

41. On 27 September 2011, the Parish Council submitted written representations on the appeal. Those observations were directed towards a two-bladed turbine. The Parish Council raised the issue of noise levels at Hill Farm Cottage. Moreover, from the terms of those representations, it appears that the Parish Council's earlier April 2011 objection, including its submissions about electricity generation, were placed before the Inspector too. These representations referred to, but did not take specific issue, with the detail of the Garrad Hassan Report. They merely pointed out that the Garrad Hassan Report itself had said that it was indicative only and subject to high levels of uncertainty.

42. In October 2011, the District Council submitted its written representations on the appeal. Its case was that permission had been rightly refused, as the applicant had presented no very special circumstances other than to state the energy output of the proposed turbine. As regards electricity generation, it accepted and adopted Mr Peake's assessment that the turbine would generate 481MW a year. However it maintained its view that the energy requirements were not sufficient in themselves to represent very special circumstances outweighing inappropriate development. As regards noise, whilst it again sought the imposition of a noise condition, it accepted that the noise impact upon Hill Farm Cottage was no bar to planning permission.

The Inspector's Decision of 9 February 2012

43. By the Decision, the Inspector granted planning permission:

> "*for the installation of a single 275 kw wind turbine to offset the existing energy consumption for the farm with the remainder automatically exporting to the national grid on land at Hill Farm, Chapel Lane, Epperstone, Notts <u>in accordance with the terms of the application, Ref 11/00435/FUL</u> dated 18 March 2011, <u>subject to the schedule of conditions set out in the attached annex</u>.*" *(<u>emphasis</u> added)*

44. In the Decision, the Inspector identified the main issues as including effect on the openness of the Green Belt, rural character and appearance, noise and whether very special circumstances outweighed the harm.

45. At paragraph 4, the Inspector, referring inter alia to the turbine's "*slender structure supported by guy ropes*", concluded that the proposal would have "*a very modest impact on the openness of the Green Belt*" and would not compromise the purposes of including land in the Green Belt. At paragraph 5, the Inspector, after stating that the turbine would be clearly visible from public footpaths, stated that in more distant views its slender form and pale colour would blend into the skyscape and concluded, contrary to the District Council's refusal, that there would be no "*significant harm to the rural character and appearance of the surrounding area and the visual amenities of the Green Belt*"

46. In relation to energy generation, the Inspector stated as follows:

> "*11. PPS22 notes that the wider environmental benefits associated with the increased production of energy from renewable sources may constitute the very special circumstances necessary to justify inappropriate development in the Green Belt. In this case the medium-sized turbine is expected to operate at a minimum 20% efficiency and would deliver a minimum of 481 MW of electricity per year. This would be a small contribution to meeting national targets for renewable energy generation. PPS22 states that wider environmental and economic benefits of all proposals for renewable energy projects, whatever their scale, are material considerations that should be given significant weight in determining whether proposals should be granted planning permission. I note that some representations contest the appellant's estimates of the amount of electricity that may be produced by the turbine, but in the light of government policy this is not a matter that would justify refusal of planning permission.*
>
> *12. PPS22 and the climate change supplement to PPS1 point to the importance and urgency of slowing down the pace of climate change by reducing the CO2 emissions from the generation of energy through the burning of fossil fuels by producing energy from renewable resources. In this context, I consider the proposal would make a modest but valuable contribution to tackling climate change to which I accord substantial weight. In addition the benefits of the scheme to farm diversification and the rural economy are matters which weigh in favour of the scheme and to which I accord significant weight.*
>
> *13. Overall I conclude that the benefits of the scheme associated with the production of energy from renewable resources and the benefits to the rural economy are sufficient to outweigh the harm by reason of inappropriate development and the limited harm to the openness of the Green Belt and therefore constitute the very special circumstances necessary to justify inappropriate development in the Green Belt*."
>
> *(emphasis added)*

47. In relation to the issue of noise, the Inspector stated:

> "7. *There are a number of residential properties in the vicinity of the appeal site. The closest with no financial involvement in the turbine is Cottage Farm bungalow about 330 metres away. PPS 22 and paragraph 44 of the Companion Guide advise that the potential effects of noise from wind farms should be assessed in accordance with guidelines set out in document ETSU-R-97. The appellant has undertaken an assessment in accordance with this guidance which concludes that noise levels at Cottage Farm bungalow would be below the night time and quiet daytime noise limits specified within ETSU-R-97. The Council's Environmental Health Officer has raised no objections to the proposed turbine ...*
>
> 9. *I conclude that there would be no material harm to the residential amenities of the occupiers of dwellings in the vicinity of the appeal site.*
>
> ...
>
> 17. *The Council has suggested a condition relating to noise levels. However, the wording of the condition lacks precision because it fails to specify how and where noise levels should be measured. In any event, bearing in mind the results of the noise assessment, which is not contested by the Council, such a condition is not necessary*." *(emphasis added)*

48. Nine conditions were imposed on the grant of planning permission. Condition 5 provided as follows:

> "*Prior to commencement of the development hereby permitted, the specification of the wind turbine shall be submitted to and approved in writing by the local planning authority. The turbine specification to be submitted shall include the make, model, power rating, sound power levels, external dimensions, precise siting, colour and finish of the wind turbine. The specified details shall comprise a three bladed turbine no larger than the maximum dimensions submitted as part of the application. No part of any of the wind turbines shall carry any logo or lettering other than that required for health and safety purposes or required for legal reasons. The development shall be carried out in accordance with the approved details*." *(emphasis added)*

At paragraph 15 of the Decision, the Inspector explained the reason for this condition (and conditions 6 and 7) as follows:

"*Conditions relating to the submission of full details of the turbine, limiting the height of the turbine, to control the colour and finish of the substation and the undergrounding of cabling are necessary in the interests of visual amenity and to ensure that the Council has control over the details of development*."

49. Condition 5 appears to be inconsistent with the proposal examined by the Inspector. First, it refers to a three-bladed rather than a two-bladed turbine. This forms the subject of Ground (v). Secondly, Condition 5 refers at one point to "turbines", in circumstances where the proposal was, at all times, for a single turbine. It is accepted that this is an error, which falls to be corrected as a matter of construction. The words "*No part of any of the wind turbines ...* " are to be construed as "*No part of the wind turbine ...*".

50. The Second Defendant has provided evidence that the Inspector had previously granted permission for a different wind turbine with a condition in the same terms, and suggested that Condition 5 arose by way of a pure clerical error, by merely "cutting and pasting" the terms of the earlier condition into Condition 5 here. Whilst this does look possible, there is no direct evidence that this is what in fact the Inspector did, and absent such evidence, to draw any conclusions would be speculation. I consider this particular aspect no further.

The Parties' contentions

The Claimants' Case

51. The Claimants three remaining grounds are as follows:

Ground (i): Electricity generation

When assessing whether the benefits of the proposal were very special circumstances outweighing the harm caused, the Inspector should have taken into account the amount of the energy that would be generated as the issue was whether that electricity generation justified the harm caused *and* should have resolved the issue as to how much electricity would be generated.

Ground (ii): Noise

The Inspector failed to consider the appellant's own evidence that the wind turbine proposal failed to comply with the noise standard in ETSU-97 *and* failed to impose any controls on noise notwithstanding condition 5 permitting (and because of the description of the blades requiring) a different turbine to be installed than that assessed.

Ground (v): Number of blades - two-bladed or three-bladed turbine?

The Inspector granted planning permission for a different wind turbine to that which was applied for, as the planning application was for a two-bladed turbine and the planning permission (condition 5) requires a three-bladed turbine, and had no power to do so. The impacts of a three-bladed turbine were not assessed and may well be different, in particular the Inspector relied on the slender design of the mast, supported by guy ropes, which was a feature of the two-bladed turbine in the application.

The Claimants contend that the Decision is invalid on any one or more of these grounds and thus that the Decision should be quashed.

The First and Second Defendants' Case

52. As regards *Ground (i)*, both Defendants' case is that the Inspector did decide how much electricity the turbine could be expected to generate, and took it positively into account as constituting "very special circumstances", and further even accepting the lower estimate of electricity generated put forward by the District Council would not have led the Inspector to a different conclusion.

53. As regards *Ground (ii)*, the Defendants' case is that the ETSU noise limits were not exceeded at Hill Farm Cottage and further that, in the Decision, the Inspector did not fail to consider the position of Hill Farm Cottage in this regard. As regards the need for a condition, the First Defendant's case was that it was not for the Inspector to cast around for a more precisely drafted condition. The Second Defendant submitted that there is no basis to challenge the Inspector's conclusion that such a condition was not necessary.

54. The First Defendant further contends, relying on *Humphris*, supra, that both *Grounds (i)* and *(ii)* are new points raised by the District Council for the first time on this appeal, and on that ground alone, the District Council's case on these two grounds falls to be dismissed.

55. As regards *Ground (v)*, the First Defendant submits, first, that the permission is to be construed as a permission for a two-bladed turbine; secondly and alternatively, that the words "three-bladed" in Condition 5 should be severed; and thirdly, in the further alternative, relying on *Agecrest*, supra, the District Council should adopt a flexible approach to approval under Condition 5 so as to allow, in due course, approval of a two-bladed turbine. The Second Defendant takes a slightly different approach. The issue is a matter of construction; it is necessary to construe the entire Decision. The Inspector plainly intended to grant permission for a two-bladed turbine only; and the reference to three-bladed in Condition 5 was a mistake which can be corrected as a matter of construction, under the principles in *Federal Navigation* and *Chartbrook* (see paragraphs 18 and 19 above). Both the permission and Condition 5 are to be construed as referring to a two-bladed turbine only

56. Finally, in relation to Ground (v), in February 2013 the Second Defendant made an application to the District Council under s.73 TCPA, seeking permission to carry out the development in the Decision, subject to variation of Condition 5, supported by a s.106 unilateral obligation not to seek to rely upon Condition 5 to erect a three-bladed turbine. This however is not directly relevant to the determination of this application. If the Claimants' application is refused, then the existing permission will stand, as corrected, and there is no need for a s.73 application. On the other hand, if this application is granted and the Decision is quashed, then there will no extant planning permission, upon which an order under s.73 could take effect. The s.73 application was made by the Second Defendant in an attempt to avoid the need for a determination of the present application.

<u>Analysis</u>

Ground (i): Electricity Generation

57. The underlying issue here is whether there were "very special circumstances" sufficient to outweigh harm arising from the inappropriate development in the Green Belt and in particular whether the Inspector properly considered whether the amount of electricity to be generated by the turbine would constitute, or contribute to, those very special circumstances.

58. The Claimants' argument has two limbs. *First*, the Claimants contend that the Inspector failed properly to take account of the amount of energy that would be generated. *Secondly*, the Inspector failed to resolve the dispute, between the Second Defendant, based on the Garrad Hassan Report, and the Parish Council as to the amount of electricity that the turbine could be expected to generate. The distinction between these two contentions is not altogether clear. In summary, as I understand it, the Claimants' contention is that the Inspector considered that the particular amount of electricity generated was not relevant to whether there were "very special circumstances" and in this way the Inspector misunderstood and misapplied government policy in PPS22.

59. In paragraph 11 of the Decision, the Inspector's reasoning was that if the amount of electricity was small, then that was not a justification for refusing permission. That, say the Claimants, was the wrong approach. Instead of considering whether the fact that the amount was small was a reason *not* to grant permission, the Inspector should have considered whether the benefits, including the amount of electricity, was a *positive* benefit, giving rise to "very special circumstances" to outweigh the harm. In so doing, the Inspector misunderstood the relevance of the issue as to the amount of electricity that would be generated - the relevance was that if the lower amount was the true amount this would be a reduction in the level of benefits which had to be shown to overcome the objections. The Claimants submit that the Inspector misunderstood Government policy and so erred in law. These errors appear from the last sentence of paragraph 11: "*I note that some representations contest the appellant's estimates of the amount of electricity that may be produced by the turbine, but in the light of government policy this is not a matter that would justify refusal of planning permission.*". Mr Harwood QC, for the Claimants, submitted that the "government policy" there referred to is a reference to

paragraph 1(vi) of PPS 22 (see paragraph 24 above).

60. In my judgment, the Inspector did take the amount of electricity generated into account as a *positive* benefit of weight constituting, or counting towards, "very special circumstances", and did not discount it, negatively, as a reason not to grant permission for other reasons. The Claimants' case focuses, almost entirely, on the final sentence in paragraph 11 of the Decision, but that sentence has to be read in the context of the preceding four sentences in that paragraph, and also together with paragraphs 12 and 13.

61. First, it must be borne in mind that, whilst paragraph 1 *(vi)* of PPS22 suggests that if the amount of electricity generated is small, this is not a reason not to grant planning permission, that paragraph has to be read in the context of paragraph 1*(iv)* of PPS22 which precedes it. The effect of paragraph 1 *(iv)* is that the benefits of electricity from renewable sources, *whatever their scale*, are to weigh positively in the balance in favour of the grant of planning permission.

62. The substance of the Inspector's reasoning on electricity generation is to be found in first four sentences of paragraph 11. First, effectively quoting paragraph 13 of PPS 22, she recorded that the environmental benefits from energy produced from renewable sources can amount to very special circumstances,. Secondly, she found that in this case the turbine is expected to deliver a minimum of 481MW. In my judgment that is her finding as to the level of electricity expected to be generated. Then, in the third sentence, she recognised that this would be a "small contribution" to national targets. But fourthly, she went on expressly to cite the wording of paragraph 1(iv) of PPS22, stating that even a small amount should be given significant weight, by referring to "whatever their scale". At that point, therefore, it is clear in my judgment that this was an assessment that the amount of 481MW is a positive benefit constituting, or counting towards, "very special circumstances". Whilst this was a small contribution, it was an environmental, and possibly an economic, benefit.

63. In that context, the Inspector went on, in the last sentence of paragraph 11, to address whether the position would have been any different on the basis of other, lower, estimates of electricity production. She said that it would not have been. Even if the lower amount of electricity would be generated, this would not have changed her conclusion reached otherwise. The specific wording in this last sentence of paragraph 11 is a reference to paragraph 1(vi), but the reference to "government policy" is apt to cover both para 1(iv) and 1(vi), not least because she has effectively set out paragraph 1(iv) in the immediately previous sentence. Indeed it can be read as including paragraph 13 PPS 22 too, as this is set out in the first sentence. I do not accept that the Inspector was saying merely – either in this last sentence or generally - that if the amount was smaller, this was not a reason to refuse permission, the grant of which was justified on *other* grounds.

64. Paragraphs 12 and 13 of the Decision are also material here. That the Inspector is

making an assessment of the positive contribution of the amount of electricity generated is borne out by paragraph 12. The contribution there referred to is the same as that considered in paragraph 11 i.e. the electricity expected to be generated, and in paragraph 12 the Inspector concludes this constitutes a "small but valuable contribution" specifically in context of environmental benefits (rather than economic benefit). Finally in paragraph 13 the Inspector draws the threads together, concluding that there are "very special circumstances"; and these comprise (1) the benefits - both environmental (paras. 11 and 12) and economic (para. 11) - of the electricity generated and (2) the benefits to the rural economy (para. 12).

65. I consider that, in so far as it is contended that the Inspector should not have worked on basis of the higher figure for electricity generated, she was entitled to make such a finding. It cannot be said that it was perverse: the Second Defendant's position was supported by the expert evidence of the Garrad Hassan Report. The Parish Council's contrary case was based on assertion, unsupported by similar expert evidence.

66. In summary, in paragraphs 11 to 13 of the Decision, first, the Inspector found that the amount of electricity that could be expected to be generated was a minimum of 481MW. The Inspector did not fail to resolve the dispute as to amount. Secondly, the Inspector took that amount of electricity into account as a positive factor in favour of the grant of planning permission and as outweighing, with other benefits, harm arising from the inappropriate development. Thirdly, and in any event, the Inspector, added that even if only the lower amount were to be generated, this would not have changed her mind, because government policy is that "any small amount" can be sufficient. Thus even if, contrary to the foregoing, the Inspector did not "resolve the dispute", this would have made no difference to the decision on this point (see paragraph 11 above: *Bolton MBC (1991)* and *Simplex*). In focussing the argument upon the “minutiae” of the last sentence of paragraph 11, the Claimants fail to consider broadly the Inspector’s reasoning in paragraphs 11 to 13, contrary to the approach suggested in *Dartford* (see paragraph 10 above). For these reasons, Ground (i) of the Claimants' challenge fails.

Ground (ii): Noise

67. The Claimants' case on Ground (ii) has two limbs: failure to take account of a breach of the ETSU noise limits in respect of the residential properties at Hill Farm and failure to impose a condition to control noise.

(1) Failure to address breach of ETSU limits at Hill Farm

68. As regards the first limb, the Claimants contend that paragraphs 7 and 9 of the Decision, dealing with ETSU noise limits, are concerned solely with Cottage Farm, a residential property with no financial interest in the proposed development, and that the Inspector failed to consider the impact of noise on the residential properties *with* a financial interest (namely Hill Farm) as required by ETSU. The proposed development failed to comply with the ETSU noise limits in respect of Hill Farm Cottage, and, even if the Inspector did consider the position at Hill Farm Cottage, she failed to explain why she did not follow those noise limits. In this way, the Inspector departed from the relevant

policy in PPS 22 and ETSU and failed to explain that departure, contrary to the principle in *Gransden*: see paragraph 14 above.

69. First, I do not accept that the Inspector failed to consider the position regarding noise limits at Hill Farm Cottage. The reference in the first sentence of paragraph 7 of the Decision to "*a number of residential properties in the vicinity of the appeal site*" includes the residential properties at Hill Farm. This is confirmed by the next sentence of paragraph 7 which selects from that "number" "*the closest with no financial involvement*" i.e. there are others *with* a financial involvement which are closer, namely Hill Farm. The Inspector then addressed specifically the position of Cottage Farm under the ETSU guidelines, and then concluded, at paragraph 9, that there would be no material harm "*to the residential amenities of the occupiers of dwellings in the vicinity of the appeal site*". In my judgment these "dwellings" are the same as the "residential properties" in the first sentence of paragraph 7, and again include those at Hill Farm. The Inspector thus did consider Hill Farm Cottage, and her overall finding included the position at Hill Farm Cottage. I accept the Second Defendant's submission that it was understandable for the Inspector to concentrate, in the Decision, on the nearest residence with *no* financial involvement, and that this does not mean that she did not also consider the nearest residence *with* financial involvement.

70. Secondly, I accept the Defendants' submission that it was not necessary for the Inspector to record in the Decision her views on each and every possible matter. The fact that there is no express reference to the specific findings in the PDA Report relating to Hill Farm Cottage does not suggest that she did not consider them: see *Bolton MDC (1996)* and paragraph 11 above.

71. Thirdly, and in any event, the PDA Report did not find that the ETSU noise limits for Hill Farm Cottage were exceeded. It is the case that PDA produced calculated figures for estimated noise levels which exceeded the limits, although it is noteworthy that, even on these figures, the limits are exceeded only at a limited range of wind speeds. More significantly, however, PDA's express *conclusion* on this issue, at paragraph 8.0, was that, because the calculation methodology was conservative, "*we would expect the calculations to overestimate the noise levels at this receiver location and it is likely that the resultant wind turbine noise levels will be below the limits detailed*". This is a conclusion that, in PDA's opinion, there was no breach of the ETSU limits. In this regard, and contrary to the Claimants' further submissions, in my judgment "likely" does mean "probably" or "more likely than not". Nor is there any reason to expect PDA to have made a downward adjustment to the actual figures produced on their calculation. The stated narrative conclusion at paragraph 8.0 was a qualitative judgment. It is the case that, unlike the position in relation to Cottage Farm at paragraph 1.0, there is no express statement of "no breach of the ETSU limits" in relation to Hill Farm. However I do not accept that a contrary finding of breach in relation to Hill Farm is to be inferred from the absence of a reference to Hill Farm in paragraph 1.0. Such an inference is inconsistent with the express conclusion at paragraph 8.0.

72. Finally, even if, contrary to paragraph 69, the Inspector did not take account of the noise levels at Hill Farm, then, given the PDA Report's conclusion that the noise limits were not exceeded, it would not be clear that there is a real possibility that the Inspector would have reached a different decision, had she taken the levels into account: see paragraph 11 above.

(2) Failure to impose a noise condition

73. As regards the second limb, the Claimants contend that the Inspector should have imposed a condition to control noise, first, because condition 5 permitted and required a different turbine to be installed, and secondly, in any event, because such a condition was necessary in the light of the findings of the PDA Report in relation to Hill Farm. The Inspector was wrong to conclude that such a condition was not necessary, and she could have drafted a suitable condition herself or invited the District Council to do so. They say that the Inspector misunderstood the PDA Report because it shows the limits being exceeded and further misunderstood ETSU because ETSU suggests the imposition of noise limit conditions.

74. The Inspector found, at paragraph 17, that the District Council's noise condition "lacks precision" and, further was "unnecessary". The Claimants' argument in relation to the need for a condition was substantially predicated on the alleged effect of Condition 5 being to require a three-bladed turbine. However, in view of my conclusion on Ground (v) below, this part of the argument falls away.

75. As regards the need for a noise condition more generally, Mr Whale for the First Defendant submitted that the Inspector's first conclusion that the District Council's condition was imprecise cannot be impugned, and further that it was not for the Inspector herself to put forward a more precisely drafted condition. To this end he relied upon *Top Deck*, supra and the fact that the present appeal was conducted under the written representation procedure: see Regulation 16, supra. It followed therefore that this ground of challenge must fail, regardless of whether a condition was necessary. However I am not persuaded that the Inspector was precluded from putting forward her own condition or indeed inviting the District Council to propose a differently worded condition. *Top Deck* concerned a case where the issue was whether the inspector was required to find a condition to avoid a decision refusing permission. Ss. 70 and 72 TCPA provide an inspector with wide powers to consider the question of the imposition of conditions. Thus there may have been scope for the Inspector to have sought a better condition, had it been necessary.

76. Thus the Claimants' challenge to the Inspector's conclusion that such a condition was not "necessary" falls to be considered. Critically, this conclusion has to be considered in the light of the fact that the ETSU noise limits were *not* exceeded in relation to any of the nearby residential properties. Indeed that is the express basis of the Inspector's decision at paragraph 17. Mr. Harwood QC contended that, even if the limits were not exceeded, the Inspector should have taken into account the fact that the noise levels were close to the limits, and on that basis, a condition was "necessary". In my judgment, this was a

matter for the Inspector's judgment and there is no basis upon which her conclusion, in these circumstances, that a condition was *not* necessary could be said to be perverse. Having reached that conclusion, there was no obvious reason for the Inspector to devise, or seek, a more precise condition.

77. For these reasons, both limbs of Ground (ii) of the Claimants' challenge fail.

Ground (v): Two- or Three-Bladed Turbine

78. It is common ground between the Claimants and, at least, the Second Defendant that the Inspector made an error in Condition 5 by requiring that the turbine submitted for approval should be "three-bladed". The issue here is what are the consequences of that error.

79. The Claimants say that the effect of the error is that the Inspector has granted permission for a type of wind turbine which was neither the subject of the application nor assessment by the Inspector, and for that reason, the permission is invalid and should be quashed. The Defendants say that the error can be corrected and that it does not affect the true construction of the permission, which remains valid and unaffected.

80. The Claimants submit that, as a matter of construction, the Decision is to be construed as the grant of planning permission for a *three-bladed* wind turbine *only*. That permission is invalid because the Inspector had no power to grant permission for a turbine which was not the subject of the application or assessment. Condition 5 is quite clear. The rest of the Decision is consistent with Condition 5 requiring a three-bladed turbine. When the application documents are considered, the application itself was merely for a single wind turbine and in the Detailed Statement the two-bladed Vergenet was only said to be "the *preferred* wind turbine". The specific drawings and details of the Vergenet were not specifically approved, other than in relation to the dimension limit. Those parts of the application documents which suggest a two-bladed turbine are set aside by the Inspector in Condition 5, which widens out the scope of the approved turbine, by giving a choice as to the type of turbine. The Claimants then go on to submit that the Inspector then, invalidly, requires a three-bladed turbine.

81. The issue here is whether, on its true construction, the Decision is a grant of planning permission for a two-bladed turbine, for a three-bladed turbine or for any wind turbine, regardless of number of blades. The real problem arising from Condition 5 is that, on its face, it *prevents* approval of a two-bladed turbine, and not merely that it *permits* approval of a three-bladed turbine.

82. The starting point is the grant of permission itself. It is set out in paragraph 1 of the Decision. That permission itself refers expressly to being granted both "*in accordance with the terms of application*" and "*subject to ... the conditions*", including Condition 5.

83. Since this is a full planning permission, the plans and drawing are necessarily incorporated into the permission. They are as much a part of the description of that which is granted permission as the words of description in the permission and application: see *Barnett*, supra, at paragraph 16 above. Regardless of any other materials, the application drawing is a drawing for a two-bladed turbine. The reference to the application in the permission necessarily includes a reference to a two-bladed turbine. Thus, without the final words of paragraph 1, the permission is to be construed as a permission for a two-bladed turbine.

84. However the permission itself is made expressly subject to the conditions, including Condition 5. Condition 5 not merely allows approval of a different make and model of turbine, but more significantly, *requires* the turbine to be approved to be a "three-bladed" turbine.

85. Thus, at this stage of the analysis, there is, *within* the terms of the permission granted at paragraph 1 of the Decision, not merely an ambiguity, but a clear inconsistency between the grant of permission for a two-bladed turbine and a condition of that permission requiring a three-bladed turbine, and effectively *prohibiting* a two-bladed turbine. The Condition does not merely widen out the scope of type of turbine that can be approved beyond that which was the specific subject of the application. It fundamentally alters the type of turbine required.

86. Given this inconsistency it is permissible to look at other extraneous material to assist in resolving that inconsistency. This material includes not just the application drawing, but also the Detailed Statement, the PDA Report, and the Garrad Hassan Report. From this material it is plain that what was applied for and what was assessed by District Council and, more importantly, by the Inspector in the Decision was a two-bladed turbine. The Claimants do not dispute this.

87. Nevertheless the Claimants' case is that, as a matter of construction, the permission granted in paragraph 1 is permission for a three-bladed turbine and for a three-bladed turbine only. The Claimants accept that this is a permission for a type of turbine not assessed. Moreover on this construction, there would be no permission for a type of turbine which was the subject of the application and which was assessed. There is an inconsistency in Mr Harwood QC's arguments. On the one hand, it is possible for an inspector to widen out or modify the permission by the reference to the contents of a condition, for example by saying any other make and model can be approved and thus the scope of the permission would be for any make and model. However the Inspector cannot have intended to *prohibit* the very thing for which permission has been sought, and thus effectively rewrite the permission paragraph. This is an absurd result and one which cannot be the intended meaning of the words used in the Decision. The Claimants themselves do not suggest that this was the Inspector's intended result. Thus, in my judgment, as a matter of construction, the permission granted in paragraph 1 is not a permission for a three-bladed turbine *only*. To construe the permission as permission for a three-bladed turbine because of Condition 5 would be to allow the condition to

overturn the permission. Condition 5 would, impermissibly, constitute a fundamental alteration of the proposal: see paragraph 20 above.

88. The further question then arises as to whether the permission, in the context of Condition 5, is to be construed as a permission for any turbine, whether two-bladed or three-bladed, or, rather, for a two-bladed turbine only. As regards Condition 5, this question becomes a question as to whether the words "three-bladed" should be read as replaced by "two-bladed", or instead read as deleted altogether. Did the Inspector intend to limit approval under Condition 5 to a two-bladed turbine? This question is more difficult. It is certainly the case that, without *deletion*, the condition is unworkable and satisfies the test set out in the *Federal Navigation* case. The question though is whether without *substitution* of the word "two-bladed" the condition is unworkable. Applying the contractual approach in *East* and *Chartbrook*, it is clear that a mistake has been made, but is it also clear what correction ought to be made to cure that mistake?

89. On the one hand, it is the case that in Condition 5, the Inspector does widen out the scope of the type and characteristics of the turbine which may be approved, so that for example a make and model of turbine other than the Vergenet GEV MP can be approved. However, if the permission and Condition 5 were to be construed as *including* a "three-bladed" turbine, this would have the effect of amounting to a grant of planning permission for a type of turbine which had not been applied for nor had been the subject of assessment. This indeed is the very basis of the Claimants' own argument on Ground (v). Furthermore, Condition 5 already has a condition linked to the maximum dimensions as found in the application; the inclusion of this second limiting condition would be apt to prevent the development from being implemented in a way which might involve greater environmental impacts than those examined by the Inspector. In these circumstances, I consider that the Inspector intended to confine the grant of permission, and the scope of Condition 5, to a two-bladed turbine, and not to allow a three-bladed turbine.

90. In my judgment this is appropriately dealt with as a matter of correction of an error by way of construction. The error in Condition 5 can be corrected as a matter of construction. There is no need to find that the Condition 5 or any part of it need to be severed

91. I conclude therefore that, on its true construction, Condition 5 falls to be read as if the words "two-bladed" are substituted for the words "three-bladed", and that the permission in paragraph 1 of the Decision is permission for a two-bladed wind turbine, subject to all the conditions, including Condition 5 as so read. (It is also to be read subject to the further correction set out in paragraph 49 above). For these reasons, Ground (v) of the Claimants' challenge fails too.

Conclusions

92. In this light of my conclusions at paragraphs 66, 77 and 91 above, each of the grounds of challenge fails and, accordingly, the application for annulment of the Decision is dismissed.

93. Since the application fails in any event, I do not need to decide whether, as regards *the District Council*, grounds (i) and (ii) fell to be dismissed, on the distinct grounds that these were points not taken before the Inspector (see *Humphris* and paragraph 12 above), and nor what effect this may have had, given that *the Parish Council* had taken these points before the Inspector.

Consequential matters

94. I will hear submissions on the appropriate terms of the order, if the parties are unable to agree. I propose dealing with this and other consequential matters, including costs, immediately following the handing down of this judgment, unless any party requests that they be dealt with subsequently and in which event, I will give further directions as to the procedure to be followed, including for the service of written submissions.

95. I am grateful to Mr. Harwood QC, Mr Whale and Mr Machin for their assistance to the Court in the presentation of oral and written argument in this matter.