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Case No: CO/10993/2009

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

12/11/2009

B e f o r e :

MR JUSTICE CRANSTON

Between:

The Queen (on the application of The Friends of Hethel Ltd)	**Claimant**
- and -	
South Norfolk District Council	**Defendant**
-and-	
Ecotricity	**Interested Party**

Richard Harwood (instructed by Richard Buxton) for the Claimant
Asitha Ranatunga (instructed by Sharpe Pritchard) for the Defendant
Gordon Nardell (instructed by Bond Pearce LLP) for the Interested Party

Hearing dates: 22, 23 October 2009

Mr Justice Cranston :

INTRODUCTION

1. In essence these judicial review proceedings seek to overturn the planning permission granted for the erection of three wind turbines in Norfolk. There is a fundamental objection to the decision, that the planning committee did not have the power to decide the matter since, in broad terms, the council's constitution is unlawful. Other aspects of the challenge are more conventional, for example, that the planning committee failed to take into account relevant factors or decided the issue on the basis of a misleading report. It is also said that the notice of planning permission contains conditions which are unreasonable and unenforceable because they rely on steps being taken off site. Finally, there is an issue relating to the failure to inform the public about the decision, as required by the environmental impact assessment directive and regulations.

BACKGROUND

2. The claimant is a company formed, as the name suggests, by local residents in the Hethel area. Hethel is a small village near the market town of Wymondham, some ten miles south of the city

of Norwich. The defendant is South Norfolk District Council ("the council"), which covers an area of countryside with a number of historic market towns, including Wymondham, and the well-known protected wetlands, the Norfolk Broads. The council is the local planning authority for the area. The interested party, Ecotricity Group Ltd ("Ecotricity"), is a green electricity company which has built wind turbines and sold electricity across Britain since 1995. Ecotricity Group Ltd trades as Ecotricity. It was the successful applicant for planning permission in this case. The proposed location of the wind turbines is at the site of Lotus Cars Limited ("Lotus"), Potash Lane, Hethel, Norfolk. Lotus is the manufacturer of high performance cars.

3. The context of the planning permission granted in this case for the erection of the three wind turbines at Lotus is that there are national targets for the installation of renewable energy. They are that ten percent of electricity will be from renewable sources by 2010, and twenty percent by 2020. Onshore and offshore wind will be contributors to this. To meet the target, the East of England region is required to install 1192MW of installed capacity generated through renewable energy by 2010. Late last year the region had met some forty percent of the required target. In terms of onshore wind, the region's target is for 647MW. By June 2008 the region had installed 79.25MW of renewable energy with 21.45MW derived from onshore wind power. In the council's area there were no onshore wind turbines and none approved. A proposal for a seven turbine wind farm at Hempnall was refused planning permission in August 2008, although an appeal in relation to that proposal was before a planning inspector at the time of the present hearing.

4. The national targets for renewable energy are reflected in *Planning Policy Statement (PPS) 22: Renewable Energy*. This sets out the national planning policy framework, which planning authorities should have regard to when preparing planning documents and taking planning decisions. It indicates that regional planning bodies and local authorities should promote, rather than restrict, the development of renewable energy resources. It also indicates that the wider environmental and economic benefits of all proposals for renewable energy, whatever their scale, are material considerations which should be given considerable weight when determining applications. Developers must address potential impacts and planning authorities must satisfy themselves that this has been done.

5. Ecotricity first entered into discussions with Lotus for use of the site for wind energy development in August 2003. A proposal in respect of the site was submitted to the council in June 2007. This was refused, but after negotiations to deal with the council's reasons for refusal a further application was submitted for the project in March 2008. As will be seen the development was granted consent at a meeting of the council's planning committee on 23 July 2008 and the permission itself was subsequently issued on 15 August 2008. Upon the council's issue of planning permission, steps for the allocation of the development within the local grid system commenced, along with the preliminary discussions to order the turbine components from a turbine manufacturer. Due to current global demand for wind turbines there is apparently at least a twelve month time delay between ordering the turbines and these being available for installation.

The planning application

6. The planning application of March 2008 proposed the erection of three wind turbines and associated works such as an electricity sub-station. The development was to be located within the currently unused grassed area in the middle of the test track at Lotus. Turbines 1 and 2 were to be situated at the northern end of the track, with turbine 3 being sited close to the southern end. Due, it was said, to continual improvements in wind turbine design, the final specification for the turbines was not confirmed at the time of the application. However, they would be three-bladed turbines, with variable speed, direct drive, mounted on a steel tower with clockwise blade rotation. The overall dimension would not exceed 78m to the centre of the hub with a rotor diameter of 82m, giving an overall height of 120m when one of the blades was in an upright

position. By comparison Norwich Cathedral is some 96m high. The turbines were to be finished in a non-reflecting off-white semi-matt paint with green bands near the base of the towers.

7. Part of the Lotus site is a former World War II airfield. It is bounded to the east by Potash Lane, normally closed to traffic at its northern end. To the east of Potash Lane is Hethel Wood, which is designated as a county wildlife site. No dwellings directly abut the site but there is a scattering of dwellings and farmsteads in the area. The nearest of these is Brunel House, a grade II listed building which is approximately 370 metres from proposed turbine 3. Corporation Farmhouse is also a grade II listed building, 700 metres south-east of proposed turbine 3. Ketteringham Hall, a grade II listed country house, is to the north of the site. In total there are eight grade I listed buildings, 17 grade II* listed buildings and 227 grade II listed buildings within five kilometres of the site, three of the Grade I buildings lying within three kilometres. One of the grade I listed buildings is All Saints Church, the medieval church in the village of Wreningham, some 1.8 kilometres to the south of the site. The steeple of Wreningham is some 25m high.

8. The expectation is that the scheme will produce some 17.3 gigawatt hours per year of electricity, which it is claimed is the equivalent to the annual electricity consumption of over 5000 average UK households. Lotus used nearly 13 gigawatts of electricity in 2005/06. Consequently, it is expected that the scheme would satisfy all of Lotus' electricity requirements and also what is consumed by an excess of 1000 homes. In addition it is claimed that the scheme will save annual emissions of up to 15,431 tonnes of carbon dioxide, 263 tonnes of sulphur dioxide and 71 tonnes of nitrogen oxide.

The planning process

9. In the decision letter dated 14th January 2008, refusing the first planning application, the council gave two reasons, first, that the wind turbines would create unacceptable interference with defence radar at RAF Trimingham; and secondly, that they "would appear as a visually intrusive, alien and incongruous feature in the rural landscape and be detrimental to the visual amenities of the area, contrary to the provisions of policies UTL 13 (Renewable Energy) and ENV 1 (Protection of Landscape) of the adopted South Norfolk local plan 2003." I need simply note that radar interference is no longer an issue.

10. The second planning application, of 13th March 2008, in large part tracked the earlier application. The list of consultees for the application included the local parish councils and a number of other organisations such as environmental groups, utilities and telecommunications companies. Officers prepared a report for consideration by the council's north west area planning committee. The report, dated 11th June 2008, but prepared some time earlier, recommended that the application be approved. The north west area planning committee met that day for just over two hours. Eight councillors were present. After consideration they voted against the application on grounds of visual intrusion 5-3. A number of objectors addressed the committee, including four members of the claimant. Three other councillors were present as local members or, in one case, a local member for a nearby parish. Eleven additional letters of objection were noted in addition to the objections which had already been received. The eleven letters raised a variety of concerns including visual impact, noise and sound recording issues, television interference, aviation safety and changes in government policy. The minutes of the meeting record that the refusal was contrary to the officers' recommendation and by a vote of less than two thirds of the committee's membership. Thus "the application stands referred to the [planning] committee for determination."

11. Some six weeks later, on 23rd July 2008, the planning committee of the council met. Fifteen councillors, chaired by Councillor Wynne, were present. In addition, the local councillor, Councillor Legg, was in attendance, as were eighty members of the public. The committee began its deliberations at 1.30pm and finished on this item at about 5.00pm, with a short break during the afternoon. The planning committee heard from sixteen speakers, including five members of the claimant, other members of the public and the local councillor. In response to a query from

Councillor Kemp, Adrian Nicholas, the senior environmental officer, said that the officers were content that noise assessment had been conducted in accordance with ETSU guidelines and had no objection to the development on noise grounds. Under "updates", it was noted that Defence Estates (part of the Ministry of Defence) had confirmed that they now had no objections; that there was a petition of support for the proposal from 543 local residents; and that there were 17 additional letters of objection, some raising concerns over aviation. The members voted 8-7 for approval of the proposal, subject to conditions.

Reports

12. When it made its decision to grant planning permission on 23rd July 2008, the planning committee had before it the report of Paul Whitham, its development control service manager ("the committee report"), copies of the relevant planning policies and the executive summary of the Environmental Statement, prepared and submitted by Ecotricity. The committee report referred to other reports, including the observations of the council's conservation and design architect ("the conservation officer's observations").

(a) Conservation officer's observations

When offering his observations on 16 March 2008, the council's conservation officer referred back to his earlier observations, on the 9th August 2007 planning application, since the proposals in both applications were the same. In those earlier observations the conservation officer had initially commented on the "impact on setting of listed buildings/Conservation Areas?" Under the heading "general comments" he observed that the site was situated in a rural location, some distance back from the main road. The land around the site was relatively flat so the turbines at nearly 400ft in height would be prominent in landscape views some miles from the site. As to Corporation Farm, the grade II listed farmhouse and its curtilage, further detail was required as to the impact of the proposal on views of the farm complex. The conservation officer continued that he also had some concern about the proposed view of the grade I listed church at Wreningham "as the southerly turbine adversely affects the appearance of the church in landscape views from the [B1113] road." He asked whether it was possible for the turbine to be sited so it had much less of an impact on the church. He concluded: "Other than the above I consider that the proposed turbines will not adversely impact on any other listed buildings. They will also not adversely affect views of any conservation areas."

(b) Environmental Statement

13. Ecotricity had a detailed Environmental Statement prepared to support the application, in accordance with Town and Country Planning (Environmental Impact Assessment) England and Wales Regulations 1999, 1999 SI No 293. The non-technical summary contained this paragraph relating to the impact of the proposal on listed buildings:

"Also the impact on Listed Buildings, Scheduled Ancient Monuments and other protected landscapes was assessed. Photographic impressions were created for the views from some protected sites in the direction of the wind turbines to see if they would impact on the inherent value of these features. This assessment has determined that within 5km of the proposed wind turbines there are 260 Listed Buildings, 24 of which are Grade I or Grade II*. Of these 24, 11 have the potential for views from the listed buildings to be affected by the development. However, the actual effect will depend on the distance between the turbines and the listed building and the initial status of the listed building, for example, is it Grade II, Grade II* etc."

As regards noise from the turbines, the non-technical summary noted that the effect was insignificant.

14. The Environmental Statement itself was on the council's web-site. Chapter 10 dealt with cultural heritage. Its methodology was intended to measure the value of historic landscape, and the

settings of listed buildings, in terms of their character, appearance and quality, important views, capacity for changes and significance in local, regional and national terms. It noted that the sensitivity of the setting of a listed building varied according to the nature of the resource.

15. Wreningham Church was identified as having a high sensitivity, with the large open area between the church and the development.

"[T]he church is partially screened to the north. There may be partial views of the wind turbines from the church yard. There will also be an impact on the view of the building as the turbines will be visible in the background.

Due to the distance to the development site there will be a small-scale negative change on a high value resource. The significance of effect on this building would be moderate to minor adverse."

For Corporation Farm, the impact would be "moderate adverse". There would be views from the building towards the development site, although they would be partially screened by vegetation. There would also be a slight impact on the setting of the building since the turbines would be visible in combination with the building when viewed from the south-west. The short distance between the building and the development and the resulting impact would cause an intermediate negative magnitude of change on this medium value resource. The impact on the setting of Ketteringham Hall would occur because the turbines would be visible in the background when viewed from the north-east, leading to an intermediate negative change on a high value resource, the significance being moderate to major adverse.

16. Summarising these effects on setting, the Environmental Statement noted that when operational the development would have a moderate to major adverse impact on Grade I and II* listed buildings within the study area. Mitigation included enhanced screening where possible and the recording of views to and from the building. There would also be minor to moderate adverse effects on Grade I and II* listed buildings. The Environmental Statement returned to the impact in the concluding chapter: for six listed buildings within the five kilometre assessment area there would be an adverse, direct, long term, paramount and significant residual significance.

17. Chapter 11 of the Environmental Statement addressed noise. It reported that baseline noise levels had been measured at five locations representative of the nearest residential properties to the site. The worst case turbine noise levels at those locations was then predicted, based on the type of wind turbines to be erected. The assessments were carried out by comparing predicted noise levels described in ETSU-R-97, Assessment and Rating of Noise for Wind Farms, 1997. That document, from the Energy Technology Support Unit, ETSU, is based on the recommendations of a noise working group. ETSU-R-97 notes that the noise level of the turbine and from other sources will vary with different wind speeds. It suggests that limits should only be sought in relation to noise over a range of wind speeds up to twelve metres per second when measured at ten metres height on a wind farm site. ETSU-R-97 suggests turbine noise be limited to 5dB (decibels) above the background noise, or a fixed level of 43dB, whichever is greater for night time hours. The daytime limit is set to 5dB above the quiet daytime background, or a fixed level of 35-40dB, whichever is the greater, all measurements at background LA_{90}. Separate noise limits should apply for day time and night time, since during the night the protection of external amenity becomes less important and the emphasis should be on preventing sleep disturbance. As for noise monitoring, the document says that the measurement position should be selected to minimise the effects of reflection from buildings because the noise limits recommended refer to free field measurements.

"In order to ensure that measurements of wind turbine noise are not influenced by reflections off buildings the microphone should be positioned at least 10m away from the façade. It may be appropriate to undertake background noise measurements closer than this if sheltered locations closer to the property are most often used for rest and relaxation. Background noise measurements should not be taken closer than 3.5m from the façade."

18. One of the five sites which the Environmental Assessment used to assess noise was Brunel House. The Environmental Assessment recorded that during the visit to deploy the equipment, wind in the trees, bird song, the Lotus factory and occasional local road traffic noise dominated the noise environment. During the visit to collect the equipment the factory, wind in the trees, bird song, lorries manoeuvring and occasional noise from cars on the Lotus test track were dominant. Summarising the noise assessments, during those two points at Brunel House, the report concluded that the predicted turbine noise level was below the night-time noise limit by a minimum margin of 5 decibels equal to or below the prevailing background noise level for all wind speeds. As the closest property to the turbines in the area of Hall Road Farm, the predicted turbine noise level was below the night-time noise limit by a minimum margin of 1 dB. Overall, chapter 11 of the Environmental Statement concluded that there would be no significant noise impact from the development and no mitigation was required. Charts with detailed findings of noise measurements were included in the Environmental Statement, as well as photographs of the five sites where they were taken.

19. Shadow flicker, that is the regular or semi-regular variation in light intensity caused when a light source is intermittently interrupted by an obstruction, was dealt with in chapter 14. Chapter 15 was entitled "Miscellaneous Considerations". One aspect covered was public safety, using PPS22, Renewable Energy: BWEA Guidelines for Health and Safety in the Wind Energy Industry; and relevant British Standards. Paragraphs 15.46 and 15.47 reported that the site selection process had ensured that all of the turbines would be located at least at a fall-over distance from public highways, with the closest turbine, turbine 1, being 281m from St Thomas' Lane. The operation of the turbines would not impact on the viability of public rights of way. "In accordance with guidance set out in PPS22, none of the turbines would overhang a [public right of way] or other public footpath."

20. Also in this "Miscellaneous Considerations" chapter was mention of the impact of the proposal on television and radio reception. If through the operation of the turbines there was a detrimental impact, the Environmental Statement recorded that Ecotricity would implement remedial works. The mitigation measures were in line with the government's target that analogue television services would be switched off in 2010, to be replaced by digital services. "Any deterioration in television would therefore be restored resulting in negligible residual effect."

(c) Planning officer's report

21. The committee report, before the planning committee meeting on 23rd July 2008, mirrored almost entirely the earlier report before the north west area planning committee. It recommended approval, subject to 13 conditions. The report noted that the matter had been referred to the planning committee by the north west area planning committee as a result of the 5-3 refusal, against the background of the planning officer's positive recommendation. After setting out the nature of the proposal the report referred to the relevant planning policies, including IMP 15, Setting of Listed Buildings. IMP15 reads: "When considering proposals for development within the setting of listed buildings special attention will be given to the design, scale and impact of the proposals."

22. The report summarised the responses to the consultation. In opposing the development, that from the parish and town councils at Bracon Ash and Hethel referred to the measurement of noise, the visual impact, shadow flicker and the effect on television signals. East Carleton and Ketteringham parish council, which also opposed the development, referred to the flicker effect and the adverse effect on named listed buildings. The report recorded that the council's environmental services department had no objections to the proposal, subject to the imposition of conditions in respect of noise levels and shadow flicker mitigation. There had been no comments from the Health and Safety Executive. (The HSE had said it had no comments "as it does not meet the consultation requirement as no people will be present normally when or if the turbines are built.") The Royal Society for Protection of Birds had no objections, although it strongly

recommended the inclusion of a condition whereby the turbines were switched off in poor conditions and reduced visibility to help reduce the risk of birds colliding with them.

23. From local residents there were 10 letters of support and 135 letters of objection. In the latter concerns raised included safety issues for uses of Potash Lane; noise pollution, including times when the test track was not used; that noise impact had not been adequately assessed; the impact of flicker effect both on residential properties and on chicken sheds; interference with television signals; danger from parts falling off the turbines; the impact on listed buildings, including Corporation Farmhouse; disputes over sound readings, in particular why the council had not commissioned an independent survey; and that it was unlikely that Ecotricity would install a Sky satellite receiver in every house affected, including those in conservation areas. After this summary of residents' responses the report noted that full copies of all comments could be viewed on the council's website.

24. Under the heading "assessment", the report recorded that the planning application had generated a significant amount of local opposition. Objections could be grouped under five headings; visual impact; noise/shadow flicker; impact on aviation and television/radar/radio signals; impact on listed buildings; and impact on ecology and birds. That summary did not mention safety. Each of these topics was then developed in the report. Relevant to the present judgment are the topics noise/shadow flicker and impact on listed buildings.

25. In relation to noise/shadow flicker, the report first noted that the wind turbines to be installed would be the quietest in production and that the only noise produced was from the passage of wind over the blades. That increased or decreased according to wind speed. Reference was then made to the Environmental Statement with its measurements taken from five locations, representative of nearby residential properties.

    "The results contained within the assessment show that these levels are all within acceptable guidelines. Environmental Services have studied the Environment Statement and subject to conditions setting noise levels do not consider it will have an adverse impact on nearby residential properties and have no objection to the proposals."

26. As to shadow flicker, the report recorded that an assessment had been carried out at fifty-five representative properties in the vicinity of the site. Of these, twelve could potentially be affected by more than thirty hours of shadow flicker per year. Assuming the worst case scenario the assessment revealed that the shadow flicker on those twelve properties could vary between 51 to 57 shadow hours per year. Mitigation measures were to be implemented in the event of shadow flicker occurring and causing nuisance, ranging from the fitting of blinds to any affected property through to automatically shutting the turbine down when the conditions were likely to cause serious effects. Shadow flicker mitigation was already in place with other turbine schemes:

    "Environmental Services are satisfied that the mitigation measures, should a shadow flicker occur, are adequate and have no objections subject to suitable conditions ensuring that these mitigation measures are carried out."

27. The committee report then addressed television interference. Ecotricity maintained that the mitigation outlined in the Environmental Statement was ample and highlighted that planning conditions along these lines had been imposed by planning inspectors in other parts of the country. Since adequate mitigation had been proposed, the report concluded that a refusal could not be justified on the grounds of possible interference with television pictures.

28. Two paragraphs in the committee report covered the impact on listed buildings. They referred to the large number of listed buildings in the vicinity of the site. They noted that the conservation officer had assessed the impact of the proposals on nearby listed buildings and had requested further information on Corporation Farm and Wreningham church. The concern in relation to the latter was that the officer felt that the most southern turbine adversely affected the appearance of

the church in landscape views from the B1113. (A photomontage of that view was shown at committee). The report continued:

"Whilst the turbine will have some impact on this long distance view, it is not considered that this impact is so great that it would in itself justify refusing consent. Other than the above the Conservation and Design officer is satisfied that the proposal would not adversely impact on any other listed building or adversely affect views of any conservation areas. The proposal is consequently considered to comply with policies IMP 15-Setting of Listed Buildings and IMP 18-Conservation Areas of the South Norfolk Local Plan."

29. Under the heading "other objections" the report noted that other objections had been received but not specifically commented on. These other objections had been taken into account but were not considered to be either individually or collectively of sufficient weight to justify a refusal of planning permission.

30. In conclusion the report urged the committee to look positively at renewable energy schemes in light of central government, regional and local policy. The applicant had submitted an Environmental Statement which had addressed the impacts and where necessary proposed appropriate mitigation. That Environmental Assessment had been considered by the appropriate technical consultees and had been found to be satisfactory. Thus the recommendation was that planning permission be granted, subject to the conditions set out in the report.

Public input

31. As indicated the council received a considerable volume of letters and emails from members of the public. The report of the development control services manager to the planning committee attempted to summarise this public input to the process. For the purposes of the forensic exercise I was shown a limited selection of the letters and comments, focused on the grounds raised in this legal challenge.

32. Some of the communications raised the issue of noise. Thus Anne Howlett, of Hethel Hall Cottage, Hall Road, Hethel, complained on 1st August 2007 that although her home was the closest on the downwind side of the northern turbine, it has been omitted from the survey. On 22nd April 2008 Richard Wilbourn of Lone Cottage, Ketteringham, raised concerns about the methods used by the noise consultants in measuring noise, the level of control exercised by the council's environmental health department over them, and their interpretation of the results. He drew attention to the noise measurements which Mr Dyer at Brunel Cottage had independently undertaken and that these varied from those found by the Ecotricity noise consultants. Mr Dyer sent an email himself about the matter on 7th June 2008: the sound level readings from two borrowed calibrated digital sound level meters showed night time background levels to be around 3dB lower than the Ecotricity results. By contrast, however, on 10th June 2008, Irvine and Geraldine Watson of East Carleton, a village just to the north-east of the site, emailed a report from a Dr John Towner, an environmental expert, whom they had independently commissioned. Dr Towner opined that noise assessment had been addressed with some rigour in the Environmental Statement and the noise measurements appropriately conducted by the Ecotricity noise consultants.

33. On safety, Richard Wilbourn wrote on 17th April 2008 of his concerns for those using Potash Lane such as cyclists, walkers and horse riders. In particular he drew attention to the 200m exclusion zone for fall over wind turbines recommended by the British Horse Society. On 9th May 2008 John Lee emailed an extract from the Caithness Windfarm Information Forum about wind turbine blade failure. The joint owner of farm land, immediately to the south and west of the site, emailed his concern about the absence of an exclusion zone because of parts falling off the turbines. Health and safety concerns about the possible collapse of the turbines were highlighted in the email already mentioned from the Watsons on 10th June 2008: it was "unusual

for three such large turbines to be sited so close to roads and to buildings where so many people work."

Planning permission and after

34. Formal planning permission was issued on 15th August 2008. It notes that full planning permission is granted, subject to a number of conditions. Thus the development has to be carried out in accordance with the application, the Environmental Statement and other documents provided by the applicant. Condition 3 in relation to noise is that, when measured at the boundary of any noise sensitive property in accordance with the guidance in ETSU-R-97, noise should not exceed:

    "During day time hours (0700-2300):

    40dB(A) (L90, 10 min), or 5dB above the prevailing background level (LA90) as measured during "quiet daytime periods", whichever is greater at wind speeds up to 12m/s at a height of 10m on the site.

    During night time hours (2300-0700):

    43dB(A) (L90, 10min), or 5dB above the prevailing background level (LA90) during this period, whichever is greater, at wind speeds up to 12m/s at a height of 10m on the site."

    Under condition 4, following any complaint to the council about noise, Ecotricity must at the council's request measure the level of noise emissions from the wind turbines using an LA90 index over a minimum of 20 periods, each of 10 minutes duration. This is to be carried out at the developer's expense and in accordance with procedures set out. One of these is that measurement will be at least 10m from any reflective surface.

35. Condition 5 relates to shadow flicker: no works are to commence "unless a scheme to alleviate the incidence of 'shadow flicker' at all receptors potentially exposed to such an effect from the turbines has been submitted to and approved in writing with the [council]." The scheme is to include details of the siting of photocells, and the measures to control, re-orientate, or shut down the turbines.

36. Television interference is dealt with by condition 11.

    "Prior to the commissioning of the development hereby permitted, a scheme for mitigating any interference with domestic television reception which can be reasonably attributed to the operation of the wind turbine development, shall be submitted to and approved in writing by the [council], and the development shall be carried out in accordance with the approved scheme."

37. As a result of condition 16 no external lighting is to be erected on the turbines unless full details of its design, location, orientation and level of luminance have first been submitted to and agreed in writing with the council.

38. Included in the planning permission are "reasons for approval". These were drawn up by officers after the 23rd July meeting and have never been formally approved by the planning committee. The reasons are that, in the opinion of the council, the proposal is acceptable in the light of the South Norfolk local plan and planning policies, including IMP15, Setting of Listed Buildings. The reasons also read:

    "The impacts of the development in respect of noise, shadow flicker, aviation, radar, telecommunications and television reception have been addressed in the Environmental Assessment. Conditions have been imposed on the consent where appropriate to ensure that adequate mitigation is undertaken to address these issues, should it be necessary. Subject to these

conditions the proposal is not considered to have an unacceptable impact on the residential amenities of the occupiers of dwellings within the vicinity of the site and the proposal accords with UTE 13, IMP 9 and IMP 10 of the adopted South Norfolk Local Plan 2003.

…

The proposal will not adversely impact on … the setting of listed buildings ..."

39. After the grant of planning permission Ecotricity wrote to the council on 29th October 2009 setting out uniform schemes for mitigation in relation to conditions 5 and 11, shadow flicker and television interference.

40. In early November 2008, Mr Wilbourn, Lone Cottage in Ketteringham, registered concerns about Ecotricity's noise consultants. In reply the council's planning officer included a memorandum from Adrian Nicholas of the council's environmental services department. With regard to Mr Wilbourn's concern about the proximity of the measurement locations to buildings, and the impact this had on the measured background noise levels, Mr Nicholas said that ETSU-R-97 indicated that the measurement position should be selected to minimise the effect of noise reflections from buildings. In order to achieve this ETSU-R-97 suggested a measurement location at least 10 metres from a building façade if possible, and not closer than 3.5m. No data was included in the Environmental Statement concerning the distance of the measurement locations from buildings. However, the photographs "would not indicate this distance to be less than 3.5m."

41. Meanwhile Defence Estates had written on 14th October 2008 informing the council of the new policy of the Ministry of Defence regarding wind turbines. It was now necessary to attach air navigation lights, producing a 25 candela constant red light to the highest stationary point of each turbine structure to mark them to military aircraft in the area. As a result, the planning committee was asked on 12th November 2008 to approve the installation of aviation warning lights, one on each turbine. The claimant's solicitors had written the day before, arguing that on their interpretation of condition 16 of the planning permission this would be a breach, unless formal consent was obtained. There were also local objections. The planning committee decided that under condition 16 the request could be granted, and resolved to do so. After legal advice, however, the council informed Defence Estates that they should submit a formal planning application for the lights. At a meeting of the planning committee on 13th January 2009 members noted the committee report not to issue a decision on the condition 16 application for aviation lighting. No formal approval was ever issued in relation to the matter.

42. At the time of the hearing there was a draft agreement under section 106 of the Town and Country Planning Act 1990, to be entered between the council, the subsidiary of Ecotricity formed to operate the development and Lotus. Under it the Ecotricity subsidiary and Lotus undertake a number of obligations. The first concerns television interference caused by the development. Lotus and the Ecotricity subsidiary are to use all reasonable endeavours to remedy any impairment of television reception at their own cost. They are to lodge a bond with the council to back that obligation. In relation to shadow flicker, the deed provides that there must be a shut down mechanism approved by the council, and Lotus and the Ecotricity subsidiary undertake to operate the wind turbines in accordance with it. Thirdly, the deed contains covenants that the development will not operate to exceed the noise levels in condition 3 of the planning permission and will at their own cost immediately have complaints independently investigated.

THE CONSTITUTIONAL ISSUE

43. The first of the claimant's contentions is that under the council's constitution the planning committee did not have power to determine the wind farm planning application. The submission is that the application was referred to them under an unlawful provision of the scheme of delegation in the council's constitution. The scheme requires a 2/3rds majority of an area

committee's membership for a decision to be taken against officer advice. But legislation demands that decisions be made by a majority of councillors present and voting. Consequently, it was unlawful to refer the decision of the area planning committee to refuse the application to the planning committee because a two thirds majority was not obtained, the vote in the area planning committee being 5-3. It follows that the planning committee did not have jurisdiction within the council's constitution to determine the application. Thus the claimant contends that the planning permission should be quashed. The area planning committee's resolution to refuse planning permission remains in existence and the council will have to decide whether to act on that resolution.

Statutory and constitutional framework

44. Section 99 of the Local Government Act 1972 provides that schedule 12 of the Act shall have effect with respect to the meetings and proceedings of local authorities and their committees. By paragraph 39(1) of the schedule council decisions shall be taken by a majority of those present and voting, unless an enactment makes other provision:

"Subject to the provisions of any enactment (including any enactment in this Act) all questions coming or arising before a local authority shall be decided by a majority of the members of the authority present and voting thereon at a meeting of the authority."

Paragraph 44(1) provides that majority voting applies to committees and sub-committees, as well as to full council.

"Paragraphs 39 to 43 above … shall apply in relation to a committee of a local authority … or a sub-committee of any such committee as they apply in relation to a local authority. "

45. The Local Government Act 1972 contains limited exceptions to the majority voting rule: two-thirds of members must vote to change the name of the council (section 74(1)), to petition Her Majesty for a charter to become a borough or county borough (sections 245, 245A) or to confer the title of honorary alderman (section 249). Support for opposition to a local or personal Bill must be 'passed by a majority of the whole number of the members of the authority at a meeting of the authority' (section 239(2)). Under the Local Government Act 2000 two-thirds majorities are required to change to different forms of executive decision making (section 33L). Similarly, the Local Government and Public Involvement in Health Act 2007 provides for a two-thirds majority as to whether councils are elected as a whole or in thirds or halves (sections 33, 38, 40) and to change the name of an electoral area (section 59). Such provisions govern decisions of major institutional significance and do not deal with day to day business or situations where the council is required to make a routine decision, such as determining an application for planning permission.

46. Under section 101(1) of the Local Government Act 1972 the powers of a council may be delegated to committees, sub-committees or officers:

"Subject to any express provision contained in this Act or any Act passed after this Act, a local authority may arrange for the discharge of any of their functions—

(a) by a committee, a sub-committee or an officer of the authority ..."

47. Under its constitution the council in these proceedings has delegated various planning powers to the planning committee and to area planning committees. The terms of reference for the planning committee in the council's 2007 constitution were, within the policies adopted by the council

"to exercise its functions under all Town and Country Planning and Building Control Legislation, in particular the determination of applications and the enforcement of planning and building

control, preservation, protection and enhancement of amenity (including forestry) listed and historic buildings and highways and traffic issues.

The planning committee was also to consider detailed aspects of the content of development plans produced by the council. Voting within the planning committee was to be by a simple majority on a show of hands.

48. The council's constitution also delegates planning power to determine applications to area planning committees. It does so in the following manner:

"Within the policies adopted by the Council, to determine the following matters within its area:

1.1 Planning applications ...

... subject to

…

b) in the case of any decision contrary to the recommendations of the Head of Planning Services, the number of votes in favour of the proposed course of action amounting to at least two-thirds of the number of the constituted membership of the Area Planning Committee (but applications of minor importance which do not raise issues of significant precedent shall be determined by a simple majority of votes cast); and

…

failing which the matter shall stand referred to the Planning Committee."

Lawful delegation

49. In considering the claimant's submissions on this matter it is instructive to begin with the background to area planning committees, and their relationship with the planning committee itself. That background demonstrates the underlying rationale of this part of the council's constitution and its adoption through democratic procedures.

50. In 1995 the council considered a report recommending both area planning committees and permitting members of the public and parish councillors to address committees making planning decisions. From council records it is obvious that the decision in favour of both recommendations followed extensive consultation, both within South Norfolk and beyond, and after a thorough debate among members. The policy as enunciated was to localise decision making and further public participation. After examining a number of options, it was decided that area committees were to be constituted by those ward councillors within each area, who were also members of the planning committee itself. The reasoning was that those members would know the area but also be familiar with the policy context within which planning decisions had to be made.

51. As has been seen, a limitation to the authority of the area planning committees, which the council agreed, is that the area committees should not be able to take decisions against the recommendation of the development control services manager unless at least two-thirds of the membership agreed. The intention was obviously to prevent area planning committees being unduly influenced by local considerations or going on a frolic on their own. In particular the underlying rationale for the referral of such cases to the planning committee itself, if the two thirds majority is not achieved, is that proper regard has to be paid to professional advice on the planning merits of a proposal. To ensure this, if two-thirds of the membership of an area planning committee cannot agree to disregard that advice the decision must be taken council-wide, by the more representative, full planning committee. It would be surprising if a scheme democratically decided upon, and with a clear and rational basis, were somehow in breach of the law.

52. The claimant's attack on the lawfulness of the planning decision focuses on the statutory requirement for majority voting. Mr Harwood's forceful submission was that any attempt to change majority voting was in breach of schedule 12 of the Local Government Act 1972. As paragraph 39(1) is applied to committees by paragraph 44 of the schedule, a council's constitutional arrangements for its committees cannot alter the requirement for a simple majority. A council's constitution cannot require a particular majority, such as two-thirds of the committee, or a proportion of the membership of a committee to vote, unless an enactment enables that. The council and Ecotricity appear to argue that the area planning committee had no power to decide the matter because of the scheme of delegation in the constitution. In Mr Harwood's submission that is not simply an impermissible attempt to evade the effect of paragraphs 39(1) and 44 but is an abuse of language. The question 'coming or arising' before the area committee – to use the language of paragraph 39(1) – was whether the planning application should be approved. That committee had power to decide it: it could agree with the officer recommendation or, under the council's constitution, refuse to decide it with a special majority. What in Mr Harwood's submission the other parties characterise as an absence of power to decide arises only at the point of voting a particular way, without a special majority. They say that the committee could not make the decision they did without a special majority, a contention which is contrary to paragraph 39(1).

53. In my view, there is nothing unlawful in the way that the council has structured its decision-making and distributed decision-making powers through the system of area planning committees and the planning committee itself. That is because it is a valid exercise of the statutory power to delegate in section 101(1)(a), which confers on a council a broad power to make arrangements for delegating decision-making throughout their organisation. The statutory obligation in paragraph 39 to decide by majority is "[s]ubject to the provisions of any other enactment", including section 101. It is not unlawful under the Local Government Act 1972 for the council to have a referral process from the area planning committees to the planning committee itself for decisions. Nor is it an abuse of the plain wording of paragraphs 39 or 44 of schedule 12, which deals with decisions on matters "coming or arising" before the council. The effect of the council's constitution is that in certain circumstances a planning application stands referred for decision from the area planning committee to the planning committee. That is a system of lawful delegation.

54. The terms in which the referral was actually made in this case are consistent with the language of the constitution, providing that if the preconditions are not met "the matter shall stand referred to the planning committee". Any decision to refuse planning permission would have been contrary to the recommendation of the council's planning officer in favour of the Ecotricity proposal. Less than two thirds of the membership of the area committee voted in favour of approval, the vote being 5-3 against. As the minutes of the area planning committee suggest, its powers were conditional and on this occasion the conditions were not met. Another way of characterising what happened is a failed attempt before the area committee to make a decision. The vote of the area planning committee was not a decision on this matter but, when it was taken, an identification of the limitations on the area committee's powers. The matter stood referred to the full planning committee. That vote of the area planning committee was part of the process but not the decision on the question "coming or arising" before the council. It was conceptually different from the planning application decision itself.

55. In any event, even if the area committee did make a decision which is flawed under paragraph 39 of schedule 12, in my view there can be no criticism of the planning committee's decision of 23rd July 2008 to grant planning permission. The planning committee had before it the committee report and during the course of the afternoon it heard representations from the public. The fact that the north west area planning committee had considered the application on 11th June 2008 played no part in the planning committee's decision, nor did their deliberations. The planning committee made its decision within its terms of reference in the council's constitution. That decision was taken in compliance with paragraph 39(1) of schedule 12 to the Local Government

Act 1972, in that the application was decided by a majority of the members present and voting. Either way there is no basis for granting relief to the claimant as regards its constitutional challenge.

FLAWS IN DECISION MAKING

English Heritage and listed buildings

56. Here the claimant contends that the council failed to consult English Heritage on the planning application, as it was legally obliged to do. English Heritage were not consulted and consequently made no comments. The requirement to notify English Heritage arose from the effect of the development on the setting of a number of buildings. A purpose of publicity and consultation is to obtain representations to help decide whether the effect on setting is adverse. The planning committee should have had the benefit of English Heritage's advice. That advice might have affected the planning officer's recommendation and, even if it did not, might have tipped the balance of the committee's decision, particularly given the previous refusal on intrusiveness grounds of 2007. Moreover, the application was advertised as being subject to an Environmental Statement, but no reference was made to the setting of listed buildings, nor was the advertisement sent to English Heritage. A failure to comply with a direction or regulation on publicity and consultation renders the decision unlawful. Where consultation or the effectiveness of the decision making process is potentially imperilled by this type of error then the decision will be unlawful.

57. As a secondary ground the claimant submits that the committee report was significantly misleading. It failed to report Ecotricity's own finding that there would be adverse impacts on the setting of 13 Grade I or II* listed buildings, of which at least six would be significant. In fact it identified an adverse impact on only one such building, Wreningham church, but considered that this did not outweigh other planning considerations. Grade I and II* buildings are the top six percent of listed buildings, with about 30,000 examples in England. If it had been appreciated that 13 of these buildings would be adversely affected by the scheme this might have led to a different decision.

(a) The planning policy framework

58. The Secretary of State has directed that English Heritage be consulted on planning applications for development

"which in the opinion of the local planning authority affects the setting of a grade I or II* listed building" (Circular 01/01, paragraph 8(3)).

A council is also required to advertise locally any planning application which would affect the setting of a listed building: Planning (Listed Buildings and Conservation Areas) Regulations 1990, 1990 SI No 1519, r. 5A ("the 1990 regulations").

"5A Publicity for applications affecting setting of listed buildings

(1) This regulation applies where an application for planning permission for any development of land is made to a local planning authority and the authority think that the development would affect the setting of a listed building …

(2) Subject to paragraphs (5) and (6), the local planning authority shall

(a) publish in a local newspaper circulating in the locality in which the land is situated:

…

a notice indicating the nature of the development in question and naming a place within the locality where a copy of the application, and of all plans and other documents submitted with it, will be open to inspection by the public …"

A copy of this advertisement must be sent to English Heritage: r. 5A(3).

59. Planning Policy Guidance 15: Planning and the Historic Environment ("PPG15") explains the concept of the setting of a listed building. Paragraph 2.16 recalls that by statute authorities considering applications for planning permission must have special regard to certain matters, including the desirability of preserving the setting of the building. The setting "is often an essential part of the building's character." Paragraph 2.17 refers to the statutory obligation to publish a notice of all applications authorities receive for planning permission for any development which, in their opinion, affects the setting of a listed building. The provision

"should not be interpreted too narrowly: the setting of a building may be limited to obviously ancillary land, but may often include land some distance from it … A proposed high or bulky building might also affect the setting of a listed building some distance away, or alter views of a historic skyline. In some cases, setting can only be defined by a historical assessment of a building's surroundings. If there is doubt about the precise extent of a building's setting, it is better to publish a notice."

(b) Setting, English Heritage and the grant of permission

60. In my view the conservation officer's report, the Environmental Statement and the committee report all addressed the setting of listed buildings, as that concept is spelt out in PPG15. The submission of Ecotricity, that the adverse effects identified in those documents did not concern setting, but some other feature such as landscape, is simply not a tenable reading of them.

61. It will be recalled that the conservation officer posed himself the question of the visual impact on the setting of listed buildings. In particular he had some concern about the proposed view of the grade I listed church at Wreningham "as the southerly turbine adversely affects the appearance of the church in landscape views from the [B1113]." Ecotricity's Environmental Statement deals with impacts on the settings of listed buildings and identifies adverse impacts on 13 grade I and II* listed buildings. The committee report noted that there were eight grade I and 17 grade II* listed buildings within five kilometres of the site, recorded the conservation officer's view on Wreningham church and then, in the passage quoted earlier, concluded that while the turbines would have some impact on the long distance view, it was not considered that this impact was so great that it would in itself justify refusing consent. The planning officer then said that the conservation officer was satisfied that the proposal would not adversely impact on any other listed buildings. All of this reflects a concern with the setting of listed buildings.

62. But if these various documents do ventilate the concept of the setting of listed buildings, in my view the failure to notify English Heritage and to advertise are not fatal to the decision to grant planning permission. That is because both obligations involve an exercise of subjective judgment by the council: the duty to notify English Heritage arises under Circular 1/01 when "in the opinion" of the council as local planning authority the setting of listed building is affected, and the 1990 regulations demand advertisement and the notification of English Heritage when the council "think" the development would affect that setting.

63. It seems to me that the council can be said to have reached the conclusion, without error, that neither obligation was triggered. The council's conservation officer raised "some concern" in relation to the proposed view of the church at Wreningham. It could be said to indicate that by use of that expression he did not regard this as a vital matter. The statement in the committee report was that the impact on the long distance view of Wreningham church was not such as to justify refusing permission, and that otherwise there was considered to be no adverse effect on the setting of listed buildings. In my judgment those comments make explicit his judgment that

the tests to consult and advertise had not been met. In neither case can I regard these assessments as being in a public law sense irrational or so unreasonable that no reasonable planning authority could have reached them.

(c) Was the committee report misleading?

64. There remains the issue of whether the committee report was significantly misleading because it failed to report the Environmental Statement finding that there would be adverse impacts on the setting of 13 Grade I or II* listed buildings. The report identified an adverse impact on only one such building, the Wreningham church. That there were in fact adverse effects on many more buildings than the church must be a concern. But does it justify judicial review?

65. Judicial review is available when a decision is made on the basis of a report which is significantly misleading. That broad proposition is subject, however, to a number of caveats. First, the assessment of the report must be of its overall fairness, taking into account that it is not to be construed as a statute or legal document. Secondly, a report may be accompanied by other documents, or there can be further advice or representations by members of the public, all of which can correct a report's defects before the relevant decision is taken: *R v Selby District Council, ex p Oxton Farms* [1997] EG 60(CS), per Pill and Judge LJJ. Thirdly, the members of a council's committee may be expected to have substantial local and background knowledge and in some cases a motivation to delve more deeply, so that again the report's defects are overcome: *R v Mendip District Council, ex p Fabre* (2000) 80 P & CR 500, 509. Finally, a report must not only not be misleading, it must also contain sufficient information and guidance to enable members to reach an informed and lawful decision: *R v Durham County Council and Lafarge Redland Aggregates Ltd ex p Lowther* [2001] EWCA Civ 781; [2002] JPL 197, [98], per Pill LJ.

66. In the present case the planning committee had the conservation officer's views, and a photomontage of Wreningham church and the development was available. The non-technical summary of the Environmental Statement was before the committee. It reflected the position in noting the total number of listed buildings with Grade I and II listings within five kilometres of the turbines and that the actual effect on setting would depend "on the distance between the turbines and the listed building and the initial status of the listed building". But it too was defective in failing to report that the Environmental Statement accepted that 13 Grade I or II* listed buildings were actually affected, six significantly.

67. Importantly the councillors had their own knowledge of the area and would have been able to assess the impact of the development on the setting of listed buildings. At least four councillors from the north west area planning committee of the council were present at the planning committee and the local councillor, Councillor Legg, was also in attendance. In addition, some eighty members of the public attended the meeting, and a number of those objecting to the development addressed the committee. The committee stage was the last of a number of opportunities when those concerned about the development's impact on the setting of listed buildings could raise them. Even if the Environmental Statement was not before the committee it was widely available. In my view it is impossible to conclude that any defects in the report about the impact of the wind farm on the setting of listed buildings would have been left uncorrected by the time members took the decision to grant planning permission.

Noise

68. Under this general head the claimant contends that the committee report was flawed because it failed to consider whether Ecotricity's noise measurements were correct and the appropriate noise levels to impose. Thus it is said the council failed to have regard to relevant considerations, took into account erroneous considerations and had no evidence on which it could reach a conclusion. Since Ecotricity calculated that the noise level from the development would be very close to the acceptable limits, it was essential that the background noise levels relied upon were accurate. Residents such as Mr Wilbourn and Mr Dyer raised complaints that Ecotricity's

background noise measurements were not carried out in accordance with the ETSU guidance. The council failed to address this issue in its decision to grant planning permission.

69. There is no doubt that noise from windfarms is an issue. Planning Policy Statement 22: Renewable Energy provides:

"Noise

22. Renewable technologies may generate small increases in noise levels (whether from machinery such as aerodynamic noise from wind turbines, or from associated sources – for example, traffic). Local planning authorities should ensure that renewable energy developments have been located and designed in such a way to minimise increases in ambient noise levels. Plans may include criteria that set out the minimum separation distances between different types of renewable energy projects and existing developments. The 1997 report by ETSU for the Department of Trade and Industry should be used to assess and rate noise from wind energy development."

In several appeal decisions planning inspectors have treated the accurate measurement of background noise levels, in accordance with guidance, as of importance, both in the decision to grant planning permission but also as a benchmark for future noise control and the operation of noise conditions: see Appeal Ref: APP/X2220/A/08/2071880, (Langdon, North Dover), [49]-[51], [57]; Appeal Ref: APP/F2605/A/08/2089810 (Shipdham, Norfolk). In the latter decision the inspector observed that it was undesirable to rely on noise conditions when margins were tight: [45]-[55].

70. Notwithstanding PPS 22, and these important decisions by inspectors, in my view the challenge in this case on noise gets nowhere. The choice of locations for measuring noise was agreed between the council's environmental services department and Ecotricity's noise consultants. Officers from that department considered Chapter 11 of the Environmental Statement and concluded that the noise measurements were in compliance with ETSU-R-97. (The environmental expert, Dr Towner, employed by Mr and Mrs Watson, of East Carleton, reached a similar conclusion). The commitee report provided sufficient information and guidance to enable the committee's members to reach a decision on noise impact, applying the relevant considerations. It summarised the noise measurements, the expert opinion and the objections of residents. It noted that full copies of all comments could be viewed on the council's website. The non-technical summary of the Environmental Assessment, which was with the report, provided more detail. At the committee meeting residents raised concerns directly with members before the decision was taken.

71. Overall, members had all the relevant considerations before them. Moreover, I am not persuaded that they took irrelevant factors into account or had insufficient information to decide the matter. Given that noise measurement and the application of the ETSU guidelines were technical matters, members were entitled to take comfort from the approval given by their own environmental services department. That is also the context in which they could justifiably weigh residents' concerns, such as those of Mr Wilbourn about how the Ecoctricity measurements had been undertaken, and of Mr Dyer, about the discrepancies between the measurements and the ones he had made on borrowed equipment. If members had been sufficiently agitated by the noise issue they could have followed up the matter. Indeed Councillor Kemp raised a query on noise at the meeting and the senior environment officer responded that officers were content that noise assessments were in accordance with ETSU guidelines and there were no noise objections to the proposal.

72. To my mind subsequent events – the evidence of Mr Wilbourn about how the noise measurements were undertaken at his property, and the comment on this by the senior environment officer – cannot undermine the rationality of the committee's decision on 23rd July 2008 to grant permission. At the hearing Mr Harwood for the claimant concentrated on what he

said was the wrong positioning within the five properties of the measuring equipment, it being too close to buildings, heating flues, gravelled drives, horses and dogs. The council's environmental services department did not comment on this matter prior to the issue of the planning permission. The contention is that the positioning of the equipment was thus in breach of ETSU guidelines, especially the 10 metre distance from building facades.

73. In my view the main difficulty with this submission is that in effect, late in the day, the claimant is inviting the court to decide the factual issue of whether the ETSU guidelines were met. All that is before me is a letter from the noise consultants employed by Ecotricity, that their standard procedure is to comply with ETSU guidance; photographs in the Environmental Statement of the noise measuring equipment in situ at the five locations, photographs which are open to different interpretations; and the statements of complainants. Even if it were possible for me to decide the issue, which on this evidence I very much doubt, it is not appropriate for me to accept the invitation to do so.

SAFETY

74. Safety is another factor to which the claimant contends the council failed to have regard. The committee report failed to consider the safety aspect of the development, and the Environmental Statement referred to safety only in the context of working on the turbines and highways and did not deal with the safety of local residents and Lotus employees. Safety was raised by a number of residents: one issue was the absence of a fall-zone; another that Potash Lane was a well-used public right of way for pedestrians, cyclists and horse riders. Specific reference was made to the recommendations of the British Horse Society. Yet none of this was taken into account.

75. Under the heading "safety", the document "Planning for Renewable Energy. A Comparison Guide to PPS 22" suggests with respect to fall-over distance, that the height of the turbine to the tip of the blade, plus ten percent "is often used as a safe separation distance". A fact sheet of the Department of Trade and Industry in 2001 records a small number of injuries and fatalities to operational staff from wind turbines – none in the United Kingdom – "caused by a failure to observe manufacturers' and operators' instructions". There is the recommendation of the British Horse Society, of a 200m exclusion zone around bridle paths to avoid wind turbines frightening horses. "Whilst this could be deemed desirable, it is not a statutory requirement, and some negotiation should be undertaken if it is difficult to achieve this." The document adds that although there is no statutory separation between a wind turbine and a public right of way, fall over distance is considered an acceptable separation, and the minimum distance is often taken to be that the turbine blades should not be permitted to oversail a public right of way.

76. Safety concerns are capable of being material to planning decisions. However, whether safety is a material consideration, and if so the weight to be attached to it, are matters of planning judgment. The companion guide to PPS 22, and the other documents mentioned in the immediately preceding paragraph, are open textured. When the expert body, the Health and Safety Executive, were contacted, they raised no objection to the wind farm. That being the case it was entirely reasonable for the committee report to deal with the issue in the manner it did. "Safety concerns for users of Potash Lane" and "danger from parts falling off turbines" were included in the objections mentioned in the report, and the report recorded that "other objections" were "not considered to be either individually or collectively of sufficient weight to justify a refusal of planning permission". The residents were able to press the issue at committee and members could have followed up any concerns if they had thought them important. It simply cannot be said that the decision is flawed through a failure to have regard to safety considerations.

PLANNING CONDITIONS

77. Two broad heads of challenge have arisen in relation to the conditions attached to the planning permission issued on 15th August 2008. The first is that conditions 3 and 4, the noise conditions, are unenforceable and irrational because they fail to require the operator to conduct

measurements at particular locations and cannot require off-site monitoring. On the same basis, condition 5, on shadow flicker, and condition 11, on television reception, are said to be unlawful, being unreasonable and unenforceable, because they could rely on steps being taken off site and outside the operator's control. The second head of challenge relates to condition 16. It is that the proposal for external lighting, which arose after planning permission was granted, would have been in breach of that condition. That is accepted by the council, although there is a dispute as to the consequences when the council never issued a formal decision in relation to the matter. A third argument, that noise condition 3 fails to impose any restriction on noise levels when wind speeds exceed 12 m/s, is unsupportable in the light of the fact that sound from the proposed turbines plateaus at 8 m/s.

Off-site monitoring

78. Planning conditions must be precise and enforceable: Circular 11/95, Use of Conditions in Planning Permission. In public law terms this is an aspect of rationality. It is irrational to impose a condition which cannot be complied with either because it cannot be understood or is easily subverted. It is also irrational to impose a condition if the enforcement remedies provided by the Town and Country Planning Act 1990 cannot be used. The claimant's off-site monitoring challenge arises in this way.

79. On this basis planning conditions may be unlawful if they require a developer to carry out or refrain from carrying out actions outside the application site. As Richards J expressed the principle in *Davenport v London Borough of Hammersmith and Fulham* [1999] J.P.L. 1122, 1126:

> "[T]he reason why a condition requiring the carrying out of works on land not within the control of the applicant is invalid is the operation of a broader principle, namely that one cannot lawfully impose a condition requiring a person to secure a result that it does not lie wholly within his power to secure."

Thus a condition relating to land outside the application site and outside the control of the applicant is unlawful if it requires the carrying out of works on such land or is otherwise one with which the applicant could not be assured of securing compliance.

80. Moreover, a breach of condition notice can only be served on a person who is 'carrying out or has carried out the development' or a person having control of the land: Town and Country Planning Act 1990, 187A. The land there referred to is land the use of which is regulated by the condition. Therefore a notice controlling off-site activity cannot be served on a person operating the business on-site who was not the original developer: *Davenport*, at 1131. An enforcement notice can only be enforced against the owner of land or a person having control of or an interest in the land to which the notice relates: s. 179. Consequently, an enforcement notice cannot be made in respect of actions required or prohibited on third party land. The power to grant a planning injunction under section 187B of the Act is not expressly limited to persons who can be subject to enforcement action under other statutory provisions if the breach of planning control has taken place.

81. Condition 3 contains noise limits for the turbines at noise sensitive properties and defined by reference to prevailing background levels, set out in the Environmental Statement. It is impossible to measure prevailing background levels when the turbines are operational and these vary with wind speed. Consequently, to ascertain whether there is compliance with the condition it is necessary to compare the noise from the turbines with the prevailing background noise level for a particular wind speed. To make that assessment noise measurements have to be taken at the right position and the wind speed at the turbines must be known. Condition 3 requires wind speed to be determined on the site.

82. However, Condition 4 provides for the council to require the operator to take noise measurements. The condition cannot require the operator to carry out measurements on third party land which is not subject to a public right of access. Moreover, it would not be possible to require any off site monitoring, even on the highway, by anyone other than the original developer. There is no part of the condition limiting it to a particular operator. For these reasons the claimant contends that the condition fails to require measurements to be taken by the operator at the noise sensitive properties. The council could carry out its own noise measurements. However, it would not have the wind speed data necessary to determine whether there is compliance with condition 3. Consequently, the noise condition is not capable of enforcement by the council from its own investigations and the operator cannot be required to take noise measurements at the relevant locations.

83. Similarly condition 11, for example, relies on steps for mitigating interference with television reception to be taken off site. The scheme described in the Environmental Statement requires an engineer to visit affected properties and either to realign or upgrade television aerials or to install a satellite dish. The proposed steps would all be on land outside the development site and the operator of the turbines would not be able to secure compliance with the condition. Even if the proposed requirements were not unlawful the council would be unable to issue an enforcement notice or serve a breach of condition notice on anyone other than the original developer.

84. In my view the *Davenport* principle must be interpreted in the light of everyday realities. In any event the conditions on their face do not require the carrying out of works on land outside of Ecotricity's power to secure compliance. Where the basis for planning conditions is the protection of residential amenity it is not unreasonable for a planning authority to adopt conditions which include access to third party land to assess and remedy a complaint. The reality is that access will ordinarily be granted. Where a condition is not enforceable because of a denial of access, it would not be expedient to take action for breach if a resident complains but then does not allow access for their complaint to be remedied. Conditions for residential amenity which contemplate access to third party land are rational because it can be assumed that residents who complain will allow access so the source of the problem can be addressed.

85. Thus in this case planning conditions contemplate noise measurement and television interference mitigation at the property which has given rise to the complaint. It is technically correct that such property would not be under Ecotricity's control, and its agents would be trespassers unless granted entry by a complainant. In the real world, however, the council is rationally entitled to assume that a person sufficiently aggrieved by noise or other problems to complain will co-operate with the subsequent investigation. In general, if this person were to refuse entry it would be lawful and rational for the council to decline to take further steps, for example, by way of service of a breach of condition notice, enforcement notice or injunction.

86. The claimant submits that it is questionable whether there is jurisdiction to make an injunction under section 187B of the Act against persons who could not otherwise be subject to action in respect of a particular breach of planning control, as explained in paragraph 80. Even if the court has jurisdiction, the claimant contends, it is likely not to exercise its discretion to make an order against such persons. I simply do not accept the claimant's submissions about the limits on availability of an injunction under section 187B. That section is in very broad terms. Thus an injunction may be in mandatory, as well as prohibitory, terms: see *Encyclopaedia of Planning Law and Practice*, para P 187B. 17. That being the case the obstacles which the claimant raises about the enforcement of the condition, both in relation to off-site monitoring and any operator of the site after Ecotricity, fall away.

Condition 16

87. After the grant of planning permission the Ministry of Defence, through Defence Estates, changed its policy regarding lighting for wind turbines. On 11th November the claimant's solicitors wrote to the council contending that the approval of aviation warning lighting was

prohibited by condition 16. Later that day they sent a judicial review pre-action protocol letter. The application for external lighting was reported to the planning committee on 12th November and approved. These judicial review proceedings were commenced on 14th November and the council consequently withheld issuing the lighting decision notice. The claimant invokes *R (on the application of Burkett) v London Borough of Hammersmith and Fulham* [2002] 1 WLR 1593, [38], [42] in support of its contention that the resolution is a proper subject of judicial review.

88. In my view this ground is academic and on that basis judicial review must be refused. *Burkett* establishes that judicial review is available to attack a council resolution, prior to a decision being taken. But where, as here, the council have made clear that no decision will ever be issued on the basis of that resolution, the grant of a remedy would be quite futile. There is no need to quash the resolution, nor is there any necessity for a declaration. That the issue of a decision was thwarted by the issue of judicial review proceedings after the planning committee passed the resolution may be relevant, however, to costs.

PUBLICATION OF PLANNING DECISION

89. The Council Directive of 27th June 1985 on the assessment of the effects of certain public and private projects on the environment 85/337 EEC, [1985] OJ L175/40, as amended by [1997] OJ L73/5 and [2003] OJ L156/17, provides:

Article 9

"1. When a decision to grant or refuse development consent has been taken, the competent authority or authorities shall inform the public thereof in accordance with the appropriate procedures and shall make available to the public the following information:

— the content of the decision and any conditions attached thereto,

— having examined the concerns and opinions expressed by the public concerned, the main reasons and considerations on which the decision is based, including information about the public participation process,

— a description, where necessary, of the main measures to avoid, reduce and, if possible, offset the major adverse effects.

…

Article 10a

Member States shall ensure that, in accordance with the relevant national legal system, members of the public concerned:

(a) having a sufficient interest, or alternatively,

(b) maintaining the impairment of a right, where administrative procedural law of a Member State requires this as a precondition,

have access to a review procedure before a court of law or another independent and impartial body established by law to challenge the substantive or procedural legality of decisions, acts or omissions subject to the public participation provisions of this Directive. ...

In order to further the effectiveness of the provisions of this article, Member States shall ensure that practical information is made available to the public on access to administrative and judicial review procedures."

90. These provisions are given effect in the United Kingdom by regulation 21 of the Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999, SI 1999 No 293:

"(1) Where an EIA application is determined by a local planning authority, the authority shall—

(a) in writing, inform the Secretary of State of the decision;

(b) inform the public of the decision, by local advertisement, or by such other means as are reasonable in the circumstances; and

(c) make available for public inspection at the place where the appropriate register (or relevant section of that register) is kept a statement containing—

(i) the content of the decision and any conditions attached thereto;

(ii) the main reasons and considerations on which the decision is based including, if relevant, information about the participation of the public;

(iii) a description, where necessary, of the main measures to avoid, reduce and, if possible, offset the major adverse effects of the development;

(iv) information regarding the right to challenge the validity of the decision and the procedures for doing so."

Local advertisement is defined as a publication in a local newspaper and publication on website, where the council uses one: reg. 2(1).

91. The council accept that they are in breach of regulation 21 in that they did not publish information about how to challenge the grant of permission by means of judicial review. The claimant goes further, however, and contends that the council have not published a notice to the public under the regulation informing them of the decision. Merely placing the planning permission on the council website is insufficient since the regulation requires positive steps to inform the public, such as by local advertisement. They have also not made available a statement in accordance with regulation 21(1)(c). In response the council submit that they published the decision on the web-site and that their only failure was that they did not produce a separate statement of the main reasons and considerations on which the decision was based. That was far from a wilful breach, if a breach at all. The full planning permission contained the reasons for approval, and other information about the application has been available. As to the omission to inform about the remedy of judicial review, the council submit that that failure can only prejudice someone who is unable to challenge the decision as a result. That is not the case with this claimant which, notwithstanding the breach, has been able to bring its judicial review.

92. In my view, this was not a trivial breach. There is a clear obligation enshrined in regulation 21, derived from the European directive. There was no publication in a local newspaper as required by regulation 21(1)(b). I am prepared to accept that the reasons in the planning permission notice were an accurate summary of why councillors decided the way they did. This is an acknowledgment of the realities of local authority procedures, a point reflected in Circular 02/99: Environmental Impact Assessment; para 127. But there was still no one statement as required by section 21(1)(c).

93. The failure of the council to comply with regulation 21 does not mean that the grant of planning permission is unlawful. The fact is that the requirement focuses on the availability of information after the decision has been made, rather than on the decision-making process itself: *R (Richardson) v North Yorkshire County Council* [2003] EWCA Civ 1860; [2004] 1 WLR 1920. Moreover, a mandatory order now requiring publicity to be carried out and a statement to be

produced seems academic when we are a year on from the decision, the material about the decision has been given wide publicity and the claimant has been able to pursue judicial review in this action, despite the absence of published information from the council about how to do so.

94. Nonetheless, the council failed to advertise and to produce a regulation 21 compliant statement. It did not assemble and make available the information which it was obliged to do, in particular the information on the legal right to challenge the planning permission. That is an unacceptable failure to comply with an important part of democratic procedures, enshrined very clearly in the European directive and the United Kingdom regulations, to make information about a decision available to the public. The importance of this obligation for the Council's conduct of its ongoing business needs to be marked by the issue of a declaration.

CONCLUSION

95. In my judgment there is no basis for quashing the planning permission which the council gave for the erection of this wind farm. Nor, with one exception, is there a basis for any other relief in this judicial review. The claimant's constitutional point, that the area planning committee breached the legislation by making a decision other than by majority vote fails because it wrongly characterises what occurred. Once the vote at the area planning committee was taken it was evident under the council's constitution that it did not have decision-making power. The matter stood referred for decision to the full planning committee, a more democratically representative body. For the reasons given the decision cannot be flawed on the basis of the other objections raised by the claimant, notably how the councillors dealt with the ramifications of the development for the setting of listed buildings, noise and safety. Nor can it be contended that the conditions in the planning permission were unreasonable and unenforceable because, for example, they had an off-site impact. The *Davenport* [1999] JPL 1122 decision must be read in the light of everyday realities.

96. The one error which in my view must be marked by a declaration is the failure of the council to inform the public of the decision. That was required by the environmental impact assessment directive and regulations. Part of that information was how the public could seek judicial review of the planning permission. Albeit that the information was available in one form or other after the decision was made, and that the claimant has been able to pursue judicial review, this is one of those occasions where a declaration is necessary to act, not as a curative, but as a preventive, instrument.