Case Name: *Substation Action Save East Suffolk Ltd, R (On the Application Of) v Secretary of State for Business, Energy and Industrial Strategy* [2022] EWHC 3177 (Admin) (13 December 2022)

Full case: Click Here

Commentary: This High Court case concerned an application for judicial review pursuant to s118 of the Planning Act 2008 ("PA 2008") of the decision by the Secretary of State for Business, Energy and Industry (the Defendant) to make two development consent orders ("DCOs") for the construction of the East Anglia ONE North and East Anglia TWO Offshore Wind Farms (and associated onshore and offshore development), both nationally significant infrastructure projects ("NSIPs").

The Claimant, Substation Action Save East Suffolk Limited, while not objecting to the wind farms themselves, had concerns about the onshore location of the connection of the development to the National Grid. The Claimant raised six grounds, all of which failed. The grounds, and the courts conclusions on each, are summarised below.

1. Flood risk – the Claimant argued that the Defendant failed to adequately assess the Floor Risk Assessment: the sequential test requires assessment of all sources of flooding at the stage of site selection, but the Defendant applied it at the stage of design after site selection. The judge found that the relevant policy guidance (NPS EN-1) only requires a sequential test in relation to the location of projects across different flood zones, and the Defendant had sufficiently themselves that the sequential test had been followed in this regard. It is a matter of judgment for the Defendant as to how to apply the sequential test to flood risks from other sources. The NPPF and PPG only require surface water flooding to be taken into account when considering the location of a development as part of the sequential test, but do not require anything further as to how surface water flooding is to be factored into the sequential approach.

2. Heritage assets – the Claimant argued that Defendant's conclusions on heritage harm were unlawful in that they (i) followed the Examining Authority's unlawful interpretation of the Infrastructure Planning (Decisions) Regulations 2010, and (ii) failed to reflect the "considerable important and weight" given to heritage harm in the overall planning balance by only giving it a "medium" weighting. The judge found that the Defendant did in fact have proper regard to heritage concerns. The weight to be attached was a matter of planning judgment; the legal tests set out in regulation 3(1) of the Decisions Regulations 2010 were sufficiently followed. Reg 3(1) placed a duty on the Defendant only to have regard to the desirability of preserving the listed building/area, in contrast to the higher duty to have "special regard" under section 66(1) of the Planning (Listed Building and Conservation areas) Act 1990, which requires the decision-maker to give considerable and important weight to harm to a listed building.

3. Noise – the Claimant argued that (i) the Defendant could not be satisfied that the

significant adverse noise effects could be avoided (as per paragraph 5.11.9 of the NPS EN-1), (ii) the requirements required to secure mitigation were unworkable (with no evidence to demonstrate the noise limits could actually be met) and therefore unreasonable, and (iii) the Defendant failed to take into account the impact of noise from switchgear/circuit breakers in the National Grid substation. The judge found that sufficient information and conclusions had been given by the Examining Authority, which the Defendant was entitled to agree with. The requirement sufficiently mitigated the harm, and it was not necessary to address a hypothetical situation where these requirements were not met – the consented development must operate in accordance with the requirements imposed, and any failure to do so is a matter for enforcement later on. The concerns around switchgear noise were properly considered and accounted for.

4. Generating capacity – the Claimant argued that the Defendant failed to take into account representations made by the Claimant that a requirement should be imposed to ensure the Applicants did not downsize output. The judge held that the only requirement was for the statutory minimum output of 100MW was secured (as per section 15(3) of the Planning Act 2008), and this was secured under the DCO description of development. There was no requirement to secure output above that. It is lawful to attach weight to the benefits of proposed greater output without formally securing it. Market factors will help secure higher output. In the Defendant's assessment, they never assumed a specified minimum output above the 100MW minimum.

5. Cumulative effects – the Claimant argued that the Defendant irrationally excluded from consideration the cumulative effects of known plans for extensions of the site. The judge held that the extension (as set out in disclosed 'Extension Appraisal' documents) was at too early a stage to be considered an "existing and/or approved project" (as per paragraph 5 of Schedule 4 of the EIA Regulations 2017); therefore the Extension Appraisal should be considered merely "environmental information" (as per Regulation 21), and need not be factored into the reasoned conclusion on significant effects.

6. Alternative locations – the Claimant argued that the Defendant erred in failing to consider alternative sites, citing the 2021 Save Stonehenge case. The judge held that the case law (including Save Stonehenge) makes clear that the consideration of alternative sites is only relevant to planning applications in exceptional circumstances, and there was no clear statutory or policy requirement to take alternatives into account. NPS EN-1 acknowledges the requirement to address alternatives as part of the EIA process, but the Claimant did not allege there had been a failure to do this. The Examining Authority report properly acknowledged community concerns about the site location and undertook site examinations of further alternative sites, but concluded that the alternatives were not relevant. The Defendant agreed with this analysis and conclusion, and the judge held that it was a legitimate exercise of planning judgment to do so.

Case summary prepared by Jed Holloway