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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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Quinn's (Brian) Application [2013] NIQB 24

IN THE MATTER OF AN APPLICATION BY BRIAN QUINN AND MICHAEL QUINN

FOR JUDICIAL REVIEW

_____

TREACY J

Introduction

[1] The applicants, Brian Quinn and Michael Quinn, are brothers and joint owners of lands situate at Mullaghturk Mountain near Draperstown, Northern Ireland, comprising Land Folio 26323 County Londonderry ("the Lands").

[2] By this application the applicants seek to challenge the decision of Commissioner Fitzsimmons of the Planning Appeals Commission ("the respondent") dated 20 July 2011 in which she dismissed the applicants' appeal of the decision of the Department of Environment (Planning Service) ("the Department") to refuse planning permission for the development of a renewable energy wind farm consisting of seven turbines with a maximum height to blade tip of 100.25m each and other ancillary works ("the proposed development").

[3] The proposed development site is located within the Sperrins Area of Outstanding Natural Beauty.

Factual Background

[4] In 2004, the applicants submitted an application (application reference number H/2004/1395/F) to the Department for the proposed development.

[5] The Department refused planning permission on 17 August 2007. Refusal reasons 1 and 2, dealing with suggested visual and landscape impacts, are material:

> "1. The proposal is contrary to Policy PSU12 of the Department's Planning Strategy for Rural Northern Ireland in that the development would, if permitted, have a seriously detrimental impact on the amenity of the Sperrins Area of Outstanding Natural Beauty by reason of its unacceptable degree of visual intrusion.
>
> 2. The proposal is contrary to Policy DES4 of the Department's Planning Strategy for Rural Northern Ireland in that the site lies within the designated Sperrins Area of Outstanding Natural Beauty and the development would, if permitted, be detrimental to the environmental quality of the AONB by reason of lack of sensitivity to the distinctive character and the landscaped quality of the area."

[6] The applicants appealed to the Planning Appeals Commission on 14 February 2008.

[7] At the time the planning application was considered by the Department, the applicable planning policy guidance was Policy PSU 12 of the Planning Strategy for Rural Northern Ireland. However, at the time of the appeal, the Department had published 'Planning Policy Statement 18: Renewable Energy' ("PPS 18"). There is no dispute between the parties that the primary source of policy guidance relevant to the application is 'Policy RE1: Renewable Energy Development' in PPS 18.

[8] The appeal was heard before a single Commissioner of the Planning Appeals Commission on 15 June 2011 at Magherafelt Council Offices, the power to determine the appeal having been delegated to a Commissioner sitting alone.

[9] By decision dated 20 July 2011 the respondent dismissed the applicants' appeal.

[10] In her decision the Commissioner indicated she was satisfied that the proposal would not impact adversely on the setting of archaeological remains (paragraphs 28-34) and she referred to the fact the parties had agreed conditions could be put in place to overcome technical issues of peat slide and potential bog burst (paragraph 39). That left the core issue of the visual impact of the proposed turbines and how such impact weighed in the overall balance against the renewable energy targets and economic benefits of the scheme.

[11] In paragraph 41 of her Decision, the Commissioner's stated she was not persuaded that the renewable energy targets and economic benefits were of sufficient weight to outweigh the 'significant environmental damage' the Proposed

Development would cause in the South Sperrins Landscape Character Area. Therefore, she dismissed the appeal.

The application for judicial review

[12] The applicants raised several areas of challenge but the central issues related to procedural impropriety/procedural unfairness and the consideration of PPS 18. The grounds on which the relief was sought were set out in full in the Amended Order 53 Statement dated 29 May 2012 as follows:

> (i) Procedural impropriety/procedural unfairness – grounds 9(c) – (e)
>
> - Ground 9(c) - The Commissioner failed to make proper inquiries in relation to the issues of "*renewable energy targets*" and/or "*economic considerations*" and/or made assumptions that were unsupported by the evidence in relation to the issues of "*renewable energy targets*" and/or "*economic considerations*" bearing upon the appeal.
>
> - Ground 9(d) - The Commissioner failed to afford and/or deprived the applicants any or any proper opportunity to comment or make submissions on the assumptions she had made in relation to the issues of "*renewable energy targets*" and/or "*economic considerations*" bearing upon the appeal.
>
> - Ground 9(e) - The Commissioner failed to give any or any adequate reasons for her decision.
>
> (ii) Irrationality/unreasonableness – grounds 9(f) – (k)
>
> - Grounds 9(f) and 9(g) - The Commissioner's findings in relation to "*renewable energy targets*" and "*economic considerations*" were without evidential basis and/or were made without giving any weight or any proper weight to the evidence and/or submissions on behalf of the applicants.
>
> - Ground 9(h) - The Commissioner failed to apply and/or interpret the relevant planning policy, guidance and/or advice as contained in Policy RE1 of Planning Policy Statement 18: Renewable Energy, Best Practice Guidance to PPS 18, Supplementary Planning Guidance to Accompany PPS 18 (Wind Energy Development in

Northern Ireland's Landscapes) and Ministerial Statements on wind energy developments released on 2 September 2009 and 9 August 2010.

- Ground 9(i) - The Commissioner failed to take any account and/or failed to give any sufficient weight to the Ministerial Statements made on 2 September 2009 and 9 August 2010.

- Ground 9(j) - The Commissioner's decision was inconsistent with the Planning Appeal Commission's application of planning policy, guidance and advice to wind farm developments in the Planning Appeal Commission's decisions in appeal reference numbers 2009/A0037, 2009/A0265, 2009/A0268 and 2009/A036.

- Ground 9(k) - The Commissioner failed to give any or any adequate reasons for her decision.

(iii) Breach of Article 6 ECHR and the applicants' right to a fair hearing – ground 9(m)

- Ground 9(m) - The Commissioner breached the applicants' Article 6 rights to a fair hearing by failing to give any or any adequate reasons for her decision.

[13] In summary and *inter alia*, the Amended Order 53 Statement set out the relief sought as follows:

(i) An order of certiorari to quash the Decision of Commissioner Fitzsimons dated 20 July;

(ii) A declaration the Decision is unlawful, ultra vires and of no force or effect; and

(iii) An order for mandamus to compel the Planning Appeals Commission to adjudicate upon and re-hear the applicants' appeal in a proper and lawful manner.

The Decision of Commissioner Fitzsimons dated 20 July 2011

[14] Paragraphs 4 – 14 of the Decision refer to the policy context. In paragraph 5 the Commissioner refers to the aim of PPS 18:

"The aim of PPS 18 is to facilitate the siting of renewable energy generating facilities in appropriate locations

> within the built and natural environment in order to achieve Northern Ireland's renewable energy targets and realise the benefits of renewable energy. The policy [RE1] headnote states that the wider environmental, economic and social benefits of a renewable energy scheme are material considerations that will be given significant weight in determining whether planning permission should be granted for a particular proposal…"

[15] At paragraph 7 of her Decision the Commissioner referred to 'criteria' which had to be met for proposals for generating energy from renewable resources to be acceptable:

> "7. Notwithstanding the generally permissive thrust of Policy RE 1 the policy head note makes it clear that to be acceptable proposals for generating energy from renewable resources must meet five criteria with a further requirement that proposal for wind energy development must comply with seven additional criteria."

[16] In the 'Policy Context' section of the Decision, the Commissioner refers to the Best Practice Guide which supports PPS 18, the Supplementary Planning Guidance entitled 'Wind Energy Development in Northern Ireland's Landscapes', a speech made by the then Minister of the Environment to the Irish Wind Energy Association in September 2009 and to comments made by the current Minister of the Environment on single wind turbine proposals at the Giant's Causeway. Specifically, at paragraph14 of the Decision she refers to the comments made by the Minister of the Environment on single wind turbine proposals at the Giant's Causeway:

> "14. The appellants referred me to comments made by the current Minister for the Environment on single wind turbine proposals at the Giant's Causeway which had been submitted by local farmers and which the Department had refused planning permission for. It is their view that it is a further indication of the Department's conservative approach to the application of PPS 18 in AONBs. It is an assessment of the impact of the appeal proposal on the AONB within which the appeal site is located that this appeal is concerned with and not the matter of single turbines at the Giant's Causeway which is a World Heritage Site. In any event the onus is on the decision maker to take account of all material considerations in reaching a decision and that includes a full assessment of the appeal proposal against PPS 18, the

BPG [i.e. Best Practice Guide] and the SPG [i.e. Supplementary Planning Guidance]."

[17] Under the heading of 'Visual Assessment', the Commissioner found, as follows:

"23. Viewpoint 1…The proposed development would introduce an overbearing vertical and industrial feature into this part of the LCA [i.e. Landscape Character Area] and would, in my view, have a major adverse impact on the unspoilt character of this part of the LCA and be contrary to Policy RE1 of PPS 18.

24. Viewpoint 10…They would also introduce an industrial element into this otherwise unspoilt landscape and would have a significant adverse effect on the character of this part of the LCA.

25. Viewpoint 14…They would appear as highly prominent, intrusive and industrial features in this relatively unspoilt landscape and would have a significantly adverse impact on this part of the LCA…

26. I therefore conclude that whilst the proposed development would not have an unacceptable adverse impact on visual amenity when seen from viewpoints 9 (a and b) and 11 and 12, it would have an unacceptable and significant detrimental visual impact on the visual amenity of the landscape and therefore the AONB when seen from Viewpoints 1, 10 and 14.

27. Whilst I accept that the life span of wind energy development is finite at 25 years I do not consider that this is a sufficient mitigating factor in response to the significant adverse visual impact that I have identified."

[18] Under the heading of 'Renewable Energy Targets', the Commissioner found, as follows:

"35. The current target is for Northern Ireland to derive 12% of its energy consumption from renewable energy sources by 2012/13 (source DETI Strategic Energy Framework for NI) with a future target of 40% y 2020 which I accept are rolling targets and not ones to be capped upon achievement. The present figure is 8.9%. Although the Department of Trade and Industry (DETI)

have said it is confident that the 12% target will be met in 2012, the appellants disagree. It is their view that because of difficulties connecting to the national grid and with the lack of capacity within the national grid to cope with energy produced by existing wind farms this target is unlikely to be met. They said that the proposed development could be connected to the national grid within 8 – 9 month, although they have not told me that there is a wind energy company committed to the appeal site. They also said that it was unlikely that the turbines would have to be turned off in this location as the generation of excessive levels of electricity would be unlikely to occur.

36. The Department is currently dealing with a number of wind farm proposals with planning permission where the operators have approached the Department with compliance measures. The Department consider this to be a good indication that they are likely to be developed in the foreseeable future. Those wind farms would produce 150MW of electricity which would contribute 4-5% of the Government's target and if all go ahead put it beyond the 2012 figure of 12%. None of this was disputed by the appellant. The proposed wind farm has the potential to produce 10.5 MW of energy which would equate to around 0.33% of the Government's targets. Whilst I accept that this would make a valuable contribution to Government targets I am satisfied that the existing approved wind farm developments will achieve the 2012 target as confirmed by DETI. Although the appellants argued in respect of the 2020 target that there were infrastructure issues that may hinder it being met I am mindful that this is someway in the future and that there are plans to upgrade the national grid system in Northern Ireland to facilitate a better use of the electricity generated by wind farm development.

37. Taking account of the current figure of 8.9%, the approved wind farms moving towards compliance and the DETI current estimate I am satisfied that the more immediate target of 12% is likely to be met. I am not persuaded that 10.5MW of electricity generated by the appeal proposal would make a significant contribution to this target or indeed the 2020 one. Whilst I acknowledge that all renewable energy will contribute to the overall targets I do not consider that the proposed wind farm is

> of such a significant benefit as to outweigh the unacceptable environmental impact of it."

[19] Under the heading of 'Economic Considerations', the Commissioner found, as follows:

> "38. Although the environmental statement contains an assessment of the socio economic benefits of the appeal proposal this is sketchy at best and appears to favour the appellants who are the sole landowners. I agree with the Department that during construction phase there may be some slight benefits to the local economy, however I also agree that many of the benefits of such a proposal will be felt outside the region for example in the manufacture and construction of the turbines. Although I note that two full time jobs are anticipated as a result of the wind farm and that 5% of the energy cost as sold will be given over to the local council in rates. I am not persuaded that economic benefits as indicated are so significant as to outweigh the unacceptable environmental impacts of the proposal."

[20] The Commissioner's conclusion is set out at paragraph 41:

> "41. As I have concluded that the proposed wind energy development would have been an unacceptable and significant adverse visual impact when seen from viewpoints 1, 10 and 14, and as I have not been persuaded that the appellants' other arguments in respect of renewable energy targets and economic benefits are of sufficient weight to outweigh the significant environmental damage that the appeal proposal would cause in the South Sperrins Landscape Character Area and consequently this part of the Sperrins AONB, the appeal must fail. Accordingly, the Department has sustained its first and second reasons for refusal based on Policy RE1 of PPS 18 and Policy DES 4 of PSRNI."

Planning Policy Statement 18: Renewable Energy - Planning Policy RE1: Renewable Energy Development

[21] PPS 18 sets out the Department of Environment's planning policy for development that generates energy from renewable resources and that requires the submission of a planning application. It supersedes PSU 12 'Renewable Energy' of the Planning Strategy for Rural Northern Ireland.

[22] Section 2 deals with 'Policy Context' and sets out the international, UK and regional energy obligations and policies which PPS 18 is intended to advance. Reference is made to 'Energy Policy' in paragraphs 2.6 – 2.8. Paragraph 2.6 indicates the renewable energy targets in Northern Ireland are challenging; paragraph 2.7 indicates the renewable energy targets form the backdrop of PPS 18 and the Supplementary Planning Guidance; and paragraph 2.8 provides that the 2020 UK-wide target of 15% is legally binding:

> "2.6 The Department of Enterprise, Trade and Investment (DETI), which has responsibility for energy in Northern Ireland, has published a revised Strategic Energy Framework (SEF) which sets out the scale of Northern Ireland's ambition in the form of new and challenging renewable energy targets. The SEF makes it clear that it is likely that on-shore wind will continue to provide the largest proportion of renewable electricity generation in the period to 2020, not least because it is one of the cheaper forms of renewable electricity generation. The SEF also makes clear the ways in which the Department is developing other forms of renewable energy generation.
>
> 2.7 These renewable energy targets form the backdrop of this PPS and the complementary 'Wind Energy Development in Northern Ireland's Landscapes' Supplementary Planning Guidance (SPG). DETI and DOE are committed to working together to ensure that these new targets, in line with what is required under the new Renewable Energy Directive, are achieved in a way that respects local and environmental considerations.
>
> 2.8 In addition, the UK Renewable Energy Strategy, published by the Department of Energy and Climate Change, will form the basis of the UK's National Action Plan required under the terms of Renewable Energy Directive (2009/28/EC). The Strategy sets out the path required for the UK to meet its legally binding target to ensure that 15% of our energy (across electricity, heat and transport) comes from renewable sources by 2020. It makes it clear that achievement of such a target will only be possible with strong, co-ordinated efforts from a dynamic combination of central, regional and local Government and the Devolved Administrations, including Northern Ireland, as well as other public groups, the private sector and dedicated communities."

[23] Under the heading of 'Sustainable Development', paragraph 2.10 refers to the 2025 target that 40% of all electricity consumed in Northern Ireland is obtained from indigenous renewable energy sources:

> "2.10 The SDS contains challenging targets for Northern Ireland above those set at national and international levels for the reduction of greenhouse gas emissions and indicates important steps towards achieving these targets. These include ensuring that where technologically and economically feasible, beyond 2025, 40% of all electricity consumed in Northern Ireland is obtained from indigenous renewable energy sources with at least 25% of this being generated by non-wind technologies."

[24] Under the heading of 'Policy Objectives', paragraph 3.1 provides:

> "3.1 The aim of this Statement is to facilitate the siting of renewable energy generating facilities in appropriate locations within the built and natural environment in order to achieve Northern Ireland's renewable energy targets and to realise the benefits of renewable energy."

[25] Policy RE1 relates to 'Renewable Energy Development' and provides:

> "Development that generates energy from renewable resources will be permitted provided the proposal, and any associated buildings and infrastructure, will not result in unacceptable adverse impact on:
>
> (a) public safety, human health, or residential amenity;
>
> (b) visual amenity and landscape character;
>
> (c) biodiversity, nature conservation or built heritage interests;
>
> (d) local natural resources, such as air quality or water quality; and
>
> (e) public access to the countryside."

[26] As to the weight to be given to the wider environmental, economic and social benefits of a renewable energy proposal, Policy RE 1 provides:

> "The wider environmental, economic and social benefits of all proposals for renewable energy projects are material

considerations that will be given significant weight in determining whether planning permission should be granted." (emphasis added)

[27] RE1 goes on to provide:

> "Wind Energy Development
> Applications for wind energy development will also be required to demonstrate all of the following:
>
> (i) that the development will not have an unacceptable impact on visual amenity or landscape character through: the number, scale, size and siting of turbines;
>
> (ii) that the development has taken into consideration the cumulative impact of existing wind turbines, those which have permissions and those that are currently the subject of valid but undetermined applications;
>
> (iii) that the development will not create a significant risk of landslide or bog burst;
>
> (iv) that no part of the development will give rise to unacceptable electromagnetic interference to communications installations; radar or air traffic control systems; emergency services communications; or other telecommunication systems;
>
> (v) that no part of the development will have an unacceptable impact on roads, rail or aviation safety;
>
> (vi) that the development will not cause significant harm to the safety or amenity of any sensitive receptors1 (including future occupants of committed developments) arising from noise; shadow flicker; ice throw; and reflected light; and
>
> (vii) that above-ground redundant plant (including turbines), buildings and associated infrastructure shall be removed and the site restored to an agreed standard appropriate to its location."

[28] Under the heading of 'Justification and Amplification", paragraph 4.1 provides:

> "Increased development of renewable energy resources is vital to facilitating the delivery of international and national commitments on both greenhouse gas emissions and renewable energy. It will also assist in greater diversity and security of energy supply. The Department will therefore support renewable energy proposals unless they would have unacceptable adverse effects which are not outweighed by the local and wider environmental, economic and social benefits of the development. This includes wider benefits arising from a clean, secure energy supply; reductions in greenhouse gases and other polluting emissions; and contributions towards meeting Northern Ireland's target for use of renewable energy sources." (emphasis added)

[29] Under the heading of 'Landscape and Visual Effects of Renewable Energy Development, paragraph 4.13 provides:

> "4.13 The landscape and visual effects of particular renewable energy developments will vary on a case by case basis according to the type of development, its location and the landscape setting of the proposed development. Some of these effects may be minimised through appropriate siting, design and landscaping schemes, depending upon the size and type of development proposed. To assist assessment by the Department proposals should be accompanied by objective descriptive material and analysis wherever possible even though the final decision on the visual and landscape effects will be made by professional judgement."

[30] Paragraph 4.15 refers to the Supplemental Policy Guidance and states it will be taken into account in assessing wind turbine proposals but it is not intended to be prescriptive:

> "The document 'Wind Energy Development in Northern Ireland's Landscapes' (SPG), published by the Northern Ireland Environment Agency identifies landscape characteristics that may be sensitive to wind turbine development. This document provides supplementary planning guidance on the landscape and visual analysis process, and the indicative type of development that may be appropriate. While the SPG will be taken into account in assessing all wind turbine proposals it is not intended to be prescriptive."

Best Practice Guidance to Planning Policy Statement 18 'Renewable Energy'

[31] The information in this guide should be read in conjunction with PPS 18. It includes technical information about the construction and operation of wind turbines and also identifies some of the issues which are likely to arise in wind energy development proposals. Under the heading, 'Planning Issues', paragraph 1.3.4 contains a general statement about the approach to wind development:

> "1.3.4 The planning system exists to regulate the development and use of land in the public interest. The material question is whether the proposal would have an unacceptable detrimental effect on the locality generally, and on amenities that ought, in the public interest, to be protected. Each planning application will be considered on its own merits, and the argument that granting permission might lead to another application will not be sufficient grounds for refusal."

[32] Under the heading 'Landscape & Visual Impact', the Best Practice Guide provides:

> "1.3.18 Northern Ireland has a variety of landscapes… Some will be able to accommodate wind farms more easily than others, on account of their landform and relief and ability to limit visibility. Some are highly valued for their quality. There are no landscapes into which a wind farm will not introduce a new and distinctive feature. Given the Government's commitment to addressing the important issue of climate change and the contribution expected from renewable energy developments, particularly wind farms, it is important for society at large to accept them as a feature of many areas of the Region for the foreseeable future.
>
> 1.3.19 This is not to suggest that areas valued for their particular landscape and/or nature conservation interest will have to be sacrificed. Nor that elsewhere, attempts to lessen the impacts by integrating the development into the surrounding landscape would not be worthwhile. On the contrary, it emphasises the need for account to be taken of regional and local landscape considerations. Careful consideration is required to locate the development and even though highly visible, every effort should be made to reduce the impact and aid integration into the local landscape.

…

1.3.23 A cautious approach is necessary in relation to those landscapes which are of designated significant value, such as Areas of Outstanding Natural Beauty, and the Giant's Causeway World Heritage Site, and their wider settings. Here, it may be difficult to accommodate wind turbines without detriment to the Region's cultural and natural heritage assets."

Supplementary Planning Guidance to accompany PPS 18 'Renewable Energy' - Wind Energy Development in Northern Ireland's Landscapes

[33] This supplementary planning guidance was issued by the Northern Ireland Environment Agency in August 2010. It includes guidance on the conduct of visual impact assessments for wind energy development proposals. It, also, contains an assessment of each of the 130 Landscape Character Areas within Northern Ireland. Paragraph 1.1 contains the following description of its purpose and scope:

"1.1…This guidance shares the aim of PPS 18 to facilitate the siting of renewable energy generating facilities in appropriate locations within the built and natural environment in order to achieve Northern Ireland's renewable energy targets and to realise the benefits of renewable energy.

…

…Utilization of the guidance will assist developers in identifying the locations most suited for wind energy development in landscape and visual terms. The guidance also provides advice on siting, layout and design of wind energy proposals. The guidance will be taken into account by the planning authority as strategic guidance in processing planning applications for wind energy development.

It is important to note that this supplementary planning guidance is intended to provide broad, strategic guidance in relation to the landscape and visual impacts of wind energy development. Every development proposal is unique, and there remains a need for detailed consideration of the landscape and visual impacts of individual applications on a case by case basis, as well as

> for consideration of other issues referred to in PPS 18 and other regional policy…"

[34] Under Section 2, 'Approach and Methodology', paragraph 2.3 on 'Sensitivity Assessment' provides:

> "Landscape sensitivity to wind energy development depends on many factors. Each landscape has its own sensitivities, depending upon its landform and landcover as well as on a range of other characteristics and values including, for example, enclosure, visibility, condition, scenic and perceptual qualities, natural and cultural heritage features and cultural associations. Importantly, sensitivity depends on landscape character as well as on landscape values."

[35] Annex 3 contains Landscape Assessment Sheets. In particular, the guidance includes a specific landscape assessment 'LCA 24 South Sperrin'. It identifies the key landscape and visual characteristics and values to be considered in connection with a wind farm development proposal.

Ministerial Statement to the Irish Wind Energy Association - 2 September 2009

[36] At the keynote speech to the Irish Wind Energy Association, the Environment Minister at that time stated:

> "…During the public consultation on the draft document helpful comments were put forward by the industry and hopefully you will be pleased that may of your suggested changes have been taken on board in the final document. I consider your input has been extremely important.
>
> PPS18 fundamentally promotes the development of renewable energy. I believe this to be a very strong message.
>
> In addition the policy makes clear that full account will be taken of the wider environmental, economic and social benefits of renewable energy projects, and these will be given significant weight in the determination of planning applications.
>
> Nothing illustrates the promotive nature of the PPS 18 more so than the opening up of Areas of Outstanding Natural Beauty (AONBs) to wind energy development for the first time.

> This is in stark contrast to the previous policy where there was a general presumption against windfarm development in AONBs.
>
> …
>
> It perhaps is no coincidence or surprise that AONBs in Northern Ireland tend to be located in upland areas which of course just happen to be the windiest places.
> …
>
> I also believe that AONBs can successfully accommodate wind energy development without compromising their special character which in itself is an asset that is important to us all.
>
> However, if we are to successfully balance the need to develop renewable energy whilst protecting our natural assets proper safeguards need to be in place. These should minimise any potential negative impacts of development while providing the Wind Industry with the certainty it needs to confidently invest in Northern Ireland…"

Ministerial Statement - Guidance published on wind energy development in Northern Ireland's landscapes – 9 August 2010

[37] The then Environment Minister provided assurances that the Supplementary Planning Guidance will not give undue weight to landscape over other issues:

> "Planning Policy Statement 18 makes it clear that the wider environmental, economic and social benefits of all proposals for renewable energy projects will be given significant weight in determining whether the planning permission should be granted. Therefore I am confident that planning decisions will take account of all the relevant factors."

Comments of the Minister for the Environment on single wind turbines at the Giant's Causeway – 13 June 2011

[38] The Environment Minister commented on single wind turbine proposals at the Giant's Causeway, as follows:

> "That [the Causeway Coast] is an area of great natural beauty and therefore we have to show particular care when it comes to how we develop that area, be it for wind turbines or anything else. I think the farmers may have a point that the rules and the policy is being interpreted in such a conservative way that it's getting in the way of good projects for green energy" (taken from a BBC News Northern Ireland report dated 13 June 2011).

Email from Department of Enterprise Trade and Investment ("DETI") to DOE dated 10 June 2011

[39] DETI provided evidence in the form of an email in relation to likely compliance with the 2012 target for renewable energy, in the following terms:

> "The rolling average of renewable electricity consumption for the twelve months ending December 2010 was 8.85%. DETI uses a rolling average to smooth out monthly anomalies. DETI believes that Northern Ireland remains on target to meet the 12% renewable energy target by 2012."

Department of Environment Planning Service Written Representation

[40] In the period between issuing the Refusal and the appeal hearing date, planning policy changed and PPS 18 was introduced, superseding PSU 12 in A Planning Strategy for Northern Ireland. The Department considered the proposal in light of the new policy but found the planning permission should still be refused as per the amended reasons for refusal set out in this written representation. In the conclusion of the written representation, the following comments were made in relation to renewable energy targets:

> "…In determining all windfarm proposals, Planning Service is aware of government thrust towards renewable energy targets. Northern Ireland has a target of 12% of energy from renewable sources by 2012. Planning Service has been informed (source DETI) that currently just under 10% is provided by renewable sources and that they fully expect to meet the 2012 target. However, Planning Service wish to direct the Commission to Appendix 7 wherein to date Planning Service has consented 41 applications for wind farm development – with the potential to provide in the region of 585 MW – the equivalent of approximately 17.6% of energy requirements. This figure equally illustrates that the Department has consented well in excess of the current

> obligation and target in windfarm terms alone. This potential for 585 MW does not include contributions from small scale renewables, single turbines, hydro power, biomass, and other renewable energy sources. The Department cannot control which consented projects are ultimately constructed but consider that current targets are well capable of being met and exceeded."

Energy – DETI Report – March 2012

[41] Under the heading of 'Electricity Consumption from renewable sources in Northern Ireland', paragraph 4 of this report provides:

> "Electricity consumption from renewable sources currently stands at 12% during 2011, with some months achieving as high as 18%. DETI expects that the 2012 target for 12% of electricity consumption from renewable sources will be achieved, albeit primarily from on shore wind, which is currently the most readily available and affordable renewable energy for power generation…"

Environmental Statement

[42] The applicants rely on the Environmental Statement in the assessment of the socio-economic benefits of the appeal proposal. For present purposes, the relevant portions from 6.10.0 and 6.10.1 are set out below:.

> "6.10.0 Introduction
> …
>
> Wind farms are a form of diversification that provides a stable income for landowners during the life of the wind turbine… Furthermore, normal agricultural practices especially those of grazing are unaffected by the presence of wind turbines.
>
> The emerging wind industry in the UK has led to a high level of economic activity in several, mainly rural, areas as some of the wind farm developments have represented substantial capital intensive projects. In addition, the ongoing expenditure associated with maintenance and operation of activities also contributes to the local economy.
>
> …

With the above statement in mind the proposed wind farm at Mullaghturk, will not only stimulate investment in the Magherafelt area, but will also provide a prudent use of the natural wind resource which exists in the area in order to provide alternative energy supplies for business in the local area.

…

Farming is an important function in the district but it is noted to be in decline. The area is associated with high unemployment, deprivation and decline. Whilst the Mullaghturk wind farm is not within the Omagh District Council area the development of the site does border with the district, thus the proposal will have social and economic implications for the District.

6.10.1 Economic Investment

The total cost of erecting 7 number wind turbine generators at Mullaghturk excluding the cost of the wind turbine generators themselves is estimated at approximately £3.5m or an approximately estimated cost per turbine of £500,000. This money would be spent on the engineering, civil works, electrical works, other works, substation construction, wind turbine generator delivery to site, assembly and erection, transmission lines and site management.

Socio-Economic Impacts of the Mullaghturk Wind Farm

It is anticipated that the wind farm development will affect the locality in the following ways:-

Short Term

- Local expenditure on development activities (site investigations, studies, monitoring, legal and commercial costs)

- Local expenditure on construction activities (local sourcing of all plant, materials and associated operatives)

- 'Follow on' effects of initial employment and expenditure on services and activities.

Long Term

- Local expenditure on operational activities (employment of maintenance and operational staff, on-going supply of local materials, services and equipment);

- Income from rental of land accrued to landowners throughout the project;

- Reduction in the use of fossil fuels and resulting CO2 levels, which will be of general benefit to the health of the local community and to Northern Ireland as a region;

- Wages and salaries to local employees – at least two full-time professional jobs will be created by the development to last for the operational lifetime;

- The payment of rates to the local authority – it is expected that approximately 5% of energy sales will revert to the community in the form of rates;

- Payment of land rents to landowners – there is a single landowner that controls the land to be used as location for the development. At present he is engaged in sheep farming and dairy farming, both of which are marginal economic activity in present times. The proposed wind farm will in contrast provide sustainable financial security over the medium to long term."

Relevant affidavits

Mr Gillespie's first affidavit dated 19 October 2011

[43] In paragraph 22, Mr Gillespie refers to a number of assumptions made by the Commissioner in her Decision:

> "22. In paragraphs 35 – 37 of the Decision Letter…, the Commissioner makes a number of assumptions on the issue of renewable energy targets, all of which are made in the absence of any objectively robust evidence or demonstrable proper inquiry. Those unwarranted assumptions must undermine the robustness of the overall balancing exercise required of the Commissioner."

[44] Mr Gillespie explains his concerns regarding paragraphs 35-37 of the Commissioner's Decision:

> "25. In Paragraph 35 [of the Commissioner's Decision], the Commissioner notes, correctly, that the Appellants disagreed that the 2012 target would be likely to be met, given difficulties connecting to the grid and capacity problems. There was, in fact, vigorous disagreement on the point by the Appellants during the hearing. The Commissioner appears, in Paragraph 36, to dismiss this disagreement by recording that the Department is currently dealing with an un-quantified "number" of wind farm proposals with planning permission where the operators have "approached" the Department with compliance measures. However, there is a clear absence of both evidence and demonstrable inquiry as to what these proposed compliance measures might entail, whether these measures would be likely to be accepted by the Department, and if so whether that would happen in time to meet the 2012 target. Without obtaining evidence on those points, the Commissioner was simply not in a position to dismiss the Appellant's concerns and side with the Department on the point, as she did. That being so, it was a remarkable leap of faith by the Commissioner to base her conclusion in Paragraph 37 that the 2012 target was "likely" to be met in part on her finding that the un-quantified approved wind farms in question were "moving towards compliance', and an even more remarkable leap of faith for her to say in Paragraph 36 that she was "satisfied that the existing approved wind farm developments will achieve the 2012 target as confirmed by DETI". As the Commissioner records in Paragraph 35, the present percentage of Northern Ireland's energy produced from renewable sources is 8.9%. What objective evidential basis did she have for believing that the further 3% or so required to meet the 2012 target would be likely to be actually delivered by then from operational wind farms? None."

[45] In relation to grid connection for the Proposal, reference is made to correspondence from NIE confirming a grid connection for the appeal proposal was obtainable:

> "26. In fact, the Commissioner is wholly incorrect to state at Paragraph 35 that the Appellants did not dispute the case made by the Department in this regard. We focussed

> our discussions on the issue of likely timeframes of those approved wind farms with outstanding compliance issues being connected to the grid by 2012 and also sought answers to the issue of likely grid connections in respect of same. No information to confirm connections to the grid etc. was made available to the Department. We also outlined correspondence from NIE which confirmed that a grid connection in respect of the appeal proposal could be obtained and we submitted that this set us apart from a significant number of the approved wind farms where such a connection was, to our understanding of the network, not available."

[46] Mr Gillespie refers to the Commissioner noting the applicants' evidence that the Proposal could be connected to the grid within 8 – 9 months but that she went on to add a qualification to this:

> "27. In the context of discussing the 2012 target in Paragraph 35, the Commissioner records the Appellants' evidence that the appeal proposal could be connected to the grid within 8 – 9 months, before adding "although they have not told me that there is a wind energy company committed to the appeal site." I have to say I am utterly perplexed by this qualification, which in context seems to be intended to diminish the Appellants' evidence of very early connection to the grid, with all that implies in terms of contributing to government renewable energy targets. The Commissioner appears to be labouring under the profound misapprehension that some third party wind energy company would need to act as an intermediary between the Appellants and the grid operator. That is just not so, and there was absolutely no evidence before the Commissioner to suggest that it was. Had she investigated the point further – or indeed given the Appellants a fair opportunity to comment on the notion, which she did not – the Commissioner would have realised that there is no need for an intermediary, and that the Appellants could develop the site themselves and sell the electricity generated by the turbines direct to the grid. As it is, she has diminished the importance of the early contribution to renewable energy targets that would be achieved by the proposal, and for no good reason."

[47] At paragraph 30 Mr Gillespie avers the fact turbines will be unlikely to generate excessive electricity did not mean they will not make a valuable contribution to renewable energy targets:

> "30. The Commissioner records at the end of Paragraph 35 the Appellants' evidence that it was unlikely that the turbines would have to be turned off in this location as the generation of excessive levels of electricity would be unlikely to occur. That was presented as a positive by the Appellants, but for some reason the Commissioner appears to take it into account as a negative. Of course, the fact that turbines will be unlikely to generate excessive electricity does not mean that they will not make a valuable contribution to renewable energy targets."

[48] In paragraphs 35 – 39 of his affidavit, Mr Gillespie refers to economic considerations and paragraph 38 of the Commissioner's Decision:

> "35. The Commissioner dismisses this assessment [of the socio-economic benefits of the appeal proposal contained within the Environmental Statement] in Paragraph 38 as "sketchy at best". I find this astonishing. The assessment is an appropriately detailed indication of the many benefits secured by the proposal.
>
> 36. The Commissioner goes on to state that the socio-economic assessment of the benefits of the proposed development "appears to favour the appellants who are the sole landowners." However, even the most cursory examination of the benefits listed in the assessment could not lead any reasonable person to the same conclusion. Of the nine benefits listed, only two favour the landowners, and the two in question duplicate the benefit to the landowners in terms of land rents. The other benefits listed are much more substantial and accrue to the community in general, not to the landowners. Therefore, the Commissioner's comment appears both mistaken in fact and irrational.
>
> 37. The Commissioner then expresses her agreement with the Department's opinion that there may be some "slight" benefits to the local economy during the construction phase. What the Environmental Statement… says at paragraph 6.10.1 is that some £3.5 million will be spent erecting the turbines at Mullaghturk, excluding the cost of the turbines themselves. Tellingly, there is no mention of

that figure in the Decision letter. An economic investment of £3.5 million (at 2004 prices) to the local economy cannot rationally be said to be "slight". At 2011 prices, the investment would be considerably greater.

38. Relatedly, the Commissioner goes on to state that "many of the benefits of such a proposal will be felt outside the region" (emphasis added). Another cursory reference to the Short and Long Term socio-economic benefits detailed above demonstrates this statement to be patenting untrue. Moreover, while no dispute is taken with the comment that the manufacturer of the turbines themselves will be undertaken outside of the local area, the Commissioner is totally incorrect to state that their construction will also be undertaken outside the region. The proposed turbines are over 100 metres tall, and because of their size can only be constructed on-site. The Commissioner appears to have assumed, without any evidence or proper enquiry, that turbines are constructed off-site, wheeled into place in one piece, and plugged in. Nothing could be further from the truth, and had the Commissioner properly investigated the issue she would have appreciated that benefits associated with the construction of the turbines, as opposed to their manufacturer, would be felt locally.

39. The final issue of note in relation to Paragraph 38 relates to the Commissioner's approach to the 5% of the energy cost that will be given to the local Council in rates. This figure, while small as a numeric value, equates to an annual rates contribution in the region of £200,000 - £350,000. In any terms, that is a very significant contribution to the local economy. At no stage during the Hearing process did the Commissioner seek to ascertain what, in financial terms, the figure of 5% equated to."

[49] Mr Gillespie avers the Commissioner's errors led to a fundamental imbalance in her Decision:

"40. While it is accepted that any planning decision always involves balancing the weight to be given to competing factors, it is clear that the Commissioner has erroneously and improperly attached limited weight to the proposed wind farms' significant/valuable contribution to the Government's Renewable Energy targets and its clear economic benefits to the local and

> wider economy. This represents a fundamental failure in the policy assessment of the proposal against Policy RE 1 of Planning Policy Statement in 18… and the associated Ministerial Statements of 2 September 2009 and 9 August 2010… which require that such factors are to be given significant weight in the determination of planning applications a point, which is detailed further in the policy assessment affidavit of Mr Alan Farningham. Undeniably, though, the improper weighting attributed to those factors by the Commissioner has prejudiced the proper consideration of the proposed development."

Mr Gillespie's second affidavit dated 3 May 2012

[50] In relation to the assessment of wind farm proposals requiring a need for a balanced approach, Mr Gillespie avers:

> "29. It is <u>of fundamental importance</u> that the assessment of an application for renewable energy development involves a <u>demonstrably balanced</u> judgement on the part of the decision-maker between – on the one hand – the environmental gains of delivering renewable energy and reducing carbon reduction, and the project's socio-economic gains and - on the other hand - the environmental impact of the development required to deliver it.
>
> 30. This balancing exercise is mandated by planning policy RE1 of Planning Policy Statement 18: Renewable Energy. The mandating of that balancing exercise is implicit in policy RE1…
>
> It is also explicit in paragraph 4.1 of the Justification and Amplification to policy RE1…" (emphasis added)
>
> 31. Therefore, the requirement on the Planning Appeals Commission in engaging with this balancing exercise is that <u>all material issues be examined adequately and assessed on a proper evidential basis</u>. As with her decision letter, the affidavit of Commissioner Fitzsimons, does not demonstrate that anything like an adequate, evidential based examination of and engagement with relevant issues was undertaken."

[51] In paragraph 32, Mr Gillespie comments on the Commissioner's approach in her affidavit:

> "32. As a general comment, the approach taken by the Commissioner's affidavit chimes with the approach taken in her decision letter, in that it fails to engage meaningfully – and very often *at all* – with the issues at play in this challenge. I find that dismissiveness quite remarkable on the part of someone acting in a judicial or at least quasi-judicial capacity…"

[52] At paragraphs 37– 44 Mr Gillespie refers to why he believes the Commissioner displays in her affidavit a fundamental failure to grasp the nature and import of the evidence before her at the hearing:

> "37. Worryingly, the Commissioner displays in her affidavit a fundamental failure to grasp the nature and import of the evidence before her at the hearing. At Paragraph 22 of the affidavit, the Commissioner states that,
>
> *"A number of issues were not in dispute during the hearing. These included the following:*
>
> *A) Northern Ireland has a future target to achieve 40% of its energy supply from renewable sources by 2020;*
> *B) The target for renewable energy by 2012/13 is 12%; and*
> *C) At the time of the hearing the current supply from renewable sources was 8.9%".*
>
> There is no issue with this statement. However, the Commissioner is absolutely incorrect to state in (d) that:
>
> *"Both parties accepted that nobody is refused a connection to the grid".*
>
> 38. The appellants did not accept that at all. On the contrary, the Department's suggestion to that effect was vigorously contested, with the appellants arguing that there were in general significant and increasing difficulties in achieving a connection to the grid because of capacity and infrastructure problems, but that their proposed scheme could be connected within 8 - 9 months thus representing an early contribution to renewable energy targets. Indeed, the Commissioner's own decision letter records at paragraph 35 that the appellants pointed to "difficulties connecting to the national grid and with the lack of capacity within the national grid to cope with

energy produced by existing wind farms". However, and without further inquiry, the Commissioner simply took at face value the Department's position that there was no difficulty in achieving connection. The Commissioner, to properly inform herself, should have asked the Department to inquire of NIE, the body with responsibility for the determination of network connection applications, as to the application success rate for wind farm connections and what difficulties applicants for connection faced. That would not be an unusual course for a Commissioner to take. It is common practice for Commissioners faced with evidential loose ends to ask for the party able to tie up those ends to attend the hearing, if need be adjourning for that purpose. Indeed, the alternative is to leave the loose ends untied and to proceed to make the decision on the appeal on an insecure evidential foundation, which is precisely what the Commissioner did in this case.

39. I note that in Paragraph 22(d) of her affidavit the Commissioner goes on to make the interesting statement that "The debate between the parties related to the capacity of the grid and technical difficulties which some energy suppliers experienced <u>when</u> making the connection". This of course is drafted so as to imply that some energy suppliers experienced but ultimately overcame capacity and technical difficulties. That was absolutely not what was debated between the parties. Rather, the appellants contended strongly that the difficulties prevented connection, and the Department attempted to reassure the Commissioner on the point, albeit without any evidence to ground that reassurance. Indeed, why would the appellants have bothered to engage in any debate on the difficulties if as the Commissioner suggests they accepted that ultimately all developers overcame them and achieved connection? That would be an arid and pointless debate.

40. At Paragraph 23, the affidavit is correct to state that:

"....the information relied upon by me and the extent of my enquiries into the capacity of other renewable energy projects is challenged by the applicants".

There is no disagreement with this statement. The lack of a sound evidential basis to properly inform the

Commissioner's decision goes to the heart of these proceedings.

41. Bizarrely, the Commissioner goes on to state in Paragraph 23 that:

"*My findings on this issue are set out in paragraphs 35 and 37 of my decision. My findings were based upon evidence presented during the hearing by the Department. It is also my recollection (as recorded in the decision) that none of it was disputed by the applicant.*" (emphasis added).

It is wholly incorrect to state that none of the Department's evidence on this important issue was disputed. On the contrary, the appellants very strongly disputed that evidence, which – if accepted – would have entirely undermined the appellants' argument that the appeal proposal helped realise renewable energy targets. It is of grave concern to me that the Commissioner 'recollects' otherwise, and frankly I cannot conceive of how anyone listening to the debate at the hearing carefully could have formed that recollection.

42. I note in this regard that in the passage from Paragraph 23 quoted above the Commissioner says that her decision records that "none of the Department's evidence" was disputed by the applicants. This is a very curious point for the Commissioner to make, because paragraphs 35 to 37 of her decision letter demonstrate profound disagreement between the parties on the renewable energy issue, with the only suggested non-dispute being recorded in the first half of paragraph 36.

43. At Paragraph 23, the affidavit states that:

"*In Appendix 7 to its Statement of Case, the Department provided an analysis of all of the renewable energy projects currently in the planning system ... During the course of the hearing, the Department was able to provide more clarity in regard to those applications which were undetermined, granted and/or granted subject to conditions ... It identified seven projects which were moving towards compliance. This meant that had been granted planning permission subject to conditions requiring the submission of further information or the conduct of further investigations. Where the developer is actively engaging with the Department to satisfy these conditions, it is regarded as a strong indicator that the*

development will actually be constructed and come into operation ... The generating capacity of these seven projects is 105MW of electricity which is 4-5% of the government target".

44. It was this evidence that prompted the Commissioner in paragraph 36 of her decision letter to conclude that approved wind farms would produce 150MW of electricity which would contribute 4-5% of the Government's target and "if all go ahead" (emphasis added) would put it beyond the 2012 figure of 12% of energy being produced from renewable sources. There was no dispute about that point because as a purely mathematical exercise it was self-evidently correct. The first point that the appellants made strongly in response was that there could be no confidence or likelihood that those proposed wind farms would have their compliance proposals accepted and hence be able to "go ahead", because there was no evidence at all as to what those conditions required (What information had to be submitted? What investigations had to be conducted?), or as to the nature of the developer's attempts at meeting them, or as to the likelihood of those attempts proving acceptable to the Department. In short, just because the developers had made efforts to comply with the conditions did not and could not provide any basis for concluding that those efforts would be acceptable and their wind farms could "go ahead". The second point made by the appellants was that Appendix 7 says nothing about the likelihood of any approved or currently proposed wind farms being able to achieve grid connection and hence being able to contribute to renewable energy targets. As I can confirm, there was absolutely no evidence before the Commissioner that if the approved wind farms were cleared to "go ahead", they would actually be constructed, connected, and brought into operation in time to contribute towards the 2012 target."

[53] At paragraph 45 Mr Gillespie refers to evidence from DETI as a decidedly flimsy basis on which to conclude that renewable energy targets are likely to be met:

"At Appendix 23, the affidavit goes on to state,

"I also had the benefit of evidence from the Department of Enterprise, Trade and Investment, indicating that it was satisfied the 2012 target would be met… I have preferred this

evidence of likely compliance with renewable targets to that of the Applicant" (emphasis added)

The evidence from DETI consisted of one line in the email exhibited at Tab 3 to the Commissioner's affidavit: "DETI believes that Northern Ireland remains on target to meet the 12% renewable energy target by 2012" (emphasis added). That is a decidedly flimsy basis upon which to conclude that renewable energy targets are likely to be met, for the following reasons:

(i) DETI stated that it "believes" that Northern Ireland is on target, not that it is "satisfied" that Northern Ireland is on target; the Commissioner has translated a tentative statement into a statement of confidence.

(ii) Just because DETI believes something does not make it so; the planning appeal process is about testing positions, not accepting them at face value.

(iii) As the Commissioner herself acknowledges in Paragraph 37 of her decision letter, the DETI belief was only a "current estimate."

(iv) If, which may or may not be the case, the DETI belief was grounded in the renewable energy figure preceding the sentence quoted, that figure was 8.85% at December 2010, some six months before the date of the DETI email. DETI does not provide any evidence of how the ground between 8.85% and 12% would be made up by 2012, or of how likely that is. It provides zero evidence of the sort of marked acceleration of renewable energy generation required to achieve that target in such a short time. It provides zero evidence of any acceleration in renewable energy generation since December 2010.

(v) The DETI belief might very well have proved ungrounded and unreasonable if the Commissioner had requested that DETI attend the appeal hearing to explain its position and the evidential basis underlying it, and had herself tested same. She chose not to do so.

(vi) Because the Commissioner chose not to invite DETI to explain its position and the evidential basis underlying it, the appellants had no opportunity to test this sliver of

> evidence to which the Commissioner attached such importance."

[54] Mr Gillespie goes on to state there was no credible evidence before the Commissioner on the issue of renewable energy targets:

> "46. On the basis of the aforementioned, at Paragraph 24 the affidavit states:
>
> *'I believe that my conclusion on this issue was appropriate and that I had sufficient credible evidence before me to support it without the need for further enquiry.'*
>
> There was no credible evidence before the Commissioner. That no adequate inquiry was undertaken in regard to information that was taken simply at face value remains fundamentally at odds with the Commission's own guidance on this matter which requires that "all critical issues are examined adequately" (paragraph 23 of the PAC Guidance at KG2 Tab 1). Moreover, I believe that it is fundamentally at odds with the duty of inquiry placed on Commissioners conducting inquisitorial informal appeal hearings of this type. Put simply, the Commissioner did not conduct anything like the rigorous examination of this difficult and important issue essential to its determination."

[55] In paragraph 47, Mr Gillespie refers to six "wholly unwarranted" assumptions reached by the Commissioner:

> "47…in relation to the issue of attainment of targets, the Commissioner reached a total of six wholly unwarranted assumptions and relied on those assumptions to downplay the importance of the Applicants proposal would make to those targets…the Commissioner has not so much as taken the assumptions under her notice, let alone sought to demonstrate that they were safe assumptions to reach…"

[56] In paragraphs 48 – 53, Mr Gillespie refers in detail to the six assumptions he believes were made by the Commissioner in her Decision and why he believed these assumptions were unsafe:

> "48. <u>The first assumption</u> (as detailed at Paragraph 35 of the decision letter) was that she could properly give lesser weight to the NIE confirmation that a grid connection for

the Applicant's scheme was obtainable (distinguishing it from other proposals where a connection was not obtainable) so that the proposal could make an early contribution to renewable energy targets, because 'they have not told me that there is a wind energy company committed to the appeal site.'

This assumption is unsafe because:

(i) As I confirm, there was absolutely no evidence before the Commissioner to even suggest that a third party was needed to act as an intermediary between the Applicants and the grid operator; the Commissioner appears simply to have assumed that an intermediary must surely be required.

(ii) Had the Commissioner investigated the point, she would have understood that, as I confirm, there was no such requirement and that the Appellant's could develop the site themselves and sell the electricity direct to the grid.

(iii) Therefore, the Commissioner seized upon a profound misapprehension, without any evidential basis, and without inquiring as to the facts on the point.

I not that in her affidavit the Commissioner has chosen entirely to ignore the arguments on this assumption as set out in the Applicants' response to the Respondent's submission.

49. The second assumption (as detailed at Paragraph 35 of the decision letter) was that she could properly attach lesser weight to the early contribution the proposal would make to the 2012 renewable energy target because it was unlikely that the turbines would have to be turned off due to producing excessive electricity.

This assumption is unsafe because:

(i) It is utterly illogical.

(ii) As I pointed out at paragraph 30 of my first affidavit, the fact that turbines will be unlikely to generate excessive electricity does not mean that they will not make a valuable contribution to renewable energy targets. Plainly a valuable contribution to renewable energy

targets can be delivered up to the point where they have to be turned off because of over-production and immediately once they are switched on again.

I note that in her affidavit the Commissioner has chosen entirely to ignore the arguments on this assumption as set out in the Applicants' response to the Respondent's submission.

50. The third assumption (as detailed at Paragraphs 36 and 37 of the decision letter) was that she could properly dismiss the Applicant's argument that the 2012 target for delivery of renewable energy into the grid was unlikely to be met given difficulties connecting to the grid and capacity problems because the Department was dealing with an unquantified number of wind farm schemes where the developer had approached DETI with proposed compliance measures aimed at securing a connection to the grid.

This assumption is unsafe because there was a clear absence of both evidence and demonstrable inquiry as to:

(i) what these proposed compliance measures might entail;

(ii) whether they would be accepted by DETI, and

(ii) most importantly, whether acceptance of those compliance measures, construction and connection would happen in time to meet the 2012 target.

Undoubtedly, the 'movement towards compliance' will delay the construction phase and ultimately any operational start on site by a period potentially between 3 – 6 months or longer. As a result, the attribution of the 'approved' megawatts of this (or these) projects cannot be relied upon to conclude that the 2012 target would likely be reached. To suggest otherwise is clearly an unsupported leap of faith by the Commissioner.

The Commissioner does deal with the broad issue of compliance in Paragraph 23 of her affidavit, but notably fails to engage with the specific arguments on this assumption as set out in the Applicants' response to the Respondent's submission. Presumably, she has thought

about those arguments but finds herself unable to say anything useful in response.

51. The fourth assumption (as detailed at Paragraph 36 of the decision letter) was that lesser weight could properly be given to the contribution that would be made by the Applicants' proposal to the 2020 renewable energy target because the target was 'someway in the future' and there were 'plans' to upgrade the grid that would overcome the problems with connection and capacity that the Applicants said would hinder the 2020 target being met.

This assumption is unsafe because:

(i) As I can confirm, there was simply no evidential basis to justify such a view.

(ii) 2020 is only 9 years into the future, and for the 40% target to be met by then the amount of energy being generated from renewable sources will have to increase more than four-fold from the 8.9% of current electricity generation from renewable sources. As I can confirm, there was nothing before the Commission to suggest that such a four-fold increase was anywhere near achievable in the next 9 years.

(iii) During the hearing, the Commissioner heard uncontested evidence that the plans for improvement of the infrastructure (the North-South interconnector) were contentious and require planning permission, so that their realisation could not be assumed. History since has confirmed the accuracy of that evidence. The public inquiry into the NIE planning application for a substation at Turleen, Moy, County Tyrone and a 400-kilovolt overhead line from there to Crossreagh and Crossbane in County Armagh was adjourned on 20th March 2012 because of issues related to the advertisement of the proposal. It is not known at what date the Inquiry may be reconvened. What is known is that the objectors have lodged a leave application seeking to challenge various aspects of the proposal and process; indeed, the planning application for the Republic of Ireland limb of the interconnector was withdrawn some time ago and has not been re-submitted.

I note that in her affidavit the Commissioner has chosen entirely to ignore the arguments on this assumption as set out in the Applicants' response to the Respondent's submissions on leave, focussing exclusively on the 2012 target.

52. The fifth assumption (as detailed at Paragraphs 36 and 37 of the decision letter) was what the Commissioner accepted was a 'valuable' contribution by the proposal to renewable energy targets was not a 'significant' contribution.

This assumption is unsafe because the two statements are inherently contradictory and logically inconsistent. A valuable contribution to targets cannot, by its ordinary meaning, be insignificant – there must be significance in value.

I note that the Commissioner has chosen entirely to ignore the arguments on this assumption as set out in the Applicants' response to the respondent's submission.

53. The final assumption made (as detailed at Paragraph 37 of the decision letter) was that the 10.5 MegaWatts of electricity produced by the appeal proposal would not make a significant contribution to the 2012 target of 12% of electricity coming from renewable sources. The Commissioner adds the throwaway comment 'or indeed the 2020 one.'

The assumption is unsafe because:

(i) The Commissioner accepted the uncontested evidence that renewable energy generation currently represents 8.9% of the total generated, so that to reach the 2012 target of 12% from renewable sources a further 3.1% is required within a year.

(ii) At Paragraph 36 of the decision letter, the Commissioner accepted that the proposal would generate a further 0.33%.

(iii) That further 0.33% equates to approximately 1/10th of the 3.1% increase required to meet the 2012 target.

(iv) An early 10% contribution to the 2012 target cannot rationally be assumed to be insignificant.

(v) How could it be that a contribution of 10.5 MW would not make a significant contribution to the 2020 target, given how close that target is and the ground that needs to be made up in that tight time frame? Only by making the fourth assumption.

I note that in her affidavit the Commissioner has chosen entirely to ignore the arguments on this assumption as set out in the Applicants' response to the Respondent's submission."

[57] In paragraph 55, Mr Gillespie makes reference to his concern that if the Commissioner's approach is adopted in future cases, it will be extremely difficult for appellants to win wind farm appeals and that the aims and objectives of Planning Policy Statement 18 will be severely prejudiced:

> "55. Looking at the matter in the round, I have to say I am deeply troubled by the Commissioner's failure properly to engage with the evidence and arguments in her decision letter ... If this approach is adopted by Commissioners in future cases I believe that it will be extremely difficult for appellants to win wind farm appeals and that the laudable renewable energy aims and objectives of Planning Policy Statement 18 will be severely prejudiced".

Mr Farningham's first affidavit dated 18 October 2011

[58] Under the heading of "Renewable Energy Targets" Mr Farningham avers:

> "25. With respect to renewable energy targets, the Commissioner in Paragraph 35 of her decision letter, although failing to mention that there is no policy need test, correctly states that the 12% and 40% target figures for 2012 and 2020 respectively, are minimum targets and not caps. Her conclusions in Paragraphs 36 and 37 that the 2012 target 'will be achieved/is likely to be met' respectively, are at odds with this in that having first of all stated they are minimum targets and not caps, she then appears to treat them in definitive terms. This is inconsistent with the approach taken by other Commissioners in the planning appeals previously referred to.

26. Furthermore, in respect of extant approvals, it would appear irrational to give any significant weight, as she does in Paragraph 36, to evidence that operators have 'approached the Department with compliance measures' to ground an implicit finding that they are likely to be delivered within the foreseeable future. Similarly, it would also be irrational for the Commissioner in Paragraph 36 to give weight to future plans to improve infrastructure without any clear evidence of delivery within the next 8 years. Furthermore, there would require to be a reasonable evidential basis for the Commissioner being 'satisfied' that the currently approved wind farms will meet the 2012 target.

27. There are further irrational, contradictory differences to be found in the Commissioner's conclusions whereby in Paragraph 36 she accepts that the proposal will make a 'valuable' contribution to the Government targets, while in Paragraph 37 she says that she is not persuaded that the 10.5MW of electricity generated by the appeal proposal would make a 'significant' contribution to either the 2012 or 2020 targets.

28. In dealing with the renewable energy benefits of the proposal, the Commissioner appears in practical terms to have left out of account the weighting direction given in Policy RE1. Policy RE1 says that:

"The wider environmental, economic and social benefits of all proposals for renewable energy projects are material considerations that will be given significant weight in determining whether planning permission should be granted' (emphasis added).

While the Commissioner does recite that direction in Paragraph 5 of the Decision letter, she certainly does not give significant weight to the renewable energy benefits of the proposal, either in isolation or cumulatively with its other benefits."

[59] In paragraphs 29 and 30, Mr Farningham sets out his criticisms of the Commissioner's approach to considering economic considerations:

"Economic considerations

29. This flawed approach to the proper application of policy continues into Paragraph 38 under 'Economic Considerations' which wrongly only focuses on specific local benefits without giving consideration to the wider environmental, economic and social benefits of the proposals as she is required to do under Policy RE1 of PPS18. In particular, as detailed in the Environmental Statement and Non-Technical Summary, there is a lack of reference to the £3.5 million pounds of investment and that the wind farm would supply the average domestic electricity for approximately 6,000 homes and contribute to saving gas emissions of Carbon Dioxide (CO2) and other greenhouse gases into the atmosphere including acid rain gases. Furthermore, there is no reference to the benefits of reducing dependence on imported fuel sources or the depletion of UK fossil fuel reserves… This approach is totally at odds with the policy test in Policy RE1 of PPS18 whereby, even in circumstances where there are unacceptable adverse effects, such effects can be outweighed by the local and wider environmental, economic and social benefits of the development.

30. In this respect, Policy RE1 of PPS18, as reinforced by the Ministerial Statements on 02 September 2009 and 09 August 2010 makes clear that full account tis to be taken of the wider environmental, economic and social benefits for projects and that these will be given significant weight as material considerations in the determination of planning applications. Furthermore, in his August 2010 Statement, in providing assurances that the guidance will not give undue weight to landscape over other issues, the Minister gives weight to the statement in Paragraph 4.15 of PPS18 that although the Supplementary Planning Guidance is to be taken into account in assessing all wind turbine proposals, it is not intended to be prescriptive."

[60] In paragraph 31, Mr Farningham concludes, as follows:

"31. Her general conclusions in Paragraph 41 of her Decision letter aside, there is no evidence that the Commissioner, in accordance with the correct application of Policy RE1 of PPS 18 gave collective consideration to the cumulative impact of the wider environmental, economic and social benefits associated with the proposals."

The Commissioner's affidavit dated 22 February 2012

[61] At paragraph 21 of her affidavit, the Commissioner stated she did not propose to expand on her reasoning:

> "21. I have set out my consideration of this issue in some detail in my written decision. It is therefore not proposed to expand upon my reasoning…"

[62] The Commissioner set out a number of issues which were not in dispute during the hearing, as follows:

> "22. A number of issues were not in dispute during the hearing. These included the following:
>
> (a) Northern Ireland has a future target to achieve 40% of its energy supply from renewable sources by 2020.
>
> (b) The target for renewable energy by 2012/13 is 12%.
>
> (c) At the time of the hearing the current energy supply from renewable sources was 8.9%.
>
> (d) Bothe parties accepted that nobody is refused a connection to the national grid. The debate between the parties related to the capacity of the grid and technical difficulties which some energy suppliers experienced when making the connection."

[63] At paragraph 23, the Commissioner refers to the applicants' challenging the information relied upon by her and the extent of her enquiries into the capacity of other renewable energy projects currently under development. She states her findings are in paragraphs 35 and 37 of her Decision and that they were based upon evidence presented during the hearing by the Department. She then refers to the information provided by the Department and concludes in paragraph 24 she had sufficient credible information before her:

> "23… In Appendix 7 to its statement of case, the Department provided an analysis of all of the renewable energy projects currently in the planning system within Northern Ireland. These are set out clearly in a table which also identifies the maximum generating capacity of each of those proposed projects. The document contained within Appendix 7 did not distinguish between applications which had been granted, those which were undetermined and those which has permission, subject to

> conditions which were in the course of achieving compliance. During the course of the hearing, the Department was able to provide more clarity on these distinctions. In particular, it identified seven projects which were described as "moving towards compliance." This meant that they had been granted permission subject to conditions requiring the submission of further information or the conduct of further investigations. Where the developer is actively engaging with the Department to satisfy these conditions, it is regarded as a strong indicator that the development will actually be constructed and come into operation. The Department was also able to identify the generating capacity of these seven projects. At paragraph 36 of my decision I identified this figure to be 105MW of electricity, which equates to 4% - 5% of the government's target. I also had the benefit of evidence from the Department of Enterprise, Trade and Investment, indicating that it was satisfied the 2012 target for renewables would be met. This was presented in the form of an email from DETI… I preferred this evidence of likely compliance with renewable targets to that of the Applicant. I have set out my reasoning on this issue more fully in my decision.
>
> 24. I believe that my conclusion on this issue was appropriate and that I had sufficient credible evidence before me to support it, without the need for further enquiry."

Applicants' submissions

[64] The applicants' repeatedly asserted that the reasoning in the Commissioner's Decision was inadequate, did not 'add up' and she failed to address the detailed criticisms in her affidavit.

[65] By reference to paragraphs 2.6, 2.8 and 2.10 of PPS 18 the applicants stress that Northern Ireland's renewable energy targets are challenging; the 2020 UK-wide targets are legally binding; meeting such targets will be heavily reliant on wind energy projects coming into operation; the ability of a renewable energy proposal to make an early and actual contribution towards the targets is a material planning consideration favouring its approval; and renewable energy schemes must be connected to the grid to contribute towards the targets. The applicants say they argued before the Commissioner that their proposal would make an early and actual contribution towards the targets and that was a material planning consideration to be weighed against adverse environmental impact.

[66] Further, the applicants submit, in deciding not to give 'significant weight' to the proposal's ability to make an early and actual contribution to the targets, and in, therefore, deciding that the adverse environmental impacts required the refusal of planning permission, the Commissioner relied on a total of six unsafe assumptions (set out in paragraphs 48 – 53 of Mr Gillespie's second affidavit). It is asserted that reliance on these unsafe assumptions resulted in skewing the balancing exercise whereby the adverse environmental impact tipped the scales against the grant of planning permission.

[67] The applicants refer to paragraph 22 of Mr Gillespie's first affidavit and paragraph 26 of Mr Farningham's first affidavit and assert the assumptions made by the Commissioner were all made in the absence of any objectively robust evidence or demonstrable proper inquiry.

[68] The applicants, also, refer to paragraphs 32 and 47 of Mr Gillespie's second affidavit and submit the Commissioner failed to engage with the applicants' arguments regarding the assumptions. Further, it is asserted the Commissioner failed to give adequate reasons for relying on each of the below assumptions.

(i) The first assumption – lesser weight could be given to confirmation that grid connection for the applicants' scheme was obtainable for early contribution to renewable energy targets because the applicants did not inform the Commissioner there was a wind energy company committed to the appeal site (see paragraphs 35 and 36 of the Decision, paragraphs 26 and 27 of Mr Gillespie's first affidavit and paragraph 48 of Mr Gillespie's second affidavit)

[69] In summary, the applicants say there was no evidential basis for this assumption and had the Commissioner investigated the point or inquired as to the facts she would have discovered the applicants did not require an intermediary between them and the grid operator. Further, it is argued the Commissioner's finding in paragraph 36 of her Decision that the proposal would make a valuable contribution to renewable energy targets did not mean she did not improperly diminish the contribution it would make to the 2012 target by reference to the absence of any commitment from a wind energy company.

(ii) The second assumption – lesser weight could be attached to the early contribution the proposal would make to the 2012 target as it was unlikely the turbines would have to be turned off due to producing excessive electricity (see paragraph 35 of the Decision, paragraph 30 of Mr Gillespie's first affidavit and paragraph 49 of Mr Gillespie's second affidavit)

[70] It is argued this assumption was illogical, irrational and unsupported by any evidence. Further, the applicants contend the fact that turbines will be unlikely to generate excessive electricity does not mean they will not make a valuable contribution to renewable energy targets.

(iii) The third assumption – the applicants' argument that the 2012 target was unlikely to be met given difficulties connecting to the grid and capacity problems could be dismissed as the Department was dealing with an unquantified number of wind farm schemes where the developer had approached the Department with proposed compliance measures aimed at securing a connection to the grid (see paragraphs 35, 36 and 37 of the Decision, paragraphs 25 and 26 of Mr Gillespie's first affidavit and paragraphs 37 - 44 and 50 of Mr Gillespie's second affidavit, paragraphs 22 and 23 of Commissioner's affidavit, paragraph 25 of Mr Farningham's first affidavit and paragraph 14 and 15 of Mr Farningham's third affidavit)

[71] It is contended there was an absence of evidence and inquiry into what the proposed compliance measures might entail, whether they would be accepted by DETI and whether acceptance of the measures, construction and connection would happen in time to meet the 2012 target. The applicants assert there was, in fact, no evidence at all that the schemes were in the process of "satisfying" the conditions on their planning permissions, merely that an approach had been made with proposals to that end.

[72] It is argued the Commissioners identification that the 12% and 40% figures for 2012 and 2020 respectively are minimum targets and not caps is at odds with the conclusion in paragraphs 36 and 37 of her Decision that the 2012 target 'will be achieved/is likely to be achieved'. The applicants say this suggested the Commissioner was treating a minimum target as a definitive cap. The applicants assert this is irrational; a misinterpretation; and inconsistent with other Commission decisions.

(iv) The fourth assumption – lesser weight could be given to the contribution made by the applicants' proposal to the 2020 target because the target was some way in the future and there were plans to upgrade the grid that would overcome problems with connection and capacity which the applicants said would hinder the 2020 target being met (see paragraph 36 of the Decision and paragraph 51 of Mr Gillespie's second affidavit)

[73] It is asserted the Commissioner appears to have taken the view the 2020 target was going to be met notwithstanding the infrastructural problems advanced by the applicants. The applicants assert there was no evidential basis for this assumption; there was nothing before the Commissioner to suggest a four-fold increase of the amount of energy generated from renewable sources was achievable in the next 9 years; and there was uncontested evidence that plans for improvements to the infrastructure were contentious and required planning permission so that their realisation could not be assumed.

(v) The fifth assumption – what the Commissioner accepted was a 'valuable' contribution by the proposal to the targets was not a 'significant' contribution (see paragraphs 36 and 37 of the Decision and paragraph 52 of Mr Gillespie's second affidavit)

[74] It is argued these two statements are inherently contradictory, logically inconsistent and do not 'add up'. It is submitted the Commissioner could only properly dismiss this contribution as insignificant if she had a sound evidential basis for concluding the targets were likely to be met without the proposal.

(vi) The sixth assumption – the 10.5MW of electricity produced by the proposal would not make a significant contribution to the 2012 target of 12% of electricity coming from renewable sources (or to the 2020 target) (see paragraphs 36 and 37 of the Decision and paragraph 53 of Mr Gillespie's second affidavit)

[75] The applicants argue an early 10% contribution to the 2012 target cannot rationally be assumed to be insignificant. On the basis of one line in the DETI email the Commissioner said the evidence indicated DETI was *satisfied* the 2012 target would be met (see paragraphs 35 and 37 of the Decision, paragraphs 23 and 24 of the Commissioner's affidavit and paragraphs 45 and 46 of Mr Gillespie's second affidavit).

[76] The applicants refer to paragraph 45 of Mr Gillespie's second affidavit which sets out reasons why the DETI 'evidence' was a 'decidedly flimsy basis' upon which to conclude renewable energy targets were likely to be met. In essence, it is argued the DETI expressed a belief which was only a current estimate which was not tested by the Commissioner. The applicants assert it is the Commissioner's role to drill into the DETI's assertions and test their robustness; not to accept them at face value.

[77] It is asserted the Commissioner failed to give adequate reasons for finding that DETI was 'confident that the 12% target will be met in 2012'.

The economic benefits of the proposal (see paragraph 38 of the Decision, section 6.10.1 of the Environmental Statement, paragraphs 35 – 40 of Mr Gillespie's first affidavit and paragraph 17 of Mr Farningham's third affidavit)

[78] It is argued the Commissioner's findings at paragraph 38 of her Decision are irrational and/or without evidential foundation because:

(i) The Environmental Assessment is an appropriately detailed indication of the many benefits secured by the proposal.

(ii) Only two of the nine benefits favour the landowners (where they are duplicate benefits to the landowners in terms of land rents) and the rest of the more substantial benefits accrue to the community in general.

(iii) An economic investment of £3.5 million (at 2004 prices) to the local economy cannot rationally be described as 'slight.' The applicants assert, with inflation, the local spend would now be greater and in a context of huge socio-economic decline. It is submitted there was no evidence the Commissioner

understood £3.5 million would be spent locally and her fixation on the groundless notion that the construction of the turbines would take place outside the region (referred to in (iv) below) confirms this. The applicants say this point alone is enough to undermine the legality of the Decision because the Commissioner's failure to grasp the fact that £3.5 million would be spent locally inevitably fed into and corrupted the balancing exercise between environmental costs and the benefits the proposal would bring - a balancing exercise which lay at the heart of her decision.

(iv) In light of the Environmental Statement, the Commissioner's statement that many benefits of such a proposal will be outside the region is untrue. Without any evidence or proper enquiry, the Commissioner incorrectly assumed the construction of the turbines will be outside the region.

(v) The 5% of the energy cost that will be given to the local council in rates equates to an annual rates contribution in the region of £200 000 - £350 000 which is a very significant contribution to the local economy. The Commissioner did not seek to ascertain what this 5% equated to in financial terms.

[79] The applicants argue the Commissioner did not take into account the contribution to the targets by, and the economic benefits of, the proposal. Therefore, it is asserted the Commissioner failed to take into account relevant considerations and her Decision was irrational. In the alternative, in reliance on Re Belfast Chamber of Trade and Commerce and Ors' Application (unreported, Coghlin J, 1 September 2000), the applicants argue the weight given by the Commissioner to these considerations and/or to the applicants' evidence on these issues had no sound evidential grounding and her findings were irrational.

[80] Further, or in the alternative, in reliance on R (Alconbury Developments Ltd) –v- Secretary of State for the Environment, Transport and the Regions [2003] 2 AC 295, the applicants contend the Commissioner grounded her decision on a mistaken grasp of the facts on these key issues and, as such, the decision was irrational.

[81] In reliance on Re Bow Street Mall Ltd and Ors' Application (unreported, Girvan J, 10 May 2006), the applicants submit the Commissioner failed to take reasonable care to acquaint herself with the relevant facts and/or make proper inquiries and, as such, the decision was irrational.

[82] The applicants argue a planning decision involves the proper balancing of competing factors and the Commissioner's errors have led to a fundamental imbalance in her Decision.

[83] It is asserted the Commissioner failed to give adequate reasons for finding that economic benefits of the Proposal did not outweigh the adverse impacts.

[84] In addition to their consolidated skeleton argument, the applicants submitted a supplemental skeleton argument dated 7 June 2012 in relation to the correct approach to Policy RE1 of PPS 18. In paragraphs 106 – 110 of the applicants' consolidated skeleton argument, reference is made to various cases which deal with the interpretation and/or application of policy.

[85] The applicants state, in the present case, the relevant policy context is contained in Policy RE1 of Planning Policy Statement 18: Renewable Energy, Best Practice Guidance to PPS 18, Supplementary Planning Guidance to Accompany PPS 18 (Wind Energy Development in Northern Ireland's Landscapes) and the relevant Ministerial Statements on wind energy development released on 2 September 2009 and 9 August 2010.

[86] The applicants assert the Best Practice Guidance should be read in conjunction with PPS 18 and it is supplementary planning guidance intended to assist decision-takers in applying PPS 18. It is argued that reading paragraph 1.3.4 of the Best Practice Guidance in conjunction with Policy RE1 of PPS 18 (specifically paragraph 4.1 of the explanatory text to Policy RE1) requires that unacceptable detrimental effect must be weighed in the balance against the local and wider environmental, economic and social benefits of the proposal and, if those benefits outweigh the detriment, the policy is clear that the Department will support the proposal.

[87] The applicants refer to paragraphs 29 - 31 of Mr Gillespie's second affidavit. It is submitted, Planning Policy RE1 of PPS 18 and paragraph 4.1 of the Justification to Policy RE1 mandate, in an assessment of an application for renewable energy development, it is necessary to balance, on the one hand, the environmental and socio-economic gains, against, on the other hand, the environmental impact of the development. It is asserted the approach of Policy RE1 reflects the more general approach within the planning system towards planning gains, as endorsed by the Courts, except that it specifically directs the decision-taker to give "significant weight" to certain categories of gains ("the wider environmental, economic and social benefits of all proposals for renewable energy projects").

[88] The applicants contend it would defeat the aim of paragraph 3.1 of PPS 18 for an interpretation to be given to Policy RE1 which elevated adverse environmental impact over the benefits of renewable energy, and/or which failed to recognise the special weight Policy RE1 uniquely directs the decision-taker to give to those benefits.

[89] The applicants refer to paragraph 31 of Mr Gillespie's second affidavit. It is contended the balancing exercise requires that all material issues be examined adequately and assessed on a proper evidential basis. The applicants say the Commissioner's decision and affidavit do not demonstrate that she met such requirements.

[90] The applicants argue a sequential or linear approach should be taken, as follows:

> (i) The starting point is that the Department will be supportive of renewable energy proposals. Therefore, there is a presumption in favour of renewable energy development.
>
> (ii) The next consideration is whether the proposal would have 'unacceptable adverse effects'. As wind farm proposals are all likely to have some degree of 'adverse effects', the question at this stage is whether those adverse effects are 'unacceptable' when viewed in isolation. It is only if unacceptable adverse impacts arise from a proposal that the decision-taker goes on to the next step, otherwise, the presumption in favour of renewable planning proposals prevails and planning permission should be granted without a need to go on to the third step.
>
> (iii) If adverse effects are deemed to be unacceptable the decision-taker must go on to weigh these 'unacceptable adverse effects' in the scale against 'the local and wider environmental, economic and social benefits of the development', giving the benefits 'significant weight'. All such benefits should be put in the balance rather than weighing them individually against the 'unacceptable adverse effects'. It is only if, on the carrying out of this weighing exercise, that the 'unacceptable adverse effects' outweigh the 'significant weight' required to be given to the benefits that the presumption in favour of development is ultimately displaced and planning permission should (in the absence of some other material consideration weighing in favour of the proposal) be refused.

[91] The applicants argue the key advantage of this sequential or linear approach is that it allows for a clear progression of reasoning, and hence logical robustness and transparency of reasoning.

[92] The applicants also suggest the alternative approach under which the decision taker should consider the question of acceptability of adverse impacts and the matters which bear on this, being:

> (i) The nature and degree of the adverse impact.
>
> (ii) The nature and degree of the positive impact.
>
> (iii) The weighting direction given by the policy to that positive impact.

[93] It is contended, under this alternative approach to Policy RE1, the question of whether an adverse impact is 'unacceptable' is dependent on a balancing exercise which, taken in the round, weighs adverse impacts against the 'the local and wider environmental, economic and social benefits of the development', and then, as

directed by the policy, gives 'significant weight' to those benefits. The applicants state the result of following the sequential/linear approach or the alternative approach will be the same.

[94] It is contended the Commissioner found the environmental impacts unacceptable even before she factored in the benefits of the scheme. The applicants say the Commissioner acknowledged the weighting direction but then she did not give significant weight to the wider environmental, economic and social benefits of the proposal.

[95] It is submitted the Commissioner fundamentally misapplied and/or misunderstood the appropriate planning policy and related guidance and advice.

Misinterpretation and mechanistic application of Policy RE1 of PPS 18, treating the factors set out as mandatory tests which must be satisfied before the proposal could be approved (see paragraph 18 of Mr Farningham's first affidavit and paragraph 7 of the Decision)

[96] Primarily, in reliance on Re Belfast Chamber of Trade and Commerce and Ors' Application [2001] NICA 6, it is contended the factors set out in Policy RE1 are not 'criteria' but are there to guide the decision-taker in reaching a properly balanced decision and must not be applied mechanistically to produce a refusal.

[97] The applicants say Policy RE1 of PPS 18 is very similar to paragraph 39 of PPS 5. They refer to the first instance decision of Coghlin J in Re Belfast Chamber of Trade and Commerce and Ors' Application in which he found paragraph 39 of PPS 5 did not set up a cumulative set of tests, all of which had to be satisfied before the proposal before him could be granted permission. Given the very close similarity between paragraph 39 of PPS 5 and Policy RE1 of PPS 18, it is argued the same principle must apply to Policy RE1 of PPS 18.

[98] Therefore, it is argued the factors in Policy RE1 are to be weighed in the balance with all other material considerations and whilst Policy RE1 requires that all of the factors be considered by the planning decision-maker, not all of them need necessarily be satisfied in order for a planning proposal to be approved.

Failure to give significant weight to the wider environmental, economic and social benefits of the proposal, as required by Policy RE1 of PPS18 and as reiterated by the Ministerial Statements

A. Failure to give significant weight to the wider environmental, economic and social benefits of the proposal, as directed by Policy RE1 (see paragraphs 5, 14, 35 – 38, and 41 of the Decision and paragraphs 28, 30 and 31 of Mr Farningham's first affidavit)

[99] It is asserted that the content and tenor of paragraph 38 of the Decision is to treat the benefits as insignificant and easily dismissed. Further, the applicants' state paragraph 38 of the Decision makes no mention of the wider environmental benefits of

the proposal and there is no evidence the Commissioner applied her mind to those benefits and to what weight she ought to give them. Therefore, the applicants submit the Commissioner failed to give 'significant weight' to the wider environmental and economic benefits of the scheme as directed in Policy RE1 so that the balance between benefit and detriment was improperly skewed against the proposal. Further, it is asserted the Commissioner failed to explain why she did not follow the policy direction to give significant weight to the benefits of the proposal.

[100] The applicants submit paragraph 41 of the Decision is an overall conclusion of the reasoning that precedes it, which approached each benefit in turn only to dismiss each, in turn, as insignificant. It is argued the Commissioner did not add the significance of the renewable energy benefits to the socio-economic benefits and ask herself how, in total, they weighed against the adverse environmental impact, applying the weighting direction.

[101] It is asserted the Commissioner failed to give adequate reasons for the weighting she gave to the 'wider environmental, economic and social benefits of the proposal' and failure to give reasons for how she balanced these against the adverse visual amenity impacts that she found.

B. The Ministerial Statements dated 02.09.09 and 09.08.10 (See paragraphs 19, 31 and 32 of Mr Farningham's first affidavit, paragraph 14 of the Decision, paragraph 4.15 of PPS 18)

[102] The applicants contend these Ministerial Statements reinforce that significant weight should be given to the wider environmental, economic and social benefits of all proposals for renewable energy projects as material considerations in determining whether planning permission should be granted and the lesser weight is to be given to Supplementary Planning Guidance in respect of landscape issues.

[103] It is submitted the Commissioner failed to make any reference to these Ministerial Statements in paragraph 14 of her Decision and there is no evidence she took into account the emphasis in the Statements on the significant weight to be given to the wider environmental, economic and social benefits of all renewable energy proposals and on the lesser weight to be given to the non-prescriptive Supplementary Planning Guidance.

[104] It is asserted the Commissioner failed to give adequate reasons for not taking into account or making reference to the Ministerial Statements of 02.09.09 and 09.08.10.

Failure to treat as a material consideration comments by the Minister for the Environment on the unduly conservative application of renewable energy policy and guidance to single turbine proposals at the Giant's Causeway (see paragraph 14 of Decision and paragraph 20 of Mr Farningham's first affidavit)

[105] It is submitted the current Minister's comments to the effect that his own officials were obstructing good green energy proposals by an overly conservative

application of policy and guidance were not treated as material considerations by the Commissioner in the determination of the appeal before her.

[106] The applicants state Policy RE1 applies to all forms of wind energy, regardless of how many turbines are proposed or where they are proposed, and regardless of the status of its location. Therefore, it is submitted the Commissioner ought to have treated the Minister's comments as a material consideration in a context of a wind farm proposal when assessing the weight to be given to the concerns expressed by the Department's officials in the context of PPS 18 and related guidance.

Inconsistently with PPS 18 and the Ministerial Speech of 2nd September 2009, and with subsequent Commission decisions, treatment of wind turbines as "industrial" features alien to Areas of Outstanding Natural Beauty, thereby misunderstanding and/or misapplying and/or failing to give any or proper weight to the policy direction favouring wind development in AONBs (see paragraphs 23 – 25 of the Decision, paragraphs 15 and 22 of Mr Farningham's first affidavit and the Ministerial Statement dated 2 September 2009)

[107] It is contended the Commissioner's approach is inconsistent with the Planning Appeals Commission's acceptance of precisely such development within AONBs articulated in its decisions in planning appeal reference numbers 2009/A0037 and 2009/A0363 and is at odds with the intention of PPS 18 to 'open up' AONBs to such development.

[108] The applicants submit the Decision had a negative tone in relation to wind farms and it contained language favoured by objectors.

[109] Further, it is argued the Commissioner misunderstood and/or misapplied and/or failed to give any or any proper weight to the Ministerial Speech dated 2 September 2009.

[110] It is asserted the Commissioner failed to give adequate reasons for treating wind turbines as 'industrial' features and not giving proper weight to the policy direction favouring wind farms in AONBs.

Rejection of the 25-year lifespan of turbines as a factor sufficient to mitigate the environmental impact of the proposal, inconsistently with the Respondent's previous approach in AONBs and elsewhere (see paragraph 27 of the Decision, paragraph 24 of Mr Farningham's first affidavit)

[111] The applicants submit the Commissioner departed from the Planning Appeals Commission's general approach on this issue in previous planning appeal decisions both within and outside AONBs and she did not provide an explanation for doing so.

[112] It is asserted the Commissioner failed to give adequate reasons for rejecting the 25 year lifespan of turbines as a factor sufficient to mitigate the environmental impact

of the proposal and failure to give adequate reasons for departure from Respondent's approach in previous cases.

Respondent's submissions

[113] The respondent says the Commissioner has given a detailed written decision which sets out her reasoning and the legality of her decision-making should be judged by reference to that written decision.

[114] It is contended, when properly construed, the applicants' challenge to the Commissioner's Decision relates to her inquiry into the benefits of the proposal together with the weight, which she afforded to them in conducting the balancing exercise. In substance, the respondent says, this is a challenge to her planning judgment and may only be made on *Wednesbury* grounds.

[115] The respondent asserts the applicants' approach to interpreting the Commissioner's Decision was 'highly analytical'. Although not a principle of planning law, reference is made to the words of Bingham MR in Clarke Homes v Secretary of State for the Environment (1993) 66 P & CR 263:

> "… I hope I am not over-simplifying unduly by suggesting that 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 exegetical sophistication."

Interpretation of the policy

[116] The respondent submits the five requirements in Policy RE1 are cumulative requirements and where the proposal is found to result in an unacceptable adverse impact upon any of those interests, the policy requires the proposal should not be permitted.

[117] The respondent states, on the face of the policy, a proposal should be refused if 'unacceptable adverse impacts' are identified. It is asserted that, theoretically, this may be difficult to reconcile with the policy's requirement to take into account and afford 'significant weight' to wider environmental, economic and social benefits. The respondent submits these two competing considerations are to be reconciled through the interpretation of the word 'unacceptable'. The respondent says the proposal should be refused where unacceptable adverse impacts upon visual amenity (or biodiversity interests etc.) are identified which are not outweighed by any wider environmental, economic and social benefits the proposal might deliver.

[118] In practical terms, the respondent asserts the threshold of '*unacceptability*' represents the "tipping point" between the adverse effects and broader benefits of any particular development proposal, as assessed by the Department. The respondent adds that the policy attempts to influence the planning balance by providing that significant weight should be given to the benefits, however, once unacceptable benefits are properly identified, the permissive thrust of the policy must yield and the proposal may properly be refused. The respondent refers to paragraphs 4.1 and 4.13 of PPS 18 in support of this interpretation of the policy.

[119] The respondent states that Policy RE1 calls expressly for the Department to exercise planning judgment in balancing two or more potentially competing considerations and that paragraphs 1.3.4, 1.3.18, 1.3.19 and 1.3.23 of the Best Practice Guidance to PPS 18 Renewable Energy and paragraphs 1.1 and 2.3 of the Supplementary Planning Guidance to accompany PPS 18 support this approach.

[120] It is asserted the Commissioner addresses economic benefits in paragraph 38 of her Decision and that she was entitled to conclude the economic benefits she indicated were not so significant as to outweigh the unacceptable environmental impacts of the proposal. The respondent states arguments that the Commissioner did not give enough weight to the economic benefits or, alternatively, that economic benefits should have 'decisive' or 'determining' weight, irrespective of their size, were contrary to the plain words of Policy RE1. Further, it is submitted the applicants' challenge is against the weight the Commissioner attached to these benefits, which, the respondent says, is not a matter for the Court.

[121] Reference is made to paragraph 35 of R (Khatun) v London Borough of Newham and it is contended any fair and ordinary reading of the Commissioner's Decision reveals that she properly understood the terms of Policy RE 1; she exercised appropriate planning judgment where the policy required her to do so; and she made sufficient inquiries into those matters she considered to be relevant to her Decision.

The six assumptions

(i) Grid connection

[122] The respondent asserts, in paragraph 35 of her Decision, the Commissioner was simply recording the submissions and evidence adduced by the applicants and she was entitled to note those submissions did not include details of any wind company which was committed to operate the site. The respondent says this was not a reasoned conclusion and not a negative finding against the applicant. It is argued the applicants' invitation to infer a negative finding by the Commissioner is not sustainable in light of her finding, in paragraph 36 of her Decision, that the wind farm would make a 'valuable contribution' to the government targets.

(ii) Turning off turbines

[123] Again, the respondent argues that, in paragraph 35 of her decision, the Commissioner was recording the applicants' submission that excessive levels of electricity were unlikely to be generated in this location and, therefore, it would be unlikely the turbines would have to be turned off. It is stated there is no basis for drawing the inference the Commissioner relied on this information and used it to reach a conclusion the project did not contribute to achieving the government's energy targets. It is stated the Commissioner's actual finding was to the contrary, namely, that the project would make a valuable contribution to the renewable targets.

(iii) Likelihood of Meeting 2012 Renewable Targets

[124] It is argued the applicants' submission that the Commissioner had either insufficient evidence or made insufficient inquiry into the likelihood the 2012 targets would be met falls to be determined within the principles in R (Khatun) v London Borough Council of Newham. The respondent asserts, as a matter of principle, the Commissioner is entitled to draw reasonable inferences about the likely progress of other applications by using her own experience and, also, by relying upon the evidence and experience of officials within the two government departments with responsibility for regulating this type of development.

[125] The respondent refers to Re FP McCann Developments Ltd's and Maghera Presbyterian Church's Application for Judicial Review as a useful analogy and submits the Commissioner's finding was perfectly rational based upon the evidence she received. It is asserted she was not required to summon the planning officer from each of those other applications to ascertain the precise timescale for grid connection and compliance with conditions.

[126] The respondent argues that three further factors are relevant in assessing the sufficiency of the inquiry conducted by the Commissioner:

> (a) The deficit between current renewable generation and the 2012 target was in the order of 3%. The projected output from the emerging alternative projects was 4 – 5 %, which incorporates a sizeable margin for error. Accordingly, the respondent asserts, there was less need for a forensic style scrutiny of each project in order to make an assessment of the likelihood of achieving the target.
>
> (b) The contribution which the project made to meeting the 2012 targets was not a determining factor in the planning decision, it was only one material consideration.
>
> (c) There was no dispute that the applicant's project itself would deliver a contribution of 0.33%. It is submitted, while a valuable contribution, the

Commissioner was right to conclude that this was not significant in terms of the overall 2012 and 2020 targets.

[127] It is argued the applicants' contention the Commissioner understood the 2012 and 2020 targets as 'definitive caps' rather than targets, is an exercise in semantics. It is argued the Commissioner demonstrates a clear understanding of the status of these government objectives. The respondent points out the Commissioner even stated unambiguously in paragraph 35 of her Decision: "*...I accept [they] are rolling targets and not ones to be capped upon achievement.*"

(iv) The 2020 Target

[128] It is argued the applicants' contention the Commissioner made some form of finding that the 2020 target would, also, be met is an unsustainable inference from the words used by the Commissioner in paragraph 36 of her Decision. It is contended the Commissioner simply recorded the applicants' submissions about the contribution the project might make to the 2020 target, noting that this was some time in the future and that there were plans for further infrastructural improvements to the grid in the interim. The respondent asserts the Commissioner's comments reveal no error of law and she recognised the project could make a valuable contribution.

(v) and (vi) "significant" v "valuable"

[129] It is contended the applicants submission there is an inconsistency in the Commissioner's conclusions that the project would be a valuable contribution to achieving the targets but would not be significant in overall terms introduces "*excessive legalism*" into the interpretation of the Commissioner's Decision. The respondent contends it is perfectly reasonable for the Commissioner to conclude that 0.33% is a valuable contribution in its own right but is not so significant in the overall context of a target of 12% or even 40%.

Ministerial Statements dated 2 September 2009 and 9 August 2010

[130] The respondent argues the comments of the former and current Environment Ministers were taken into account by the Commissioner and given the weight she believed appropriate. In reliance on Re Central Craigavon Limited, it is asserted the after dinner speech of the former Minister of the Environment on 2 September 2009 was not a statement of planning policy. Further, it is contended this speech of the Minister could not be understood to mean all wind farm projects should be permitted, including ones located in an AONB.

Renewable energy targets (see paragraphs 35 – 37 of the Decision)

[131] The respondent argues the Commissioner's approach was based upon credible and reliable evidence from the Department regarding the number of renewable projects which had received permission and which were in the process of satisfying

conditions. It is submitted the Commissioner's approach was entirely logical and rational; it did not reveal any failure to understand the relevant planning policy; and she did not misapply planning policy.

DETI email

[132] The respondent submits the Department of Trade and Industry are the department with responsibility for overseeing the achievement of these targets and it has specialist knowledge in this area. Therefore, it is argued, the Commissioner is not only entitled to rely upon its opinion for assessing the likelihood of meeting the renewable energy targets but it would be surprising if she were not to accept it in the absence of clear contrary evidence.

Economic benefits

[133] The respondent repeats that the applicants' challenge is against the weight she attached to these benefits, which is not a matter for the Court.

[134] It is asserted the Commissioner was entitled to describe the assessment of socio-economic benefits in the applicants' Environmental Statement as 'sketchy at best' because many of the claimed socio-economic benefits were not quantified; the £3.5 million figure given for the cost of erecting the proposed turbines was seven years out of date; and while a reduction in fossil fuel use and resultant carbon dioxide levels was mentioned, it was not quantified.

[135] The respondent submits the Commissioner's comments at paragraph 38 of her Decision that the assessment of benefits set out in the Environmental Statement appear to favour the applicants as landowners were simply drawing on information that had been presented to her.

[136] It is contended the Commissioner was not in a position to say whether the benefits accruing to the landowners would be more or less substantial than those accruing to the community at large as she was given no breakdown of the respective benefits by the applicants. Also, the respondent states that, while the Environmental Statement contains references to local expenditure, no monetary figures were attached. It is asserted, in this evidential void, the Commissioner was entitled to reach the conclusion that during the construction phase there may be some slight benefits to the local economy. The respondent says this conclusion was not irrational.

[137] Finally, the respondent refers to the applicants' claim the Commissioner did not properly take account of the cumulative effect of the economic, environmental and social benefits. The respondent submits, in paragraph 41 of the Decision, the Commissioner explicitly weighed the contribution of the proposed wind energy development to meeting renewable energy targets (in other words, its wider environmental benefits) plus the claimed economic benefits against the unacceptable

and adverse visual and landscape impact. It is asserted the Commissioner's approach was entirely consistent with the structure of Policy RE 1.

[138] The respondent submits the Commissioner's interpretation and application of Policy RE1 were entirely correct.

Inconsistency

[139] It is submitted the applicants have no grounds for their argument there is an inconsistency of approach between the Decision and other applications for wind farm development, particularly within an AONB. It is contended all planning applications are judged on their own merits and on the basis of their own features. The respondents say, in the context of PPS 18, this point is emphasised in the Best Practice Guidance which, in turn, is expressly required to be taken into account in assessing proposals.

Conclusion

[140] The applicants mounted a wide-ranging attack on the impugned decision. However, in view of the clear conclusion that the court has come to on some of the grounds it is unnecessary to address all of the grounds relied upon. I have set out at paragraph 42 above the Environmental Statement (ES) furnished by the applicants setting out the socio-economic benefits of the proposal. The impugned decision addresses these considerations in paragraph 38 and 41 which I have set set out at paragraph 19 of this judgment.

[141] Mr Gillespie at paragraph 35-38 of his affidavit is highly critical of the way in which the Commissioner dealt with this. I have already set out at paragraph 38 above these detailed averments. Mr Farningham makes similar criticisms at paragraph 28-31 of his affidavit set out at paragraphs 58&59 above.

[142] The respondent contended that the Commissioner was entitled to conclude that the economic benefits were not so significant as to outweigh the unacceptable environmental aspects of the proposal and that the issue of weight (subject to irrationality) is a matter for her.

[143] I am persuaded that the Commissioners assessment of the socio-economic benefits is legally flawed. First, the characterisation of the assessment of such benefits in the ES as "sketchy at best" is unjustified. I agree with the applicant that it was a sufficiently detailed indicator of the claimed socio economic benefits of the proposal. Secondly, her conclusion that the benefits of the proposal favours the appellants who are landowners does not stand up to scrutiny. As the applicant established of the nine benefits listed, only two favour the landowners. The other seven are much more substantial benefiting the community in general. Thirdly, the Commissioner expresses agreement with the Departments opinion that there may be some "slight" benefits to the economy during the construction phase. But the ES at paragraph 6.10.1 states that

3.5 million will be spent *erecting* the timbers excluding the cost of the turbines themselves. That figure is conspicuously absent from her decision. An economic investment of that figure (at 2004 prices) cannot properly be regarded as slight. Fourthly, the Commissioner states that "many of the benefits of such a proposal will be felt *outside* the region". This is plainly an incorrect reading of the ES. The manufacture of the turbines will be outside the area but the Commissioner has erroneously and without evidential foundation assumed that their construction would also be undertaken outside the region. In this connection I refer to the averment of Mr Gillespie at paragraph 38 of his affidavit which I have set out at paragraph 48 of this judgment of his affidavit. Fifthly, at paragraph 38 of her decision she refers to the 5% of the energy cost that will be given to the local council in rates. However the Commissioner did not ascertain what, in financial terms, the figure of 5% equated to. Mr Gillespie averred that it equated to a contribution of 200k – 350k. On any showing in the context of this case such a figure would be a not insignificant contribution to the local economy and it is not apparent that this was fully grasped.

[144] Accordingly, I accept for these reasons that the assessment of the socio-economic benefits was materially flawed because it proceeded on material mistake of fact and evidentially unjustified assumptions.

[145] Given that the wider environmental, economic and social benefits are material considerations that will be given significant weight under policy RE1 the flawed assessment tainted the balancing exercise which involves weighing adverse impact against, inter alia, economic benefits. I consider in those circumstances that the decision must be quashed. As previously explained I do not, in light of these conclusions, consider it necessary to decide the other issues raised on the applicants behalf.