England and Wales High Court (Administrative Court) Decisions

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IN THE HIGH COURT OF JUSTICEQUEEN'S BENCH DIVISION THE ADMINISTRATIVE COURT

Royal Courts of Justice
Strand
London WC2A 2LL
19 August 2010

B e f o r e :

FRANCES PATTERSON QC(SITTING AS A DEPUTY HIGH COURT JUDGE)_____

Between:

THE QUEEN ON THE APPLICATION OF HULME **Claimant**

v

SECRETARY OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT **Defendant**

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Mr R Taylor (Instructed By Richard Burton) Appeared On Behalf Of The ClaimantMiss L Busch (Instructed By The Treasury Solicitor) Appeared On Behalf Of The First DefendantMr G Nardell Qc (Instructed By Eversheds) Appeared On Behalf Of The Third Defendant With Miss J Thornton For Judgment _____

MR G NARDELL QC (INSTRUCTED BY EVERSHEDS) APPEARED ON BEHALF OF THE THIRD DEFENDANT WITH MISS J THORNTON FOR HTML VERSION OF JUDGMENTHTML VERSION OF JUDGMENT

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THE DEPUTY JUDGE: This is an application under section 288 of the Town and Country Planning Act 1990 for an order that the first defendant's decision to grant planning permission to the

third defendant (RES) on a 200 hectare site for nine 3-bladed horizontal axis wind turbines, electricity transformers, access tracks, crane hardstandings, control buildings, sub-station, meteorological masts, temporary construction compound and temporary construction compound and meteorological masts, in a decision letter dated 11 December 2009, be quashed.

Background

The planning application the subject of the decision letter was made as long ago as 10 November 2005. It was refused on 31 January 2006 by West Devon Borough Council and appealed. The appeal was successful but subject to a legal challenge. The challenge was dismissed by the High Court. Permission to appeal to the Court of Appeal was granted by Laws LJ but before the substantive hearing took place the matter was resolved by a consent order, whereby the decision was quashed and the appeal remitted for re-determination.

The claimant is the freehold landowner of Coxmoor, Spreyton, Crediton, Devon. His dwelling house is 1133 metres from the nearest proposed turbine. His land (he owns 10 acres between his dwelling and the proposed turbines) is 900 metres away at the closest boundary from the proposed wind farm site. The claimant is a key member of the Den Brook Judicial Review Group (DBJRG), a group of local residents who formed a pressure group to oppose the proposed development. The resumed public inquiry into the development proposal sat for some 13 days over a period from 23 July until 26 October 2009. DBJRG was a Rule 6 Party, called witnesses, and was represented by counsel at the public inquiry.

The decision letter

The inspector, in a detailed decision letter of some 55 pages, identified the main issues at paragraph 7 as:

"i) the effect of the proposed development on: • the character and appearance of the surrounding area including the historic

environment; • local ecology, especially bats; • the living conditions of local residents, especially in relation to possible noise disturbance; and (ii) whether any harm resulting from the first main issue could be sufficiently regulated by conditions, or would be outweighed by the benefits of renewable energy generation, to justify the development". He then proceeded to set out his reasons. I deal only with those parts of the decision letter which are relevant to the matters argued before me but, given the number of grounds of challenge, this section of the judgment is of some length.

Under the heading "character and appearance" the inspector identified Policy CO1 of the Devon Structure Plan and summarised it in paragraph 12 of the decision letter as follows:

"Policy CO1 (landscape, character, local distinctiveness) requires that the distinctive qualities and features of Devon's landscape character zones should be sustained and enhanced".

In paragraph 15 he identified the Local Plan Policy as follows:

"Policy NE10 (protection of countryside and open spaces) and the West Devon Borough Local Plan 2005 records that development within the countryside outside settlement limits, or not otherwise in accordance with the policies of the plan, will not be permitted unless it provides an overriding economic or community benefit which avoids unacceptable harm to the distinctive landscape character of the area. Natural features which contribute to the character are protected including views. However, in relation to wind energy proposals, this policy is essentially subject to Policy PS10 (energy production in West Devon)".

In paragraph 20 the inspector recorded that he was able to consider all the views expressed on behalf of both the principal parties and those who made representations. He said:

"I visited the four closest settlements - North Tawton, Bow, Spreyton and Zeal Monachorum - together with most of the

viewpoints discussed, including those on Dartmoor. I have considered the impact of the scheme in terms of its effect on both landscape, character and visual amenity."

In paragraph 25 the inspector noted the evidence in the environmental statement which was supplemented by further photographs and wire framed images. The inspector then proceeded to go through the key vantage points. In relation to Itton Cross he said at paragraph 31:

"31. A gateway at Itton Cross (ES Viewpoint 3) is a good vantage point for the assessment of the visual effect of the proposed turbines from the west. At this location the viewer would be above the level of the turbine bases, and the topographical context – the shallow basin – of the development would be evident. The fields in the foreground are quite large, and the ridge to the east of North Tawton provides a degree of enclosure. In contrast to the prospects from the north however, there is no complementary upland area and the turbine blades would be seen against the background of the sky. Although in clear weather Exmoor is visible to the north-east, in my view it is too distant to make the same contribution as Dartmoor does in views from the north".

He dealt with Bow at paragraph 33 where he said:

"Bow would be a little closer to the nearest turbine than Spreyton but, more significantly, the valley of the River Yeo effectively connects the village with the appeal site. The village is sited on rising land on the East side of the valley and the turbines will therefore be clearly visible, especially from the houses with South West facing windows in, for example, Hobbs Way, Nymet Avenue, Collatons Walk and Gregory Close ... In my view, a wind turbine has a readily comprehensible design simplicity and, although the proposed turbines would undoubtedly be large, I do not consider the number and distribution of the turbines would be inconsistent with its landscape setting as seen from the village".

He set out his conclusions on character and appearance in paragraphs 57 and 58. Paragraph 57 reads:

"57. Except perhaps in a limited number of industrialised or urbanised locations, it will invariably be the case that modern commercial wind turbines will be out of scale with both the natural vegetation and other man-made structures in the vicinity. Similarly, it might have been expected within the context of the Devon landscape that the proposed wind farm would be too large for its landscape setting. The wind farm would be most closely observed from the minor road which passes through Itton, but this is only a lightly trafficked route. In contrast, the next closest route is the A3072, and this is relatively heavily trafficked. In my view the greatest visual harm resulting from the scheme would be experienced both on this route, and, to a lesser extent, from the bridleway to the north-east of Burrow. In this sense the scheme would therefore conflict with the landscape protection policies, or parts of policies, of the development plan to which I have referred – principally structure plan policy CO1, local plan Policy NE10, Policy EN 1 of RPG 10, and Policy ENV1 of the emerging RSS".

The inspector moved on to deal with the issue of local ecology. A key concern was that relating to bats. Paragraph 59 reads:

"59. An ecological assessment of the site taking particular account of protected species was carried out on behalf of the developer at the ES stage of the project in 2004. Amongst other matters the assessment noted a moderate to locally high level of bat activity, mainly associated with the hedgerows woodland edges and wetlands. A total of seven species of bat was identified the distribution suggesting that individuals were entering the site from roosts around the periphery. However, most of the bats were observed flying at between 2 and 10m above ground level and in this case the blades would not be closer than 30m above ground level. It was recognised that the noctule bat would be more vulnerable as it often flies between 10 and 20m above

ground level".

Paragraph 66 is also relevant:

"66. I recognise that understanding the relationship between bats and wind turbines is a developing area, and the potential for surveys to become out-of-date exists. An additional survey using the latest equipment would doubtless have improved the extent and detail of our knowledge of the site. However, in my view the work carried out in 2004 constituted a thorough survey of the land and I agree with the appellant that new surveys would be unlikely to reveal significantly changed circumstances. I do not dispute the danger that turbines present to bats, including the noctule bat. The scheme thus entails the threat of some harm to individuals, but not to roosts, and there is no suggestion that the turbines would constitute a threat to local bat populations".

He concluded on ecology in paragraph 68:

"68. I therefore conclude in relation to this matter that the potential effect of the proposed development on local ecology has been the subject of detailed investigation and assessment, including special consideration for protected species. In my view the project is in conformity with the relevant parts of policy EN 1 (Landscape and Biodiversity) of RPG 10; with structure plan Policy CO10 (Protection of Nature Conservation Sites and Species); and with local Plan Policy NE6 (Protected Species)".

There then followed a long section in the decision letter on possible noise disturbance. Paragraph 70 refers to the recognition within PPS22 that renewable technologies may generate increases in noise levels, and refers to ETSU-R-97 as relevant guidance at the end. The content of ETSU-R-97 was summarised at the end of paragraph 71 as follows:

"The guidance constitutes an exhaustive - even elaborate - examination of the issues relating to the assessment of wind turbine noise and its regulation, but it was recognised by the

authors that it and its recommendations should be reviewed 2 years after publication. However, there has been no review and evidence submitted by the appellant indicates that there are no current plans to revise ETSU-R-97".

Paragraph 72 recorded that the parties recognised that the commercial wind turbines which were proposed in the instant case were materially larger than those considered by the authors of the report. The Inspector noted also that there was agreement at the inquiry that ETSU-R-97 failed to pay adequate attention to the impact of wind sheer resulting through atmospheric changes. The paragraph then continues:

"Amongst many other matters, the report promotes a correlation between background noise levels at receptor locations with simultaneous measurements of the mean wind speed at 10m above ground level measured at the proposed site. Some of the acousticians who practice in this field fear that the failure to pay sufficient regard to variations in wind shear could result in significant errors when comparisons are made between background noise levels and wind turbine noise emission levels. A methodology has been identified which seeks to overcome this problem".

The inspector proceeded to set out the various noise limits in the guidance. He considered the purpose of the different limits and concluded in paragraph 77 that the different criteria for day time and night time limits implied different thresholds for the protection of amenity and for the need to avoid sleep disturbance, with the need to avoid sleep disturbance a significantly more demanding and compelling criteria.

In paragraph 80 the inspector recorded his sympathy with the view that a review of ETSU-R-97 was overdue, but recognised and acknowledged its significance in the context of the case before him. In paragraph 93 he set out an agreement between the parties as to the inadequacy of ETSU-R-97 in relation to wind

shear. He proceeded then to set out the difficulties with wind shear calculations, observing that the subject was complex and that the circumstances emphasised the necessity of the imposition of robust and adequate noise conditions as the attempt to forecast turbine noise was fraught with difficulty and uncertainty (paragraph 96). The inspector found that the appellant's acoustic advisers had departed from the guidance included in ETSU-R-97 in the manner in which they sought to predict the noise generated and propagated by the turbines (paragraph 97). He concluded, on the appellant's methodology in paragraph 98, as follows:

"98. Although I agree with DBJRG that 10m above ground level is the height frequently cited in ETSU-R-97, I see no overriding reason why the necessary correlation should not be made with the wind speed at the actual proposed hub height of the turbines. I recognise that omitting the correlation with the 10m reference height amounts to a departure from the methodology adopted by ETSU-R-97, but in many other respects DBJRG is critical of the document. In any event, although ETSU-R-97 enjoys the status afforded it by PPS22 and subsequent Government endorsements, I see no reason why alternative improved or otherwise adequate methodologies should not be utilised. There is no useful purpose to be served by slavishly following guidance if more robust processes are available and reliable. In my view the 10m reference height is simply a means to an end – the end in this case being to relate the background noise measurements to the wind speed and hence the noise generated by the turbines. I cannot see that the method adopted by the appellant undermines this principle".

The inspector went on to deal with Amplitude Modulation (AM). That is the phenomenon known as blade swish. The adverse effect of modulation of aerodynamic noise at blade passing frequency was not properly understood when ETSU-R-97 was published. Further research was commissioned by the

government from the University of Salford and was referred to by the inspector, but the research was inconclusive in providing a proper understanding. The inspector recorded at paragraph 117 of the decision letter:

"On the basis of the evidence I have received, I conclude that the possibility of a greater than expected impact from AM would be possible. In circumstances where the result of unforeseen consequences is sleep disturbance, I am in no doubt that, in the event of the appeal succeeding, a condition to regulate the phenomenon is both necessary and reasonable. I discuss this matter later in the decision". The inspector then set out his conclusions on noise.

In paragraph 118 the inspector summarised the purpose of the guidance and expressed the view that the appellant had carried out a detailed and comprehensive assessment of the noise environment in the vicinity of the appeal site and considered that the uncertainties identified by DBJRG could never be entirely extinguished. In paragraph 121 the inspector said:

"121. It is in the light of these inherent uncertainties that I conclude the living conditions of local residents would not be unreasonably affected provided the necessary and appropriately worded conditions were imposed. If the appellant's predictions are correct there would be no need for the conditions to be enforced, but it is important that the council is able to take the necessary action if it became expedient to do so. In my view the uncertainties which have been identified serve to accentuate the necessity for the imposition of conditions on any permission granted. I conclude on this basis the proposed development would not conflict with the provisos included in both structure plan Policies CO12 and CO16 and local plan Policies PS10 and BE18".

The inspector then concluded on the first issue in paragraph 137 as follows:

"137. I therefore conclude in relation to the first main issue that the

project would be a cause of some harm in terms of its visual effect on the landscape – especially from some vantage points to the north and north-east of the site. The scheme would also result in a significant change to the landscape character of the surrounding area. I found there would be no harm however in relation to the historic environment or with respect to local ecology. In relation to possible noise interference, I am concerned that this is a matter where there are significant uncertainties surrounding the generation and propagation of wind turbine noise. In contrast, I am reasonably confident about the background noise surveys. In my view these conclusions can only accentuate the importance and necessity of appropriately worded conditions to any permission granted in order to secure compliance with the limits included in ETSU-R-97. I have found no harm resulting from the other matters raised".

In dealing with noise conditions the inspector recorded at paragraph 181:

"181. However, as is evident from my consideration of the possible noise impact of the proposed wind farm, I am concerned about the effect of greater than anticipated AM41 arising at the site. At my instigation DBJRG has drafted a condition designed to regulate this possibility and prepared a reasoned justification, and this has been the subject of a response by the appellant".He then set out the appellant's objections and concluded that their misgivings were either overstated or misleading.

He continued in paragraph 183:

"On the basis of the evidence I have heard I am satisfied that the phenomenon is not fully taken into account in ETSU-R-97 and the condition proposed is of a precautionary nature. I would have more sympathy with the appellant's view had the purpose of ETSU-R-97 been merely the preservation of amenity, but it is not. From the viewpoint of wind farm neighbours the most important purpose of ETSU-R-97 would be more accurately described as the preservation of sleep. Taking account of both

this and the uncertainties to which I have already referred, it is for these reasons that in my opinion the imposition of conditions is both necessary and reasonable".

The inspector proceeded to announce his intention to re-draft the proposed condition to clarify its content and purpose, which he then did. The inspector highlighted his overall conclusions from paragraph 185 and set out the balancing exercise with which he had to engage. The final two paragraphs of the decision letter are material. They read as follows:

"186. As far as the effect of the scheme on the character and appearance of the surrounding area is concerned, I have concluded that although the development would result in the creation of a localised zone in which the turbines would dominate the landscape character, this would diminish quite rapidly. I see no significant objection to the proposed development in relation to its effect on the historic environment. In visual terms however, I believe there would be locations to the north of the appeal site which would be harmed by the development. In contrast, I have concluded there would be no equivalent effect in relation to the local ecology. The effect of the scheme on the noise environment was the subject of much evidence and occupied a significant proportion of the inquiry. The issue is the subject of specific guidance, but I am concerned that with the growth of knowledge and the advent of larger commercial machines, ETSU-R-97 is not now as applicable as previously. However, subject to some important conditions, I have concluded that the effect of the scheme is likely to fall within the limits which were designed, in part, for the protection of wind farm neighbours. I have also taken account of other matters which I did not consider constituted main issues but which were raised by contributors to the inquiry.187. In conclusion, the harm I have identified is fairly limited. In respect of the landscape protection provisions of the development plan there is conflict with structure plan Policy

CO1, local plan Policy NE10, and Policy EN 1 of RPG 10. The protection of the landscape is also a component of Policy RE 6 of RPG 10 of structure plan Policy CO12, and of local plan Policy PS10. The purpose of these policies is to support the exploitation of renewable energy, but they require in each case that a balance is struck. The latter policies also require that account is taken of the living conditions of nearby residents. The purpose of structure plan Policy CO16 and local plan Policy BE18 is more specific – to protect existing residents from noise pollution. This is also one of the purposes of ETSU-R-97. I have concluded that, subject to conditions to regulate its impact, the scheme would conflict with neither Policy CO16 nor Policy BE18 and that the conflict with the landscape policies to which I have referred is sufficiently limited to be outweighed by the purposes of structure plan Policy CO12, local plan Policy PS10, and Policy RE 6 of RPG 10. It is for the reasons given above that I have concluded the appeal should be allowed".

The decision letter was originally challenged on 10 grounds. One, ground 5, relating to day time noise criteria, was withdrawn at the hearing. The other nine were maintained. The first four grounds relate to challenges on the topic of noise, the remaining five relate to a variety of different topics that I will set out and deal with separately below. In this judgment I have retained the numbering of the grounds as originally put.

Before dealing with the points of challenge, I set out the legal framework.

Legal framework "Section 288 of the Town and Country Planning Act 1990, so far as relevant, provides as follows:'(1) If any person ... (b) Is aggrieved by any action on the part of the Secretary of State to which this section applies and wishes to question the validity of that action, on the grounds – (i) that the action is not within the powers of the Act; or (ii) that any of the relevant requirements have not been complied with in relation to

that action He may make an application to the High Court under this section'. By section 288(4), section 288 applies to any such action on the part of the Secretary of State as is mentioned in section 284(3). One of the actions mentioned in section 284(3) is "any decision on an appeal under section 78"(which confers a right of appeal against planning decisions by local planning authorities). Section 288(5)(b) provides that on an appeal under section 288 the High Court may, if satisfied that the action in question is not within the powers of the Act, or that the interests of the applicant have been substantially prejudiced by a failure to comply with any of the relevant requirements in relation to it, may quash that action".

There are certain well established principles to be born in mind when considering a challenge under section 288, as follows:

1) An inspector is not writing an examination paper. The decision letter must be read in good faith and references to policies must be taken in the context of the general thrust of the inspector's reasoning (see South Somerset District Council v Secretary of State for the Environment [1993] 1 PLR 80 at 83E to G);

2) As Sir Thomas Bingham MR observed in Clarke Homes v Secretary of State for the Environment [1993] 66 PMCR 263:
"The central issue in this case is whether the decision of the Secretary of State leaves room for genuine as opposed to forensic doubt as to what he has decided and why. This is an issue to be resolved as the parties agree on a straightforward down to earth reading of his decision letter without excessive legalism or exogetical sophistication";

3) On a reasons challenge the law is set out in South Bucks District Council v Porter No 2 [2004] 1 WLR 1953 at paragraph 36:
"14. So far as reasons-challenges are concerned, in South Bucks DC v Porter [2004] 1 WLR 1953 Lord Brown of Eaton-Under-Heywood, with whose opinion the other members of the House

agreed, set out a useful summary of the law at paragraph 36 of his opinion (see [2004] 1 WLR 1953, at 1964), as follows:'The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the 'principal important controversial issues', disclosing how any issue of law or fact was resolved. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision. The reasoning must not give rise to a substantial doubt as to whether the decision maker erred in law, for example, by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds. But such adverse inference will not readily be drawn. The reasons need refer only to the main issues in the dispute, not to every material consideration they should enable disappointed developers to assess their prospects of obtaining some alternative development permission or, as the case may be, their unsuccessful opponents to understand how the policy or approach underlying the grant of permission may impact upon future such applications. Decision letters must be read in a straightforward manner, recognising that they are addressed to parties well aware of the issues involved and the arguments advanced. A reasons challenge will only succeed if the party aggrieved can satisfy the court that he has genuinely been substantially prejudiced by the failure to provide an adequately reasoned decision'".

4) The weight to be attached to material considerations and matters of planning judgment are within the exclusive province of the Secretary of State or local planning authority (see Tesco Stores v the Environment Secretary [1995] 1 WLR 759 at page 780);

5) On challenges brought under section 288 on the basis of lack of rationality, the threshold is high and the position is set out in R (Newsmith Stainless Steel Limited) v SSETR [2001] EWHC

Admin 74, at paragraphs 6 to 8 inclusive.

I turn now to deal with the ground of challenge.

Noise *Ground 1 - Amplitude modulation and conditions 20 and 21*

The complaint is that, having recognised a condition was necessary to control AM, the inspector in fact imposed defective conditions, namely conditions 20 and 21, because they were unenforceable, imprecise, and did not achieve the inspector's objectives. Mr Taylor, for the claimant, stressed paragraph 183 of the decision letter, when the inspector found that the imposition of conditions for the preservation of sleep, and because of the uncertainties of forecasting noise, was both necessary and reasonable. It was clear from the paragraph that the inspector intended the condition or conditions to be enforceable. DBJRG had submitted a draft condition on AM to the public inquiry which the inspector amended.

The final conditions, 20 and 21, attached to the planning permission read:

"20. At the request of the local planning authority following the receipt of a complaint the wind farm operator shall, at its expense, employ a consultant approved by the local planning authority, to assess whether noise emissions at the complainant's dwelling are characterised by greater than expected amplitude modulation. Amplitude modulation is the modulation of the level of broadband noise emitted by a turbine at blade passing frequency. These will be deemed greater than expected if the following characteristics apply: A) A change in the measured LAeq, 125 milliseconds turbine noise level of more than 3 dB (represented as a rise and fall in sound energy levels each of more than 3 dB) occuring within a 2 second period.B) The change identified in (a) above shall not occur less than 5 times in any one minute period provided the LAeq, 1 minute turbine sound energy level for that minute is not below 28 dB.C) The

changes identified in (a) and (b) above shall not occur for fewer than 6 minutes in any hour. Noise emissions at the complainant's dwelling shall be measured not further than 35m from the relevant building, and not closer than within 3.5m of any reflective building or surface, or within 1.2m of the ground. 21. No wind turbine shall generate electricity to the grid until the local planning authority, as advised by a consultant approved by the local planning authority at the expense of the operator, has approved in writing a scheme submitted by the wind farm operator providing for the measurement of greater than expected amplitude modulation emissions generated by the wind turbines. The objective of the scheme (which shall be implemented as approved) shall be to evaluate compliance with condition 20 in a range of wind speeds and directions and it shall terminate when compliance with condition 20 has been demonstrated to the satisfaction of and agreed in writing by the local planning authority".

The claimant contends that condition 21 creates a requirement for a scheme to be submitted by the wind farm operator which will provide for the measurement of greater than expected AM emissions by the wind turbines. Once that evaluation process has been approved in writing by the local planning authority, and compliance demonstrated with condition 20, the submission is that the condition falls away. Beyond that, Mr Taylor submits that condition 21 is of no further use. It is not permissible, the claimant contends, to read into conditions 20 and 21 words that ensure that an excess of AM is prohibited. Mr Taylor relied on Sevenoaks District Council v the First Secretary of State [2004] EWHC 771 where Sullivan J said:

"Since a planning permission is a public document and breach of a condition may ultimately have criminal consequences if a breach of condition notice and/or an enforcement notice is served/issued and not complied with, it is essential that any obligation by way of a condition is clearly and expressly

imposed. In both Crisp from the Fens and Carter, the Court of Appeal concluded that the condition in question was ambiguous. That is not the position in the present case. There is no ambiguity in condition 12".

In reaching that view, Sullivan J relied upon the judgment of Widgery LJ in Trustees of Walton on Thames Charities v Walton and Weighbridge District Council [1970] 21 PMCR 411 at 497, which says:

"I have never heard of an implied condition in a planning permission and I believe no such creature exists. Planning permission (inaudible) is not simply a matter of contract between the parties. There is no place, in my judgment, within the law relating to planning permission for an implied condition. Conditions should be expressed, they should be clear, they should be in the document containing the permission".

Sullivan J concluded at paragraph 45:

"If conditions are to be included in a public document such as a planning permission, they should be clearly and expressly imposed, so that they are plain for all to read. There is no room for implication".

The problem that the wording of conditions 21 and 20 causes, according to the claimant, is that condition 20 is not enforceable as a condition as there is no sanction contained within it to meet the objective intended by the inspector and condition 21 falls away. Mr Taylor accepted that there would be a degree of benevolence attached to the interpretation of the conditions and that they would be interpreted in the context of the decision letter as a whole. Neither of those factors, Mr Taylor submitted, overcame the fundamental problem that the claimant identified. Further, as these were conditions that went to the root of the planning permission, they could not be severed and the planning permission must fall.

The first defendant submitted that the conditions had to be read in the context of the decision letter as a whole and in the light of the intentions of the inspector. If the conditions were capable of having a workable meaning they should be upheld. Condition 21 in particular, it was said, was critical as that allowed for a scheme which had to be submitted to and approved by the local planning authority to provide on-going assessment so that there was no basis for quashing the planning permission. In particular, reliance was placed on the case of Roger Michael Greene v SSCLG and others [2010] EWCA Civ 64, where Pill LJ did not conceal his discomfort in having to construe the conditions before him creatively, particularly in the absence of any detailed reasoning by the decision maker (see paragraph 36). He added at paragraph 40:

"If the inspector's decision is read in the context of the planning guidance and conditions, it appears clear to me what the inspector intended, though his intentions could, with respect, have been expressed more clearly including the conditions imposed".

The first defendant referred also to paragraph 179 of the decision letter that reads:

"179. It is in Note 4 that the conditions reach their conclusion. The DBJRG holds that the Note should require that any offending turbine is switched off. I acknowledge that this would be a logical conclusion of the process, but it would clearly constitute a serious step which should only be taken after due consideration of all the circumstances. It would be a matter for the council in the first instance. In this respect I agree with the appellant that such action falls to be specified in either a Breach of Condition Notice or an Enforcement Notice. I anticipate that the scheme required by draft noise condition 4 would inevitably involve switching off selected turbines for temporary periods in order to permit the necessary evaluation".

The first defendant then submitted that it would be open to the

second defendant to taken enforcement action in respect of any breach of condition and that it was unnecessary for the inspector to spell out any steps that should be taken in the event of a breach of condition notice relating to noise.

The third defendant supports the arguments of the first defendant. Mr Nardell QC submitted that it was clear what the developer had to do, which was that he could not operate until they had a scheme which was approved by the local authority and which was binding upon them. If there was a breach then it would be possible for the local authority to draft an enforcement notice if there was an excedence of the noise rating limits as set down in condition 16, plus the tonal correction required, or if there was a breach of the scheme approved under condition 21. He accepted that conditions 20 and 21 were fundamental to the grant of planning permission in the mind of the inspector.

Conditions 20 and 21 have to be read in the context of the decision letter of which they are a part. From that it is evident that the inspector regarded a condition or conditions to regulate excessive AM as fundamental to the grant of planning permission. Without such a condition or conditions he retained real concerns about the preservation of sleep on the part of the local residents when the turbines were operational, and he retained reservations about the uncertainties inherent in the forecast of AM. He rejected the appellant's argument that it was not necessary to impose such a condition as being overstated or misleading. The inspector found that the condition to deal with AM would be of a precautionary nature and was necessary and reasonable. It is clear also, in my judgment, that the inspector intended through his re-drafting to clarify the content and purpose of both conditions. He clearly envisaged that his re-draft would assist the local planning authority with enforcement, should that become necessary.

Condition 21 is the first condition in time to be discharged. Until the wind farm operator has a scheme submitted under condition 21 and approved in writing by the local planning authority, he is unable to operate his wind turbines so that they generate electricity. What is an acceptable content of such a scheme is for the judgment of the local planning authority, guided by the wording of conditions 21 and 20 in the context of the preceding decision letter. Condition 21 sets out in express terms that the objective of the scheme is to evaluate compliance with condition 20 in a range of wind speeds and directions. That much is uncontentious. There remain two issues however. First, is the submitted scheme to be confined solely with the objective of compliance with acceptable levels of AM; and second, does condition 21 "fall away" as described by Mr Taylor upon the approval in writing of such a scheme? In my judgment, the objective of the scheme is to provide a method of assessment and/or evaluation of AM so as to ensure that AM is contained within acceptable levels. However, when read in the context of the preceding decision letter it is also clear that the inspector intended the scheme to provide a basis for enforcement if required so that the levels of AM measured under condition 20 did not attain the characteristics set out in that condition at A to C inclusive. It follows that, if such characteristics were identified as a result of the measurement carried out, there is nothing in condition 21 that would prevent a scheme from identifying what should be done in that eventuality. Indeed, in the context of the decision letter any scheme should do so. The fact that the condition is worded that "it shall terminate when compliance with condition 20 is demonstrated" envisages that there may be steps within the scheme to provide for that compliance. Whether that compliance is tying the noise emission levels back to condition 16 or by some other means is a matter for the local planning authority to determine in approving any scheme. With such a scheme approved the local planning authority would then have a clear and precise basis for

enforcement against a wind farm operator should that be required.

Second, although condition 21 refers to the objective of the scheme and says that "it shall terminate" when compliance with condition 20 has been demonstrated, the words are capable of applying to either the condition, or the scheme itself, or part of the scheme. In context it is clear that the scheme is not envisaged to provide for a single complaint but to endure for the life of the planning permission. The assessment methodology may change over time so that a complaint, for example made 5 years after the operation of the wind farm has commenced, may need to be evaluated in relation to the then current but possibly not now anticipated scientific knowledge. Given what the inspector recorded about uncertainties at present and possible future research, it cannot be the case that the condition falls away. The approved scheme is, in those circumstances, envisaged not just to deal with an initial complaint but also with others that may occur in the future during the life of the permitted development. Any approved scheme would have to provide for further submission of appropriate evaluation measures in relation to future complaints.

I do agree with Mr Taylor that the wording of conditions 20 and 21 is not an exemplar of clear English, or indeed of model conditions. That, however, is not enough to succeed on ground 1. Read in context there is sufficient in the words used within both conditions to enable them to pass the test set out in Circular 11/95 and to come within the words of Lord Denning in Fawcett Properties v Buckingham County Council [1961] AC 636 at 678 when he emphasised that a planning condition is only void for uncertainty if it can be given no meaning or no sensible or ascertainable meaning. In my judgment, the conditions imposed on the planning permission here can be given a sensible and ascertainable meaning in view of the objectives of the scheme to

be submitted and approved by the planning authority.

Ground 1 therefore fails.

Grounds 2 and 3 - conflict with PPS22 and methodology of noise assessment

PPS22 was issued in 2004. It sets out government guidance on renewable energy. Paragraph 22 provides guidance on noise. It includes the following sentence:

"The 1997 report by ETSU for the Department of Trade and Industry should be used to assess and rate noise from wind energy development".

That the government stance has remained one of reliance on ETSU to assess and rate noise for wind farms was evidenced in two documents placed before the inquiry. Firstly, a letter dated 1 October 2009 from Lord Hunt at the Department of Energy and Climate Change; and secondly, the government response to a petition seeking a buffer of 2km around wind turbines. It was the claimant's case at the public inquiry that the developer had assessed and rated the noise from the proposed wind turbines in a non-ETSU compliant way, in that it had correlated wind speed measured at hub height on the wind farm site to background noise levels at the relevant receptors. The inspector found that the developer had departed from ETSU-R-97 guidance by omitting the correlation with the 10 metre reference height (paragraph 98 decision letter).

The claimant recognises that it is open to the decision maker to depart from his own policy and PPS22 but says that, in those circumstances, the inspector has to provide reasons to explain why he is doing so and the inspector did not discharge that duty. Further, the claimant says that the DBJRG provided noise evidence through their expert Mr Stigwood that was PPS22 compliant, which should have been preferred as it was done in accordance with ETSU guidance. The claimant submits that the

inspector failed to grapple with the fact that there was methodology available which did comply with policy and failed also to grapple with arguments that the developer's approach to wind shear was not adequate or robust. In the absence of reasons from the inspector it is contended that the claimant is unable to understand why the inspector departed from national policy. Because the decision letter is silent on the point, it is submitted that the inspector omitted a material consideration.

The defendants submit that, on a fair reading of the decision letter, there is no basis for a reasons challenge, nor is there any omission of a material consideration. All parties at the inquiry were critical of ETSU in many respects. The inspector recorded (paragraph 72) that commercial wind turbines were materially larger than those considered in the ETSU report and that there was agreement that ETSU failed to pay adequate attention to the impact of wind shear resulting from atmospheric changes. In relation to wind shear, the inspector recorded that the parties agreed that ETSU did not adequately confront the issue (paragraph 93). He went on to set out the revised methodology used by the appellants' noise consultants to predict noise generated and propagated by turbines, and expressed himself satisfied with the use of "a more robust process" to relate the background noise measurement to wind speed, and hence the noise generated by the turbines (paragraph 98).

In the circumstances of the case before him, the inspector sanctioned a departure from ETSU methodology on the basis that the approach of the appellant's acoustician in using the turbine hub height was more robust and reliable than the process set out in ETSU. His reasons for departure as set out in paragraph 98 are clear. He elaborated further by considering the objective behind the advice to use a reference height of 10 metres, and found that that objective was not undermined by the appellant's methodology. The inspector did, therefore, provide

clear and adequate reasons for departing from the letter of the advice set out in ETSU and for preferring the evidence led by the appellant.

It follows from what he said that the evidence led by DBJRG was rejected by the inspector because it was less robust and less reliable than that led by the appellants. In my judgment, the inspector did precisely what the claimant wanted him to do and provided clear and adequate reasons and considered all relevant material considerations.

I dismiss the challenge on grounds 2 and 3.

Ground 4 - uncertainties and the precautionary approach

It was the claimant's case at the public inquiry that DBJRG submitted that there were considerable uncertainties associated with the noise impact assessment that had been carried out by the developer and that a precautionary approach should be adopted to the assessment of noise so that the noise impact assessment had to be conducted on a basis of assumptions that would most protect the environment, ie on a basis that assumed at least a 7db addition to the forecast predicted by the developer. In failing to adopt such an approach, the claimant submits that the inspector made various errors of law, in that he failed to provide any adequate reasons why a precautionary approach should not be adopted, and did not provide adequate reasons for his conclusion that it was likely that the impact and development would fall within the relevant noise criteria given the inspector's earlier conclusions regarding uncertainty and the use of the noise prediction model outside its parameters. It was also submitted that the inspector failed to grapple with the extent of uncertainty that existed on noise forecasts and that he failed to compare that uncertainty with the margin between the noise forecasts and noise criteria levels. Complaint was made also that the inspector did not deal with the points made by

DBJRG dealing with (i) the spread of background noise measurement data and the use of a line of best fit; (ii) ground factor assumptions; and (iii) assumptions about sound pressure levels from the proposed turbines. As a result, it was submitted that the inspector was irrational and in clear breach of his duty to give adequate reasons.

In dealing with the litany of complaints under this ground, I bear in mind in particular that the inspector is not writing an examination paper and does not need to deal with all the points raised but only the main controversial issues. The issue of noise was clearly a main controversial issue at the inquiry. Even so, the inspector was not obliged to deal with each of the criticisms made by DBJRG of the appellant's evidence on an individual basis. Provided that he set out his reasons for preferring the evidence of the appellant on the issue of noise, that was sufficient. In my judgment, that is what the inspector did. On examination of the decision letter on the issue of noise, the inspector began his consideration by referring to the development plan policies. He set out Policies CO12 and 16 of the Structure Plan and Policies PS10 and BE18 in the Local Plan. The policy framework provided support to renewable energy development provided that there was no significant adverse effect on the conditions of those living and working nearby. The fundamental question for the inspector was then whether the proposed development would have that significant adverse effect. The inspector concluded that he was generally confidant about the adequacy of the background noise survey (paragraph 93) but agreed with DBJRG that there are some notable uncertainties in the assessment process (paragraph 118). Notwithstanding the inherent uncertainties, the inspector concluded that the living conditions of residents would not be unreasonably affected provided necessary and appropriately worded conditions were used (paragraph 121). In other words, through the imposition of conditions to protect, in particular, the

living conditions of nearby residents, the inspector was in fact taking a precautionary approach. He underlined that that was his stance in paragraph 183 of the decision letter when setting out the reason for imposing a condition dealing with AM and in his concluding paragraph (187) when he set out the balance to be struck and matters he took into account as part of his planning judgment. As set out earlier, the inspector explained in his decision letter his preference for the noise evidence adduced by the appellant, due to it being robust and more reliable in the context of large commercial wind turbines. He held that the approach advocated by ETSU-R-97 could be refined when that refinement improved the quality of the noise assessment exercise and the consequent results.

It follows that I find no deficiency of reasoning in the decision letter on the issue of uncertainty or the precautionary approach. Nor do I find the approach adopted by the inspector to be irrational.

Ground 4 fails.

Ground 6 - Alternatives

The claimant submits that the inspector was required to consider alternatives, by which he means both alternative sites and alternative modes of renewable energy. He relies upon the decision in Trusthouse Forte Hotels Limited v Secretary of State for Environment and Another [1987] PNCR 293 and the Operation of Development Plan Policy. The DBJRG had argued at the public inquiry that, if the development caused harm, the weight that could be given to its alleged benefits on the basis of a claimed need for the development fell to be assessed by reference to whether that need could be met on alternative sites which gave rise to less harm or less policy conflict. They relied upon the judgment of Simon Brown J, as he then was, in Trusthouse Forte at page 229 when he said:

"Where ... there are clear planning objections to development upon a

particular site, then it may well be relevant, and indeed necessary, to consider whether there is a more appropriate site elsewhere. This is particularly so when the development is bound to have significant adverse affect, and where the major argument advanced in support of the application is that the need for the development outweighs the planning disadvantages inherent in it".

The claimant contends that the inspector should have asked himself whether alternatives were available, and he should have considered them. It was particularly important to consider that issue in the context of the weight to be given to the benefits said to be supportive of the scheme. Further, where there was conflict with development plan policy, as here, and where conflict with landscape protection policies was found, as in paragraph 57 of the decision letter, it was incumbent on the decision maker to expressly consider alternatives, which the inspector had not done. Although the inspector had considered Local Plan Policy NE10, he had not expressly considered the first part of the proviso to that policy, namely that the development could not be reasonably located within an existing settlement, and thus the inspector had failed to have regard to a material aspect of the development plan as he was required to do or, if he had considered it, he had failed to set out his reasons for finding no conflict with that part of the policy.

The first defendant submitted that, in fact, there was no need for the inspector to embark upon the exercise. The claimant's premise was that there was significant adverse effect, whereas the inspector had found there to be a limited adverse effect. The first defendant relied upon Derbyshire Dales District Council v Secretary of State for Communities and Local Government [2009] EWHC 1729 and drew my attention to paragraph 37 where Carnwath LJ considered PPS22 and said:

"I accept that the reference to careful consideration of location may

be said to imply a need for the developer to be able to demonstrate the particular merits of the selected site, but it is far from requiring the decision maker in every case to review potential alternatives as a matter of obligation. It is left as a matter of planning judgment on the facts of the case. That is how the inspector approached it, and he was entitled in law to do so."

The first defendant did not accept that Local Plan Policy required alternative sites to be considered or alternative modes of renewable energy. In fact though, the first defendant pointed out that, in paragraph 151 of the decision letter, the inspector did consider alternative sites, 47 of which were examined in the environmental statement and subjected to a series of sifts to reduce their number to 6; of which the appeal site was the largest. The third defendant adopted, in essence, the arguments of the first defendant.

In the context of a finding that the harm identified by the inspector was "fairly limited" (paragraph 187), there was no legal obligation on the inspector, in my judgment, to consider alternative sites or alternative modes. Both the judgments in Trusthouse Forte and Derbyshire Dales make it clear that that legal obligation arises when there are clear planning objections. For the inspector to treat the issue as one of planning judgment on the facts of the case was here entirely appropriate. The inspector did in fact consider alternative sites, in paragraph 151, in a manner which was proportionate to the issues raised before him and the conclusions that he reached on them, in particular in relation to landscape harm and conflict with Development Plan Policy.

As to whether Local Plan Policy NE10 required the consideration of alternative forms of renewable energy, I find it does not. On a fair reading of Policy NE10, the words used within it are

directed to the development which is the subject of the planning application and are not directed towards a consideration as to how the benefits that it delivers may be delivered by an alternative form of renewable energy. Even if that is wrong, the correct approach to an interpretation of planning policy is whether the words used within the policy are capable of bearing that meaning: R v Derbyshire County Council ex part Woods [1997] JPL 958 at page 967. The words of Policy NE10 are clearly capable of bearing the meaning that the inspector attached to them. The inspector therefore made no error of law in his approach to alternatives and, in my judgment, understood and applied Policy NE10 correctly. He set out reasons in so doing that were entirely adequate.

Ground 7 - Structure plan policy CO1

Policy CO1 of the Devon Structure Plan provides:

"The distinctive qualities and features of Devon's landscape character zones ... should be sustained and enhanced".

The claimant argues that there is a distinction between a policy that says "sustain and enhance" and a policy which says "sustain or enhance". To accord with Policy CO1 the requirement is to meet both policy objectives. The claimant submits that the inspector erred in law because he failed to have regard to a material aspect of the development plan, in that the inspector applied a test of whether harm would be caused and did not ask himself whether the development would enhance the landscape character area. Alternatively, his reasoning in relation to Policy CO1 was defective.

As the first defendant pointed out, the question of enhancement did not fall for consideration by the inspector, who found that there was some harm from the development in terms of its visual effect on the landscape and a significant change to the landscape character of a surrounding area. As a consequence, the inspector found there to be conflict with Structure Plan Policy CO1.

In those circumstances, the question of enhancement did not arise. There is no error on the part of the inspector as to how he approached Structure Plan Policy CO1 or in the reasoning as to how he dealt with it.

Ground 8 - visual impact

The claimant complains that the inspector made no express finding in relation to his appraisal of the visual effects of the development on the settlements of Itton Cross or Bow. The consequence is, therefore, that it is impossible to ascertain whether there is an adverse effect at either location. Alternatively, it is said that the reasoning is defective because of the absence of any conclusion.

The first defendant pointed out that in DBJRG's closing submissions it was said that whether or not the proposed development would have significant visual impact was for the inspector. The inspector made an overall finding and that is all that was required. The decision letter, at paragraphs 31 and 33, makes it clear that the inspector had in mind the locations of Itton Cross and Bow. From paragraph 187, the inspector makes it clear that the harm that he identified was fairly limited. As none was identified at Itton Cross or Bow, it would be a fair reading of the decision letter as a whole to conclude that the inspector did not find the visual impact at either location unacceptable. Had he found otherwise, he would have identified harm as he did for certain other vantage points. The inspector made an overall finding and considered the most important receptors, including views to and from Dartmoor. That is all that was required in the circumstances of the case. He made those findings based on his own site visits and the evidence before him. Those were matters of planning judgment. There is no error of law in his approach.

Ground 9 - Bats

The claimant challenges the decision letter on two bases in relation

to bats. First, it is said that the inspector erred in his approach to the evidence; and secondly, it is said that he erred in omitting to consider the Habitats Regulations. I deal with each of those points separately.

(i) Error in approach:

At the inquiry DBJRG had submitted that the proposed development would cause harm to bats and would be contrary to PPS9 and Policy CO10 of the Devon Structure Plan and Policies NE4 and NE5 of the Local Plan. In particular, Policy CO10 provided that development likely to have an adverse effect on a specially protected species should only be permitted where appropriate measures were taken to secure its protection. DBJRG relied upon the evidence of Dr Holloway, the expert ecologist called to give evidence on the part of the developer. His evidence as to the result of the impact of the development on bats was:

"Overall impact magnitude is negative on a receptor of district/borough importance; impact magnitude is negative and impact significance moderate negative; overall anticipated residual impact is minor negative. It is my considered opinion that the proposed wind farm would not, however, significantly impact on the conservation status of local populations of this species".

DBJRG argued further that the impact had to be judged without the benefit of mitigation measures, as they would not be effective. They argued that there was no evidence upon which the inspector could conclude that there was no significant effect on bats. Thus, the claimant submitted that the inspector failed to provide reasons for his conclusion and did not deal with the issue of mitigation and its adequacy.

The inspector dealt with the bat issues in his decision letter in paragraphs 59 to 68 inclusive. In that section he considered the possible effect on bats and the bat populations in the light of advice in PPS9. The application of that meant that, in dealing

with protected species, planning permission should be refused where harm to the species or their habitat would result, unless the need for and benefits of the development clearly outweighed the harm. The inspector concluded in paragraph 66:

"The scheme thus entails the threat of some harm to individuals but not to roosts, and there is no suggestion that the turbines would constitute a threat to local bat populations".

The inspector was alert to mitigation measures as evidenced by his reference to them in paragraph 63. He considered the development before him, including mitigation measures. I conclude on this aspect that the inspector approached the evidence correctly, taking into account national and local policy, and came to conclusions that were supported by the evidence. A fair reading of paragraphs 59 to 68 of the decision letter reveals no flaw in his reasoning which dealt with the main points raised.

(ii) Habitats Regulations

The other point raised on bats was not, Mr Taylor accepted, raised at the inquiry. Indeed, it was not raised until the submission of the claimant's skeleton argument. Mr Taylor sought permission to add paragraphs 122 to 137 of his skeleton argument to the grounds of challenge, so as to be able to submit that the inspector had not considered the Conservation (Natural Habitats) Regulations 1994 as amended. The regulations transpose into English law the EC Habitats Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and wild fauna and flora .

The purpose of the directive can be gleaned from the preamble which contains the following recital amongst others:

"Whereas a general system of protection is required for a certain species of flora and fauna to compliment directive 79/409/EEC (the Birds Directive) whereas provision should be made for management measures to certain species, if their conservation status so warrants, including the prohibition of certain means of

capture or killing, whilst providing for the possibility of derrogations in certain conditions".

Article 12 provides, so far as relevant here:
"1) Member states should take requisite measures to establish a system of strict protection for the animal species listed in annex (iv)(a) in their natural range, prohibiting:(a) All forms of deliberate capture or killing of specimens of these species in the wild".The protected species listed in annex 4 includes bats.

Article 16 allows for derogation from strict compliance so that:
"1) Provided there is no satisfactory alternative, and the derogation is not detrimental to the maintenance of the populations of the species concerned at a favourable conservation status in their natural range, member states may derogate from the provisions of Article 12 ... (c) In the interests of public health and public safety or for other imperative reasons of overriding public interest, including those of a social or economic nature and beneficial consequences of primary importance for the environment ...".

As set out, the Habitats Regulations transpose the directive into domestic law. Regulation 3(2) provides:
"The Secretary of State and the Nature Conservation Bodies shall exercise their functions under the enactment relating to nature conservation so as to secure the compliance with the requirements of the Habitats Directive".

Regulation 3(4) provides:
"Without prejudice to the preceding provisions, every competent authority in the exercise of any of their functions shall have regard to the requirement of the Habitats Directive, so far as they may be affected by the exercise of those functions".

Article 12 of the directive was transposed by Regulation 39. That reads, where relevant:

"39(1) A person commits an offence if he -(a) Deliberately captures, injures or kills any wild animal of an European protected species ...".

Regulation 44 allows for derogation, and provides:

"44(1) Regulations 39, 41 and 43 do not apply to anything done for any of the following purposes under and in accordance with the terms of a licence granted by the appropriate authority.(2) The purposes referred to in paragraph (1) are - ...(e) preserving public health or public safety or other imperative reasons of overriding public interest including those of a social or economic nature and beneficial consequences of primary importance for the environment....(3) The appropriate authority shall not grant a licence under this regulation unless they are satisfied - (a) that there is no satisfactory alternative, and (b) that the action authorised will not be detrimental to the maintenance of the population of the species concerned at a favourable conservation status in their natural range".

The guidance document produced by the European Commission on the Habitats Directive explains at paragraph 33:

"An offence is also committed by a person who might not intend to capture or kill a species but is sufficiently informed and aware of the consequences that his actions will most likely have and, nevertheless, performs the action leading to the capturing or killing of specimens with reckless disregard of the known prohibitions". That definition was accepted as applying to Article 12(1)(a) by the ECJ in Commission v Spain C/221/04 and referred to by Ward LJ in R (Morge) v Hampshire County Council [2010] EWCA Civ 608 at paragraph 29. Reliance was placed on R (Woolley) v Cheshire East Borough Council [2009] EWHC 1227 where the issue of Article 12(1) of the EC Habitats Directive was considered. From that, Mr Taylor submitted that there were four questions to ask:

1) Are there EC protected species on or near the site?

2) Is article 12 engaged?

3) If article 12 is engaged, will the development involve the deliberate disturbance/killing of such species?

4) If Article 12 is engaged, is the derogation pursuant to Article 16 justified?

Because the inspector did not engage with Article 12 issues, the claimant submits there is a fundamental error of law.

Before considering those arguments, if it is appropriate to do so, I consider the issue of whether to allow Mr Taylor to amend his grounds. The first and third defendant objected to the amendment proposed due to its lateness. However, neither was unable to deal with the amendment, nor claimed any prejudice would be suffered if the amendments were allowed. As the addition related to a question of law which did not require any additional evidence to be filed, I was prepared, albeit with an element of disquiet, to allow Mr Taylor to amend his grounds. As Sullivan J said in R (Newsmith Stainless Steels Limited) v SSETR [2001] EWHC Admin 74 at paragraph 16:

"Whilst I accept that there is no general rule preventing a party from raising new material in a section 288 application, it will only be in very rare cases that it would be appropriate for the court to exercise its discretion to allow such material to be argued. It would not usually be appropriate if the new argument would require some further findings of fact and/or planning judgment, matters which are for the inspector not for the court".I make it clear that I regard this as one of those very rare cases which Sullivan J referred to. It is not to be taken as a licence to add additional grounds in the generality of cases, it is simply as a result of the factual context of the current case and the respective positions of the parties that I have found it appropriate to grant the necessary application to amend the

claimant's grounds.

In dealing with the merits of the amended ground, both the first defendant and the third defendant submitted that the inspector had engaged with the directive and regulations as much as he needed to, as evidenced in paragraph 66 of the decision letter. It was not necessary to go further and volunteer a discussion of the regulations. The evidence was that the inspector had carefully considered the issue. The first defendant submitted that, if the inspector had not then, because of the lateness of the amendment and because of the inspector's findings that there was no risk to any bat species, that the decision should not be quashed.

Dr Holloway's evidence, on which DBJRG relied, summarised the data collected and said at paragraph 5.4.21:

"The data collated suggests no roosts were located within the bounds of the site and, therefore, bats were commuting through the site and forging. In particular, the majority of bats kept a hedgerow habitat and green lane systems, as indicated within the ES. The data reflected the probable absence of a significant breeding roost of any bat species within the area ...".At paragraph 5.4.25:"It has been stated that, of the eight species of bat found on site, seven are known to fly close to ground level, beat along hedgerows or water bodies. It is unlikely that such species would come into contact with turbine blades which are elevated at height above which normal flight activity occurs".Paragraph 5.4.26:"The most vulnerable bat species recorded within the Den Brook site was the Noctule. This species characteristically flies at high levels and does not adhere to linear landscape features. It can, therefore, be found flying over fields to forge or commute. Th Noctule bat is recorded at very low numbers and scattered throughout the site. I acknowledge that this species is recognised by Natural England as being at high risk from collision, however the number of

registrations recorded at Den Brook was very low, which reduces the overall risk considerably".

The difficulty with the submissions of both defendants is that they do not direct themselves to the wording of Article 12(1)(a) of the directive or Regulation 39 of the regulations. In referring to all forms of deliberate killing, capture or killing of specimens of these species in the wild, the directive clearly contemplates harm to individuals as opposed to the effect on the species which is what is required under Article 12(1)(b), dealing with deliberate disturbance. The inspector directed himself to the impact on individuals and populations and concluded that there was:

"The threat of some harm to individuals but not to roosts, and that there is no suggestion that the turbines would constitute threat to local bat populations"(Paragraph 66).

It follows that the inspector did engage with the directive and regulations, despite not being asked to do so by any party to the inquiry. The fact that he did not identify either by name is not surprising in the circumstances, but he clearly had in mind the importance of the presence of a European protected species on the development site in reaching his planning decision.

Further, from his conclusion there was the prospect of contravention of Regulation 39(1)(a) of the Habitats Regulations. What then was his relevant duty? In the case of Woolley (Supra), HHJ Waxman QC, sitting as a Judge of the High Court, considered that question. At paragraph 29 on page 63, he said:

"In my view, that engagement involves a consideration by the authority of those provisions and considering whether the derogation requirement might be met ... but the point is that it is only by engaging in this kind of way that the authority can be said to have any meaningful regard for the directive".

The inspector did not expressly address the steps allowing for

derogation under Regulation 44(3). He did not have to deal with them in the same degree of detail as if he was the appropriate authority considering whether to grant a licence under the regulation, but the issue is whether he dealt with the substance of the requirement sufficiently to comply with his obligations under the regulations. In my judgment, he did. At paragraph 64 of the decision letter the inspector expressly referred to the advice in PPS9 which, at footnote 7, notes the protection of European animal species under the Habitats Regulations 1994 and said that his consideration took it into account. He had already considered the issue of alternative sites at paragraph 151. There was no evidence of alternative modes of renewable energy at the inquiry.

So far as the proposed development not being detrimental to the maintenance of the population of the species is concerned, at a favourable conservation status in their natural range, the evidence was entirely one way. All parties relied upon the evidence of Dr Holloway who concluded that there would be 1) no significant impact on the conservation status of local populations of this species; and 2) in relation to Noctule bats, that the number of registrations recorded was very low which reduced the overall risk considerably. As a result, the inspector concluded that there would not be any threat to bat roosts, and there was no suggestion that the turbines would constitute a threat to local bat populations.

The inspector had then substantially complied with the requirements of the regulations, albeit he did not attribute his conclusions to the letter of the regulations for the reasons I have set out earlier. The circumstances here are very different from an EIA case where the provision of an environmental statement is the cornerstone of that regime. There, the ES, including mitigation measures, is the basis of public consultation prior to a decision being made. Here there is a different statutory regime. The

decision maker is not under a comparable consultation requirement based upon a single accessible compilation of the relevant information provided by the applicant at the start of the application process. He has to satisfy himself on the considerations set down in the regulations. Reading the decision letter as a whole, the inspector here did so.

In those circumstances, I do not have to go on to consider the issue of discretion but, for the sake of completeness, I deal with that matter and make it clear that, if I had had to consider it, I would have exercised it in favour of the defendants and upheld the planning permission.

In Berkely v Secretary of State for the Environment [2001] 2 AC 63, Lord Bingham emphasised that the discretion of the court to quash a decision, even in the domestic context, was very narrow. In Bown v Secretary of State for Transport [2003] EWCA Civ 1170 Carnwath LJ emphasised that the speeches in Berkeley needed to be read in context. In Edwards v Environment Agency [2008] EKHL 22 Lord Hoffman agreed with that observation and considered that both the nature of the flaw in the decision and the ground for the exercise of discretion had to be considered. In the circumstances of Edwards when he carried out that exercise, Lord Hoffman agreed with the Court of Appeal and the judge below that it would be pointless to quash the pollution permit granted under the Pollution Prevention and Control Regulations 2000. Applying those principles here, the flaw in the decision would be one of form but not of substance. It would thus be another occasion where it would be pointless to quash the planning permission granted.

Ground 10 - PPS22 and failure to minimise impacts

PPS22 is the government's planning policy statement on renewable energy. The key principles are set out in paragraph 1. Amongst those is:

"(viii) Development proposals should demonstrate any environmental, economic and social benefits, as well as any environmental and social impacts that have been minimised through careful consideration of location, scale, design and other measures".

At the inquiry the claimant argued that the the developer had not established that the impacts of the development had been minimised, and there was conflict with PPS22 as a consequence. In this challenge, Mr Taylor argued that the inspector had failed to have regard to a material consideration, namely the key principle in PPS22 set out above, or alternatively that the inspector had failed to provide adequate reasons that the impacts had been minimised and could not be reduced further. Both defendants argued that this ground was misconceived, as the inspector had found as part of his planning judgment that the development would cause some limited harm but that that harm was outweighed by the benefits which the development would bring by its contribution to the provision of renewable energy.

I prefer the submissions of the defendants. The mere absence of an express reference to paragraph 1(viii) of PPS22 does not mean that the inspector failed to take it into account. The analysis carried out by the inspector was one of classic planning judgment, balancing the pros and cons of a proposed development. As Keene LJ said in First Secretary of State and Westend Green Properties v Sainsbury Supermarkets Limited [2007] EWCA Civ 1083 at paragraph 38:

"There is certainly no legal principle of which I am aware that permission must be refused if a different scheme could achieve similar benefits with a lesser degree of harmful effects. In such a situation, permission may be refused but it does not have to be refused. The decision maker is entitled to weigh the benefits and dis-benefits of a proposal before him and to decide, if that is his planning judgment, that the proposal is acceptable even if an

improved balance of benefits and dis-benefits could be achieved by a different scheme".

What the inspector carried out here was an analysis of the development proposed against the Development Plan Policy and concluded that the limited harm which he identified, and the conflict with Landscape Policies, was sufficiently outweighed by the purposes of Structure Plan Policy CO12, LPPS10 and RPG10 Policy RE6, which supported renewable energy proposals subject to no significant adverse impact (see paragraph 187). In coming to that judgment, the inspector was satisfied, as evidenced in the decision letter, that the impacts of the development were minimised to an acceptable level, taking into account location, scale, design and other measures of the development before him. He took into account the key principles set out in PPS22 and there was no obligation on him to go further, either in considering the PPS or in his reasoning.

Ground 10 fails also.

It follows that I dismiss this challenge.

MISS BUSCH: Thank you very much indeed, my Lady. The question of costs. I appreciate that obviously this case went in excess of 1 day but there is in existence a capping of the claimants costs liability to £5,000. Our total costs in actuality are slightly in excess of £16,000, although that does not include the costs of today. So, in those circumstances, I respectfully submit that there is no good reason why the costs should not be assessed summarily now in the amount of £5,000.

THE DEPUTY JUDGE: Mr Taylor, do you want to say anything?

MR TAYLOR: May I just take instructions?

THE DEPUTY JUDGE: Of course, yes.

MR TAYLOR: My Lady, I am afraid we have not been served with a copy of the costs schedule from the Treasury Solicitors and so, in those circumstances, to accept costs in the amount of £5,000 is a little difficult for us.

THE DEPUTY JUDGE: Yes.

MR TAYLOR: Can I suggest that, in the circumstances, it may be better to make a costs order limited in the following way, that costs should be assessed if not agreed, limited to a maximum of £5,000 in accordance with the protected costs order that was made. I do not resist the principle of costs.

THE DEPUTY JUDGE: No.

MISS BUSCH: My Lady, I am told they were in fact served with a copy of the schedule.

THE DEPUTY JUDGE: I am afraid I have not got the original bundles that were before me so I am not able to assist either way on this matter. Obviously they have got mislaid somewhere. But it would seem to be the case, would it not, that if I make the costs order as suggested by Mr Taylor that deals with all matters, and it does not preclude -- assuming the costs schedule is either found or served -- agreement between the parties as to the appropriate level. So that is what I propose to do. It will be the claimant to pay the first defendant's costs, to be assessed if not agreed, in the sum of £5,000.

MR TAYLOR: My Lady, there is two other matters that I want to address. The first is probably the most invidious thing that any counsel has to do, which is to apply for permission to appeal. I will try and keep it as short as I can, given the extensive number

of grounds.

In relation to the issue on ground 1, your Ladyship found that, in effect, the issue there turned upon whether the condition 21 could be construed in relation to the words "it shall terminate", as those words not meaning that the scheme should terminate at any point that the local planning authority were satisfied. In my submission, there are reasonable prospects of success that another court may have a different view on the meaning of those words in the context of that condition, particularly given the need for precision in (inaudible) which might otherwise give rise to prosecution. I make no further submissions on ground 1 at this stage.

In relation to grounds 2 and 3, the key point there was that the decision letter itself, when read as a whole, simply does not address why it is that the DBJRG methodology which is suggested was (inaudible) was rejected in favour of the methodology that plainly was not. Whilst one can see from the decision letter that the DBJRG methodology appears to have been rejected, the reasons for its rejection are simply not set out. In my submission that gives reason to reasonable prospects of success in another court.

In relation to ground 4 and uncertainty, your Ladyship will recall that the inspector found in his decision letter at paragraph 130 that, in certain respects, the forecasts were within 1 db of the noise limits. He recorded that the noise propagation report had a plus or minus 3db level of uncertainty. In my submission, what has not been grappled with, with the greatest respect, in your Ladyship's judgment is how the inspector can have concluded that the noise limits were likely to be met in the light of that evidence on a rational basis. In particular, whether he had to grapple with the level of uncertainty which was a key part of the submissions put forward by the DBJRG at the inquiry. Of

course, in my submission, the inspector has to satisfy himself that the conditions that he imposed could actually be met in order to impose them. If the conditions cannot be met, then it cannot be reasonable to impose them. So, the conditions are the solution to this issue and (inaudible) that requires an examination of the numbers.

In relation to ground 6, that is the alternatives, I focus my submissions on policy NE10. The key point there is that NE10 has to be construed with the objectives of the policy in mind, and whilst there might be rationality scope for interpretation of that policy, it has to give effect to the objective, and the objective of that policy is to prevent development in the open countryside that is not justified if it can be accommodated within the urban area. In my submission, that gives rise to a requirement to consider alternative modes of renewable energy which simply was not grappled with by the inspector or, with respect, by your Ladyship in the judgment.

In relation to ground 7, that is the point about policy CO1, the simple point there is that, in my submission, the inspector did not apply the right test; that he applied the harm test. If you do not apply the right test, then you do not identify the area where the turbines will give rise to no harm but where they would not enhance either. That area is an area of land in respect of which there is a policy conflict in relation to Policy CO1. That additional policy conflict would have to be given weight and was not. Again, with respect, that issue is not grappled with either by the inspector or by your Ladyship in the judgment.

In relation to ground 9 and bats -- I skip over ground 8 -- I stick to the point about the Habitats Regulations. The key issue there is, your Ladyship having identified that Article 12(1) is engaged, is whether derogation was properly considered by the inspector, and that the first element of Regulation 44(3)(a) is to consider

alternatives. Whether there is an alternative is not limited to simply looking for different sites for wind farms or indeed different modes, it would also conclude considering whether or not conditions should be imposed requiring the turbines to be switched off so that the bats would not be harmed. That is a matter which simply was not considered by the inspector. In that context, in my submission, the inspector cannot have been taken to have considered alternatives of the bases.

So far as the discretion issue is concerned, which of course I then have to deal with also, there is clearly an issue of law as to the extent of the court's discretion. We have heard what your Ladyship says but also contrasting that with what is said by the court in the Woolley judgment. In that context, there is a clear issue, a compelling issue in that case that is appropriate for another court to consider.

In relation to ground 10 the submission is simply this, that the inspector identified harm, that the policy required him to consider whether that harm could be further reduced, and that the Westend Green case is not relevant because that is not considering the same policy context. In those circumstances, in my submission, the judgment of your Ladyship does not grapple with the point that, where there is harm identified and the decision maker has not, in the context of a renewable energy project such as the wind farm in this case, gone on to ask themselves whether that harm could be reduced, there is an error of law through the failure to grapple with the requirements of that policy.

So, for all of those reasons, I would submit that there is a reasonable prospect of success and/or compelling reasons for permission to appeal to be granted in this case.

THE DEPUTY JUDGE: Miss Busch, do you want to say anything?

MISS BUSCH: My Lady, I will limit myself to perhaps the opposite of the invidious; complimenting my Lady's judgment. In my submission it could not possibly have been clearer or any more lucid. Perhaps more importantly, in my submission, all of the findings that your Ladyship has made are quite clearly supported by existing authority. So, in my submission, there is no real prospect of success for that reason. Moreover, in my submission, the only point that conceivably raises one of interest or importance is that concerning discretion and that has already been considered by the Court of Appeal. So, I would suggest it is not an appropriate case.

THE DEPUTY JUDGE: Right. Sorry, do you want to say anything?

MISS THORNTON: My Lady, I am in some difficulty as I was not here for the substantive hearing.

THE DEPUTY JUDGE: I appreciate that, I thought I should extend you the opportunity.

MISS THORNTON: My Lady, I think what I would say is, I am instructed that the concern, as far as we can see, most of what Mr Taylor has said relates to matters of planning judgment and, therefore, we do not feel the need to address the court on many of the issues. But if your Ladyship is minded to, or has some concerns about the ground 9 on bats, then I would welcome the opportunity to take instructions just to familiarise myself with this, which does seem to us to be an area of law. But I only feel the need to do that if your Ladyship is minded to take that point further.

THE DEPUTY JUDGE: All right, thank you. Well, I think in those circumstances, Mr Taylor, it would be even more pointless to ask you to reply because there is really not much to reply to.

MR TAYLOR: I do not have anything to say, thank you.

THE DEPUTY JUDGE: I am going to refuse your application, you will have to take it elsewhere. In my judgment, there are no realistic prospects of success, but it is for others to say.

MR TAYLOR: I am obliged. One last thing, which is can I apply for an order that the transcript of the judgment be expedited?

THE DEPUTY JUDGE: Yes, of course.

MR TAYLOR: To assist in the consideration we have to make in the next few weeks.

THE DEPUTY JUDGE: Yes, certainly. I am happy to order that be done.

Thank you all very much.