

Case Name: *Suffolk Energy Action Solutions SPV Ltd, R (On the Application Of) v Secretary of State for Energy Security and Net Zero* [2024] EWCA Civ 277 (22 March 2024)

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Commentary: This was an appeal against the order of Holgate J dismissing Suffolk Energy Action's (the "Claimant") claim for judicial review of the Secretary of State's decision to make two Development Consent Orders (DCOs) granting consent for the construction of two offshore windfarms off the coast of Suffolk. The Secretary of State's decision to grant the DCOs was made in March 2022, following a statutory Examination of the two applications by a panel of five inspectors.

The Claimant alleged that the DCO Examination process was unfairly distorted and that this impeded the carrying out of a proper enquiry as to whether or not the proposed development was in the public interest. The Claimant's grounds centred around the fact that a number of private landowners whose land was impacted by the compulsory purchase required as part of the development had entered into Heads of Terms and Option Agreements with the developer. These documents contained "non-objection clauses" which the Claimant alleged were unlawful because they precluded, or, if they were not legally binding, had a tendency to dissuade, the landowners from raising any objections to the proposed development, even those wholly unrelated to the impact on their own land. In addition, the Option Agreements expressly required the landowners to withdraw any objections they had already articulated.

The Claimant had raised its concerns during and following the close of the Examination. Section 26 of each of Secretary of State's decision letters acknowledged the concerns that had been raised by a number of parties in relation to the confidentiality provisions in the agreements that had been entered into in order to acquire land or rights. The decision letters concluded however that all relevant issues were raised and explored in the Examination and that the Secretary of State was of the opinion he had the necessary information to make a decision.

The Claimant challenged the Secretary of State's decision on the following related grounds:

- (1) the use of non-objection clauses was not legitimate; and
- (2) the Secretary of State failed to address the complaints about the use of non-objection clauses.

Ground 1

In considering whether the use of non-objection clauses was legitimate, the court noted that the use of non-objection clauses when a party has obtained an interest in land, or an interest in land conditional on the grant of planning permission, is permissible for

two main reasons. First, an applicant who owns land and seeks planning permission for a relevant use of that land is unlikely to object to that application. Secondly, the planning process is inquisitorial in nature. The inquisitorial nature of the process means that it is for the decision-maker to ensure that there is sufficient information to enable an informed and lawful decision to be made on the application for planning permission. Whether the effect of a non-objection clause has in fact meant that there is insufficient information to enable a planning decision to be made will always be a fact-specific inquiry. In this case, the Court of Appeal held that the Heads of Terms, which contained the non-objection clause and confidentiality clause, were not contractually binding and the landowners (who received independent legal advice) could reasonably be assumed to have known this. It was only when the Option Agreements were exercised that the non-objection clause became legally binding. No Option Agreements had been signed before the completion of the Examination by the five inspectors, and only two Option Agreements had been completed before the Secretary of State issued the decision letters.

The fact that 39 out of 55 landowners who had signed the Heads of Terms did in fact object to the scheme showed that landowners were not, in practice, "stifled" or "neutralised" when it came to objecting to the scheme. The court held therefore that there was no conduct interfering with the administration of justice.

Ground 2

In relation to the complaint that the Secretary of State had failed to address the complaints about the use of the non-objection clauses, the Court of Appeal held that it was reasonable and permissible for the Secretary of State to conclude "that all relevant issues were raised and explored in the Examination and that he has the necessary information to enable him to reach a decision". Moreover, the fact that 39 out of 55 landowners did object (notwithstanding the presence of the non-objection and non-disclosure clauses in the Heads of Terms) supported the findings made by the Secretary of State that all the necessary information to make a proper decision was before him. In these circumstances, the court concluded that the Secretary of State had properly addressed the complaint about the use of non-objection clauses, and that Holgate J was right to dismiss this ground of challenge.

The appeal was therefore dismissed.