

Case Name: *Substation Action Save East Suffolk Ltd, R (On the Application Of) v Secretary of State for Energy Security and Net Zero & Ors* [2024] EWCA Civ 12 (17 January 2024)

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Commentary: This was an unsuccessful appeal against the judgment of Lang J, who had dismissed a claim by Substation Action Save East Suffolk Limited (“**the Appellant**”) relating to the decision by the Secretary of State for Business, Energy and Industry (“**the First Respondent**”) 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), which were both nationally significant infrastructure projects (NSIPs).

Facts

The Appellant, a company formed by several local residents, had challenged the two DCOs granted by the First Respondent on six grounds in the High Court. Permission was granted by the Court of Appeal to appeal two of the grounds. The risk of surface water flooding at the onshore development and the cumulative effects of the development to the National Grid were the two grounds subject of the appeal.

Relevant to the flood risk ground, the environmental statement submitted with the application dealt with flooding from surface water by providing that the onshore substations and National Grid Infrastructure were located in areas primarily at low risk of surface water flooding, with some permanent infrastructure (parts of access roads) likely to cross areas at both high risk and medium risk of surface water flooding, with appropriate mitigation measures within the design to address any remaining surface water flood risk concerns.

The Overarching National Policy Statement for Energy (EN-1), the National Planning Policy Framework (“**NPPF**”) and the National Planning Practice Guidance (“**the NPPG**”) provide the relevant framework to assess flooding for development applications. As part of the assessment of flood risk, a “sequential test” may be required when a development is in an area of flooding. This test in EN-1 is reflected in the NPPF paragraphs which deal with applications for development consents. The sequential test says that development should not be permitted if there are reasonably available sites appropriate for the proposed development in areas with a lower risk of flooding.

Judgment

Ground 1: The application of the sequential test in relation to flood risk

The appellant contended that the provisions of the relevant policies related to flood risk required the First Respondent to be satisfied that a sequential test had been applied by the applicant when selecting the site for the proposed development. That test, it was

submitted, required the applicant to locate the development in an area which was not at medium or high risk of surface water flooding unless there were no other sites reasonably available for the development with a lower risk of flooding from surface water. Further, this issue had to be considered at the site selection stage, not at the stage of designing the project and deciding where within the application site particular infrastructure would be located or in deciding what mitigating measures might be adopted.

Lewis LJ stated at paragraph 41 that it is clear from the relevant policies that the application of the sequential test is concerned with risks of flooding from fluvial flooding (i.e. from rivers). The Flood Risk Zones 1, 2 and 3 relevant to the sequential test are concerned with areas at risk from fluvial flooding (as appears, for example, from Table 1 to the PPG) and do not identify zones by reference to flooding from surface water.

On this basis, Lewis LJ (with Davis LJ and Coulson LJ agreeing) found that the relevant policies regarding the sequential test do not require an applicant for development consent to demonstrate that whenever there is a risk of flooding from surface water, there are no other sites reasonably available with a lower risk of surface water flooding. Whilst the risks of flooding from surface water is to be taken into account when deciding whether to grant development consent, the way in which account is to be taken of that risk raises issues of planning judgment in the application of the relevant provisions of the policies.

On this basis, this ground of appeal was dismissed.

Ground 2: Cumulative effects of the development

The appellant's second ground argued that an assessment of the cumulative effects of the development to the National Grid in light of other projects, known as the "Nautilus" and "Eurolink" schemes ("**the potential projects**"), had not been undertaken. These potential projects had been identified as projects which could connect with the new National Grid substation.

Lewis LJ stated that the law on cumulative effects is well-established (citing *R (Larkfleet Ltd) v South Kesteven District Council* [2016] Env. LR. 76 and *Pearce v Secretary of State for Business, Energy and Industrial Strategy* [2021] EWHC 326 (Admin), [2022] Env LR 4) and a decision-maker may defer consideration of the cumulative effects arising from future projects where, amongst other reasons, there was not any adequate information on which a cumulative assessment could be based.

The First Respondent took the view the information that was provided relating to the effects of the potential projects was insufficient and did not affect his reasoned conclusion on the significant effects of the developments for which applications had

been made, i.e. EA1N and EA2.

Lewis LJ found (with Davis LJ and Coulson LJ agreeing) the effects of other potential projects (which were not projects forming part of the developments forming the subject matter of the application for development consent) did not have to be the subject of a cumulative impact assessment before development consent was granted. The First Respondent was entitled to defer consideration of the effects of the other projects as there was insufficient information available to make an assessment. This decision was rational and lawful.

For these reasons, this ground of appeal was dismissed.

Conclusion

This Court of Appeal decision provides useful guidance on the relevant policy framework applying to assessing flood risk from surface water using the sequential test approach. In particular, the finding that the relevant policies do not require an applicant to demonstrate that whenever there is a risk of flooding from surface water there are no other sites reasonably available where the proposed development could be located in an area of lower surface water flood risk. It is worth noting that whilst the judgment references the NPPF at the time of the decision (being 2022), the current NPPF is substantially the same on flood risk and the sequential test.

Case summary prepared by Jack Curnow