

**Section 78 Town and Country Planning Act 1990**

**Town and Country Planning (Environmental Impact Assessment)  
(England and Wales) Regulations 1999**

**Appeal by RES Developments Limited against the refusal of West Devon  
Borough Council to grant planning permission for a wind farm at Den Brook**

**Planning Inspectorate Reference APP/Q/1153/A/06/2017162**

**CLOSING SUBMISSIONS ON BEHALF OF THE APPELLANT**

**Marcus Trinick and Paul Maile  
Eversheds LLP  
October 2009**

## **CLOSING SUBMISSIONS ON BEHALF OF THE APPELLANT**

### **Structure**

1. Main issues and other matters.
2. Identification of key policies.
3. Submissions on main issues and on development plan compliance.
4. Other material considerations and final submissions.

#### **1. Main Issues And Other Matters**

In my view, following the evidence, the main local environmental issues in this appeal are:

- the landscape and visual effects of the development on the character appearance of the area (including Dartmoor National Park);
- cultural heritage; and
- noise.

In relation to the local environmental issues, there are policy matters to be explored and the need for and benefit of the proposed development.

Before turning to deal with other issues discussed in evidence at the inquiry, I feel that this would be the appropriate point to address you on relevance of the previous appeal decision in relation to this same project.

On 22 March 2007 Inspector David Lavender granted planning permission for the development which is before you (CD27(p)). He did so following a public inquiry which considered in detail each of the issues that have been discussed in this inquiry, except for noise.

In the circumstances which are clear from document CD124 Mr Lavender's decision was challenged in the High Court, ultimately resulting in the quashing of the decision and its remittance to the Planning Inspectorate.

The point that I need to deal with at this stage addresses the extent of your duty when arriving at a decision to have regard to the decision of Mr Lavender and the reasons for that decision given in the 22 March 2007 appeal decision. We are fortunate that the law is tolerably clear in this area. It is sufficiently represented in my view in three cases:

- North Wiltshire DC - the Secretary of State for the Environment (1993) 65 P&CR 137
- J.S. Bloor (Sudbury) Limited - first Secretary of State (2003) EWHC 1898 (Admin)
- R (on the application of Chisnell) -v- Richmond Upon Thames LBC (2005) EWHC 134 (Admin)

I do not think that I need to produce these decisions for you and can adequately summarise the position purely in these submissions.

And I think I can adequately summarise the position by specific reference only to the 2005 case referenced above since this decision referenced (indeed necessarily referenced) the Court of Appeal decision in the North Wiltshire case. The facts of the case are not important to the general observations which I need to make. I can do no better than to record exactly what Newman J. had to say on the point. He noted that the legal argument before him relating to this topic reflected, "as one would expect", a substantial measure of common ground between the parties as to how previous decisions in relation to the same planning site should be treated ..". He said:

*"The basic position can be stated as follows:*

- (1) The planning history in relation to [the] site is a material consideration in connection with a planning application (see Spackman -v- Secretary of State for the Environment and Another (1977) 1 All ER 257);*
- (2) A previous appeal decision is a material consideration in connection with a planning application including a subsequent appeal to a different Inspector (here he referred to the North Wiltshire case). The reason why previous appeal decisions are a material consideration is, as Mann L.J. (the judge in the North Wiltshire case) pointed out;*

One important reason why previous decisions are capable of being material is that like cases should be decided in a like manner so that there is consistency in the appellate process. Consistency is self-evidently important to both developers and development control authorities .."

*Mann L.J. went on to add:*

*"But it is also important for the purpose of securing public confidence in the operation of the development control system. I do not suggest, and it would be wrong to do so, that like cases must be decided alike. An Inspector must always exercise his own judgment. He is therefore free upon consideration to disagree with the judgment of another but before doing so he ought to have regard to the importance of consistency and to give his reasons for departure from the previous decision."*

*Thus analysed, the principle is straightforward enough: that in the planning process that previous history in connection with the site, including decisions in connection with the site, are material considerations, but anybody having the power to reach a decision in connection with the site at a subsequent date has a discretion. The discretion must be exercised in accordance with their own*

*judgment. The requirement for consistency does not mean that they must be slaves to the previous decision and are in any sense bound by it, or must therefore come to the same conclusion. Their judgment and discretion is informed but not fettered by the history.*

*The principle of consistency comprises a material consideration to be taken account of in reaching a judgment. Because of the importance to be attached to consistency, a decision maker should not depart from it without realising the importance to be attached to it, and when departure occurs reasons for departure from any previous decision must be given."*

Newman J. went on to say at a later stage in his judgment that:

*"In my judgment there was no justification for the committee being told that there was a need for there to be a material change in circumstances in order to introduce a new ground for refusal. There was a need for the committee to understand the importance of [the] consistency, and a need for the committee to express a reason if it was going to depart from it, which would reflect its own judgment as to whether or not a basis for refusal was to be found in the physical impact upon the neighbouring occupiers [this last phrase is clearly case specific] .."*

For the avoidance of doubt, this rehearsal of the law fulfils my promise in my opening statement: "Renewable Energy Systems accept that all issues in the appeal are for your determination. The previous decision is not binding on you. However, I will refer in closing to decisions of the court which make clear the desirability of consistency and decision making, primarily in the interests of predictability and fairness to all participants in the planning process .."

Therefore it is my view that Mr Lavender's appeal decision is merely a material consideration in your decision. The weight that you give to that material

consideration is a matter for you on the evidence. I say at this stage, so as to present the whole of my views on this point at one point, that an element of your judgment on this topic will involve a consideration of the extent to which there has been a material change in planning circumstances since the previous decision, and the influence that any material change may have, based on the evidence. I note at this stage that the Council would not appear to have even considered a material consideration of a previous decision in its evidence, and DBJRG has given scant consideration to the previous appeal decision. On the other hand, the Appellant has provided you with evidence on any changes in material planning circumstances since 22 March 2007 and, if rather prematurely in terms of these submissions, it is my view that the material considerations which are before you, but which were not before Mr Lavender, argue in favour of the grant of a permission rather than that in relation to any evidential topic you should depart from Mr Lavender's decision. There is an exception to the point I make: no substantial noise evidence was before Mr Lavender and I acknowledge that in relation to this issue, the influence of the previous decision is very slight. However, all the other topics debated at the inquiry were before Mr Lavender.

The principal matters debated before you, but not before Mr Lavender (excepting noise) were:

- (1) Developments in progress towards 2010 renewable energy targets set out principally in the Structure Plan (CD8).
- (2) The Energy White Paper 2007 (CD32b).
- (3) The EU Directive on the promotion of renewable energy (CD35).
- (4) The Renewable Energy Strategy (CD32c).

It is my view, as I shall make clear in the closing of these submissions, that each of the fresh material considerations before you argue in favour of the grant

of a planning permission rather than comprising an argument that you should make a different decision from that of Mr Lavender.

Finally, on this point, it is my argument (acknowledged to be mine rather than deriving directly from the decisions which I have rehearsed), that considerable weight should be given to the material consideration of consistency in decision making. In circumstances where (for example), the landscape and visual baseline has not changed from that considered by Mr Lavender, I think that there would have to be particularly good reasons for a different decision to be taken in relation to the landscape and visual impacts of the project, remembering that the project before you is precisely that which was before Mr Lavender.

Against that background I now turn to deal with matters which, although brought in evidence to the inquiry, do not in my view amount to potential determining issues.

I should say at this stage that I do not necessarily refer specifically to all the witnesses who gave evidence at the inquiry. No disrespect is intended, and I have taken account of all the evidence given before making these submissions.

(1) *Bats*

Evidence on this topic came from Dr Holloway and Mr Buxton. Dr Holloway is a professional ecologist with much experience of surveying bat activity. Mr Buxton is not a professional ecologist, but he has a lot of experience in survey work and is well respected. My submissions on the evidence are as follows:

## Surveys

- (1) Recent studies referred to by Dr Holloway (but not before the inquiry) disclose that there is much more bat activity at ground level than at a height of even 30m - particularly in respect of pipestrelles.
- (2) Therefore hand held bat detectors at ground level are perfectly sufficient. In any event there are practical difficulties with surveying at height, quite apart from cost. Helium balloons are a possibility, but they need constant refilling and they drift with the wind, and as a result are not very reliable.
- (3) The noctule bat does fly higher than other species, but has a louder echo location call, meaning that its calls can be picked up by hand held detectors.
- (4) Mr Holloway confirmed that the three surveys undertaken during early Summer, Summer and Autumn were perfectly adequate to record bat activity around the site, and that further surveys would not have revealed additional significant data which would have influenced his impact assessment. In this connection Dr Holloway noted that the Andrew McCarthy Associates paper referred to by Mr Buxton and produced by him as an appendix was written to generate discussion on survey methodology, and not as a prescription for surveys.
- (5) There are no particular complexities to explore in respect of the Den Brook site and area such that the three surveys carried out were perfectly appropriate.

- (6) The newest bat roost to Den Brook is 3 km from the survey area, and therefore as a matter of professional judgment is not relevant to the level of survey effort from Den Brook.
- (7) As to the advice from Eurobat (Mr Buxton Appendix 3), this must be seen in context which is that of mainland Europe where there are migratory species for which different survey methodologies are appropriate. As Dr Holloway said, it must be for individual countries to develop their own advice on the appropriate level and type of surveys.
- (8) As to the Natural England Interim Guidance on bats and onshore wind turbines (Appendix 1 to Mr Buxton's evidence), it is indeed interim guidance not final advice. No definitive methodology exists for bat surveys, and I refer again to Dr Holloway's view that the level of the survey effort for this site was adequate for purpose.
- (9) Turning to a particular species, noctules were the only species found during the survey effort which are recognised (see the Natural England guidance) as being of high risk of collision because of flight heights and whose population might be at risk from wind turbine collisions.

#### Collision Risk

- (10) Dr Holloway gave convincing evidence that current perceptions of collision risk originate in mainland Europe and in the USA and Canada where researchers concentrated on migratory bat species. It is currently considered unlikely that migration takes place between the UK and mainland Europe.

- (11) The survey results at Den Brook showed 10 passes for noctule bats, noting that the record may have been of 10 bats or several passes recorded for fewer bats.
- (12) The majority of noctule bat passes were recorded over habitat at some distance from the proposed wind turbines (9 of the passes were more than 150m from any proposed turbine position).
- (13) Mr Buxton brought evidence that noctule bats may turn off echo location during feeding. Dr Holloway responded that this could be for a very short period if at all because echo location is vital to a bat's navigational ability when in flight. Therefore any such behaviour would be short term and not material to a collision risk assessment.
- (14) It is clear from the survey effort carried out on behalf of RES that the majority of registrations of species relate to populations which (evidence of the Natural England guidance and Dr Holloway in chief) are at low risk in terms of collision.
- (15) The most sensitive turbine in terms of collision risk with bats is T1 (see Environmental Statement Figure 5.6). Dr Holloway evaluated this turbine in evidence and concluded that all of the species recorded in the hedgerows close to this location are recognised to be at low risk of collision because of low flying behaviour.

#### Barotrauma

- (16) Dr Buxton brought evidence of deaths of bats, primarily in the USA, from barotrauma (resulting from a drop in air pressure immediately proximate to a turbine blade). Dr Holloway noted that deaths from barotrauma will primarily occur within a 1m radius of a blade tip. Mr Buxton drew attention to wake and vortices effects, but Dr Holloway

said that such information must be read with a degree of caution because of the lack of an evidence base for conclusions drawn.

In summary, I commend the evidence of Dr Holloway whose thorough proof fully addressed all relevant issues. There is no evidence before the inquiry that the operation of the wind farm will give rise to any material risk to individual bats, to individual species, or to bat populations generally.

(2) *Shadow Flicker*

A number of witnesses made contentions in relation to shadow flicker. Quite simply, shadow flicker is a local environmental effect which is well understood and which can be avoided through the deployment of photo sensitive software within the wind turbines. Indeed, the ability to avoid shadow flicker effect was well understood at the time of the previous appeal, and condition 7 imposed by Inspector Lavender addressed the point. There is a similar condition before you which RES invites you to impose. The imposition of this condition will ensure the avoidance of shadow flicker effect and the removal of this issue from consideration.

(3) *Tourism and the local economy*

I deal with this issue briefly in the context of landscape and visual effects.

(4) *Birds*

Although potential for collision between wind turbines and birds was raised at the inquiry, I do not feel I need to make any particular submissions on the topic. Apart from observations of birds in the area of the wind farm, there is no evidence before you of any collision risk, or of the risk of any other adverse interaction between bird populations and the wind farm.

## 2. Identification of Key Policies

The development plan now comprises RPG10 (CD9), the Devon Structure Plan (CD8) and the West Devon Local Plan (CD14). Mrs Hart confirmed towards the close of evidence on 23 October that the position had not changed since that debated in the session of the inquiry which took place in the summer of 2009. In addition there is a well advanced draft RSS (CD10) which it is common ground should be given considerable weight. Finally, at a regional or local level there is an emerging LDF within West Devon for this is at a very early stage and it is common ground (although not recorded in the Statement of Common Ground) such that you give you weight to this document.

Addressing first the development plan, and within that renewables policies, we have RE6 in RPG10, CO12 in the Structure Plan and PS10 in the Local Plan. RE6 sets regional targets in terms which I need not rehearse and gives advice on content of development plans. Mrs Hart sought to argue (para 5.1.1 of her proof) that, on the basis of advice in para 16 of PPS1 on climate change (CD166) advice on targets in RSS should not be applied directly to individual planning applications. You will remember that in XX I took Mrs Hart to a judgment of the High Court in relation to the proposed Carsington wind farm (CD 164). I commend in closing the reasoning of Carnwath, L.J. in paragraph 42 of his judgment, disagreeing with the submissions of Leading Counsel for the Claimant which reflected Mrs Hart's approach. We can do no better than to commend, with respect, the position of the judge without the need to add more. It flies in the face of any planning logic that RSS advice on targets should not be applied at the project level.

CO12 in the Structure Plan advises that provision should be made for renewables developments in the context of a sub-regional target of 151 MW of electricity production from land based sources by 2010 "subject to the consideration of their

impact upon the qualities and special features of the landscape and upon the conditions of those living or working nearby ..". The policy envisages that priority should be given to locations within the area of search identified in the key diagram. It is clear from paragraph 4.73 of the Structure Plan that the prioritised areas are broadly those outside national designations and AGLVs. Mr Stewart addressed the issue of Areas of Search in his evidence. In reliance on the advice in paras 24 and 25 of PPS7 (CD 16) it seems to be clear that AGLVs will disappear when RSS is adopted where it is my view that even at this stage these regional or local designations should be given less weight and a proper assessment of impact based on landscape character (see here evidence of Mr Goodrum).

In all events, CO12 does not advise that development should be excluded from areas outside the Area of Search. Note that Mr Lavender gave the Area of Search no particular weight in his March 2007 decision, and I concur with his approach.

It seems to me that CO12 is broadly consistent, so far as it goes, with relevant advice in PPS22 (CD21).

Turning to PS10 in the Local Plan, this advises that renewable energy developments should be supported "provided that they have no significant adverse impact upon the qualities and special features of the natural landscape or townscape, upon which conservation or upon the conditions of those living and working nearby ..". In my view this policy is not consistent with the advice in PPS 22 and it does not reflect the realities of wind energy development which will inevitably have some significant impacts on landscape, quite possibly on the visual amenity (stressing here that I do not mean residential amenity) of those living nearby. The test of no significant adverse impact would preclude any proposed wind farm, and in my view weight that might otherwise be given to PS10 as a Development Plan policy should be significantly reduced with this in mind.

Turning to policies within the Development Plan advising on other topics, I will in closing concentrate on those which I feel will attract your attention, as opposed to the many policies referred to by various witnesses which, although theoretically relevant, are unlikely to be helpful.

There are no additional policies to which I wish to refer in the RPG. As to the Structure Plan, CO1 and CO2 require to be considered. CO1 advises that the distinctive qualities and features of Devon's Landscape Character Zones (illustrated in the Structure Plan map) should be sustained and enhanced, and that proposals for development in each part of Devon should be informed by and be sympathetic to landscape character and quality. I make the same submission on CO1 as I made on PS10 on the Local Plan. If the view is taken that the landscape and visual effects of a particular wind energy development are both significant and adverse, then it would be difficult for a development to comply with CO1, but in my view such an approach would not be consistent with PPS22 nor would it be consistent with the approach of the very many appeal decisions which are before you. Likely significant and probably adverse and visual impacts is a factor which cannot be escaped, but which should not of itself be given any particular weight in the decision making process.

Turning to CO2, this advises substantially on development within the Dartmoor National Park, but the last paragraph advises that particular care should be taken that no development is permitted outside the National Park which would damage natural beauty, character and special qualities or otherwise prejudice the achievement of National Park purposes (as set out in the Environment Act 1995). I deal with the advice in the last paragraph of this policy in my submissions on the main issue of landscape and visual effects.

Turning to the Local Plan, NE7 advises on applications for development "on or close to the edge of the Dartmoor National Park". In my view the evidence shows

very clearly that the Den Brook proposal is outside the scope of NE7 and that it could not remotely be described as "on or close to the edge" of the National Park. It is not clear from paragraph 37 and Mr Lavender's decision if he took this view, but he did, in the context of views from the National Park, to the "very distant presence of a lowland wind farm" and I concur with his perception, noting that in my view that necessarily means that NE7 is not engaged.

Turning to NE10 on the Local Plan, this is a standard countryside protection policy relating to developments of all kinds. It requires that any development outside "settlement limits" or "not otherwise in accordance with policies .. in the Plan" must fulfil three criteria. The first relates to the provision of economic or community benefit. The second requires that no unacceptable harm should be called to distinctive landscape character, including views. The third relates to the use of agricultural land (and is clearly not relevant here because the advice is related to maintaining the stock of agricultural land).

This is one of those policies which was written without any regard to wind energy development (not a criticism but just a fact) and in my view it should be given little weight. There is no requirement in PPS22 that economic or community benefit should be provided as a by product of wind energy development (although such benefits may arise during both the construction and the operational period). The criterion relating to landscape character is in fact reasonably consistent with the approach of PPS 22, but I can't have it both ways and my primary argument is that this policy is unlikely to play a major part in your consideration of the proposals. Mr Lavender concluded that any departure from the aims of NE10 would not be overriding. He did not make a finding about the essential applicability of the policy.

Overall in relation to the Development Plan, it has to be said that there is a paucity of really useful advice. The RPG does not engage on local environmental

