

BROADVIEW ENERGY DEVELOPMENTS LIMITED:

SPRING FARM RIDGE WIND FARM

O P I N I O N

Introduction

1. Broadview Energy Developments Limited is seeking planning permission for the construction of a wind farm including five wind turbines of up to 125m in height. The development is described on the application form as the “erection of five wind turbines plus underground cabling, meteorological mast, access tracks, control building, temporary site compound and ancillary development”. The five turbines would be rated at 2-3 MW each, and therefore total some 10-15 MW together. The application site is comprised of agricultural land in a number of different ownerships.
2. I am asked to advise the Helmdon, Stuchbury & Greatworth Wind Farm Action Group (HSGWAG) as to the compliance of Broadview’s Environmental Statement (ES) with the relevant legal requirements, and also as to the prospects of the grant of planning permission by the local planning authority. This latter question is one of planning judgement which will ultimately be for the authority, but, based on my professional experience of wind farm cases, previous appeal decisions for such developments, and the provisions of the development plan and other relevant policy, I consider that I can give an assessment of the prospects of the proposal securing planning permission from the local planning authority. I understand that a copy of this Opinion may be provided to the local planning authority in order to assist with the determination of this application.

3. In order to assist in the preparation of this Opinion, I visited the site and its surroundings on 15 December 2010. Before visiting the site I reviewed some documentation, including the Design and Access Statement (DAS), the Planning Statement (PS), the ES, and reports prepared on behalf of the HSGWAG by Alison Farmer Associates, Environment Information Services and Robert Davis Associates, as well as a letter dated 25 November 2010 from the Northants Bat Group.
4. On my site visit, I walked along the byway which runs north-south through the application site. I was driven around the local landscape, in all directions around the application site, and stopped to view the site from a number of locations. I also visited a number of particular viewpoints, including Helmdon church, Helmdon, Sulgrave Manor, Sulgrave church, Sulgrave ringwork, Greatworth church, Astral Row in Greatworth, Stuchbury Hall Farm, Manor Farm, Stuchbury Manor Farm and Grange Farm.

Compliance with the Environmental Impact Assessment Regulations

5. Planning permission cannot lawfully be granted for environmental impact assessment development unless there has been substantial compliance with the EIA Regulations^{1,2}. Information capable of meeting the requirements of Schedule 4 to the EIA Regulations must be provided before planning permission can be granted.³
6. The requirements of Schedule 4 include:
 - (i) an outline of the main alternatives studied by the applicant and an indication of the main reasons for the choice, taking into account the environmental effects;

¹ Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999 (as amended).

² *Berkeley v SSE* [2001] 2 AC 603.

³ *R v Cornwall CC, ex p Hardy* [2001] Env LR 25.

- (ii) a description of the aspects of the environment likely to be significantly affected by the development including fauna;⁴
 - (iii) a description of the likely significant effects of the development on the environment, including direct, indirect, secondary and cumulative effects;
 - (iv) a description of the measures envisaged in order to prevent/avoid, reduce and remedy/offset the significant adverse effects on the environment; and
 - (v) the data required to identify and assess the main effects which the development is likely to have on the environment.
7. These points are set out by way of an introduction to this section as they are relevant to a number of the matters which I raise below where there appear to have been failures properly or fully to comply with the requirements of the EIA Regulations.

Alternatives: site selection / project development

8. National policy requires consideration of whether a development is appropriately sited.⁵ PPS22 requires a developer to demonstrate how environmental and social impacts have been minimised through careful consideration of location, scale, design and other measures, and also requires that wind farm developments are proposed in a way such that their effects – and in particular their landscape and visual effects and their noise impacts⁶ – are minimised.

⁴ This would also include the noise environment.

⁵ 2007 Energy White Paper.

⁶ PPS22, paras 19 and 22.

9. In terms of environmental impact assessment, there is an obligation to report consideration of alternatives, which would include alternative locations and scales of turbines. The ES provides some information related to site selection and alternatives. There is little material provided in the ES as to what has been done by way of a site selection process to consider how environmental impacts could be minimised by the choice of the location of the development.
10. Whilst the application documents refer to a process of design iteration and refinement, very little detail on this process is provided. Some information is provided on different layouts considered, but this does not, for example, give any detail of the relative effects of each layout in relation to each of the main environmental impacts, nor how the application scheme is better in these respects than other layouts. Nothing is said about the scale of turbines.
11. The DAS refers to there having been a “feasibility exercise” or “feasibility study” undertaken, where the suitability of the site was assessed in relation to a range of matters including environmental factors, but this exercise is not reported in the ES. Similarly, the DAS says that “a computer model was used to determine the optimal configuration” but no details of this modelling are provided in the ES. The four “layout iterations” presented in the ES are only the “most significant” ones according to the DAS, whereas it says that “many more were developed and considered”. None of those other ones are described in the ES at all.
12. It appears to me therefore that the ES does not contain, as it should, an outline of the main alternatives studied by the applicant and an indication of the main reasons for the choice, taking into account the environmental effects. In this respect the ES is not in my opinion fully compliant with the EIA Regulations.

Development proposed

13. The DAS states that “each turbine will have a total height to tip of no more than 125 metres with a typical hub height of 80 metres and a blade length of 45 metres”. This is echoed in the ES. The proposal in this case does not fix the height of the turbines (hub or blade tip) and does not identify the turbine type to be used. Rather, the application gives a maximum height, and the noise assessment is based on a “candidate turbine representative of the type that could be installed on the site” (ES 12.4.2). The actual height of the turbine, and the actual turbine type used, could be different. This uncertainty is compounded by the proposal explained in the DAS to allow micro-siting of each turbine by up to 50m in any direction, after the grant of planning permission.
14. The ES states that it has been based on turbines of 125m being “the maximum size envisaged” and that “the EIA has been based on preliminary design information for which any changes would only improve the potential environmental impact” (ES 1.3, 5.2). The ES offers no support or evidence for this latter statement.
15. Whilst it may be obvious that landscape and visual impacts would only improve if smaller turbines were used, there are other impacts which could be different as a result of using smaller turbines. The effects in relation to noise and bats are examples of areas where I understand effects could be different if smaller turbines were used and the turbines were moved by up to 50m in location. This gives rise to concerns about the accuracy of the assessment in the ES and the ability to impose effective conditions.
16. Not only does Schedule 4 to the EIA Regulations require an ES to include a description of the development, a description of the physical characteristics of the development, and the “size of the development”, an ES must also include a description of the likely significant effects of the development on the environment. The ES in this case does not do this. It describes one possible

development that could be constructed under a planning permission granted. It describes one possible set of likely significant effects arising from a development that could be constructed under this permission. But the lack of definition of the development in the application and the ES means in my opinion that the ES as it stands cannot meet the requirements of the EIA Regulations.⁷

17. In my view, in order to ensure that the development proposed has been subject to an environmental assessment which reflects the development as it will actually be built, the developer should not be allowed such latitude in relation to height, type and siting of turbine. There is a risk that, through any or all of these factors, the development as constructed could be significantly different in its environmental effects from that set out in the application documentation and assessed in the ES. It would be unlawful to grant planning permission for development which could have significant effects which were different from those which had been subject to assessment in the ES.⁸

Grid connection

18. The DAS states that “three options for a grid connection point for the proposed development have been identified”. The three options are shown on figure 5.7 in the ES. The three options are very different in terms of route. They all appear to be quite long. Two of the three options are not confined to existing highways and cross areas of what appears to be agricultural land. The ES says at 3.2.3 that “the preferred grid connection point would be confirmed following receipt of planning permission”. The ES also notes that the grid connection could be constructed under a “permitted development order” by a statutory undertaker. This appears to be a reference to the blanket planning permission granted to statutory undertakers under the Town and Country Planning (General Permitted Development) Order 1995 (as amended). In this

⁷ See *R v Rochdale MBC, ex p Tew* [2000] Env LR 1, *R v Rochdale MBC, ex p Milne* [2001] Env LR 22 and *Smith v SSETR* [2003] Env LR 32.

⁸ See *Barnes v SSCLG* [2010] EWHC 1742 (Admin) at para 6.

case, the grid connection would not be subject to environmental impact assessment under another application process.

19. For the purposes of environmental impact assessment, where a project is to be developed as separate components a proposal should not be considered in isolation if it is properly to be regarded as an integral part of an inevitably more substantial development (so-called ‘salami slicing’).⁹ In this case it is apparent that the construction of the grid connection would be part of the project.¹⁰ Accordingly, there has been a failure in the ES to assess the likely significant effects of the grid connection, being an integral part of the overall wind farm project.¹¹ This is a significant omission and means in my opinion that the ES is inadequate as it stands.

Assessment of significance

20. The assessment of environmental effects in the ES repeatedly asserts that the effects of the development on various environmental receptors would not be significant in environmental impact assessment terms. The ES states that “significant effects are predicted where important resources, or numerous or sensitive receptors, could be subject to impacts of considerable magnitude” (ES 2.4.1). In relation to landscape and visual impacts, only impacts of “major” or “major / moderate” significance are treated as being significant in EIA terms (ES 7.4.1.4). Similarly, in relation to cultural heritage assets, only impacts of “major” or “moderate” significance are treated as being significant in EIA terms (ES 8.6.2). In relation to ecological interests, the test of significance is very complicated and excludes from being regarded as of significance in EIA terms even some adverse effects on internationally important species and permanent adverse effects on the integrity of sites or species of county importance (ES 9.4.3).

⁹ *R v Swale BC, ex p RSPB* [1991] 1 PLR 6.

¹⁰ See eg the ES at 5.5.1, 7.4.1.5, 7.6.4, 7.7.3, 7.7.5.

¹¹ The local planning authority’s scoping opinion dated 22 March 2010 stated that the ES should cover the grid connection and should “detail how the proposal will be connected to the national grid”.

21. Having regard to the case law on what can be said to constitute a significant effect,¹² it appears to me that the ES in this case has set the threshold of significance too high. Even if it is accepted that the scale of the effects are as Broadview has described them (ie moderate, minor, etc) I cannot see how some of the effects identified can be taken to be other than significant in EIA terms. It appears to me therefore that the ES has understated the significance of the environmental impacts of the development.

Matters not addressed by the ES

22. Article 3 of the EIA Directive 85/337/EEC (as amended) requires a description and assessment of the effects of a project on “human beings”. Annex IV to the Directive sets out the information that should be provided including likely significant effects on the “population”. Schedule 4 to the EIA Regulations also requires that an ES deal with “population”. The Government’s consultation draft guidance on EIA good practice from June 2006 included within the ambit of population effects “effects of emissions, noise, etc on health”. European guidance on EIA scoping includes social changes arising from a project, including community health and welfare, and community and cultural identity.¹³ Guidance in the Design Manual for Roads and Bridges Volume 11 on environmental impact assessment includes effects on land used by the community and on amenity. Other guidance refers to the assessment of a development’s socio-economic, social and health impacts.¹⁴

23. It is common in my experience for environmental statements to consider community and socio-economic impacts of development, including on the overall quality of life in an area. Also, it is common for environmental statements to consider together the overall effects of a development on the general amenity of an area, for example from the combined visual, noise and other effects of the development. EC guidance stresses the importance of

¹² See eg *R (Jones) v Mansfield DC* [2003] EWCA Civ 1408.

¹³ EC Guidance on EIA Scoping (June 2001).

¹⁴ See for example the IEMA’s guidelines for environmental impact assessment. PPS22 also refers to “social impacts” as well as environmental impacts.

considering in EIA what are described as “impact interactions”, including where a development has two separate impacts which interact to produce a combined effect.¹⁵

24. The ES in this case has a heading of “socio-economic effects” but considers only employment and economic effects (ES 17.3). The ES also briefly considers “health and safety”, but in terms of the risk of accidents from the development (ES 17.5). The ES does not consider the population effects of the development in terms of its social and community effects. Nor does the ES consider the “impact interactions” arising from the development, and in particular the combined visual and noise impacts of the development on the amenity of the local communities and the character of the settlements in which they live, as well as in relation to the living conditions of the occupants of nearby residential properties. In my opinion these are important deficiencies in the ES which mean that it is not fully compliant with the EIA Regulations and Directive.

Noise

25. The PS takes the approach that as the development is predicted to meet noise limits derived from ETSU-R-97 the “noise impacts are deemed to result in an effect which is not significant” (PS 3.3.5). The same approach is taken in the ES, which concludes that because the predicted wind turbine noise is lower than the noise limits derived from ETSU “therefore the predicted noise impacts are deemed to result in an effect which is not significant” (ES 12.1, 12.4.7, 12.6.2). Broadview’s noise assessment, contained within the ES, was aimed at assessing noise against the standards contained in ETSU (ES 12.2, 12.3.3). It does not consider noise impacts more widely.¹⁶

¹⁵ EC Guidelines for the Assessment of Indirect and Cumulative Impacts as well as Impact Interactions (May 1999).

¹⁶ Although the ES at 12.3.5 states that “the evaluation of the potential effects on the amenity and quality of life of residents in the vicinity of the proposed development forms the basis of this noise assessment”, the ES does not appear to contain consideration of the effects of the development on amenity and quality of life in relation to noise (only compliance with ETSU-derived noise limits).

26. However, ETSU permits very substantial increases in actual noise levels and therefore adverse noise impact, including for example in low wind speeds or at night. Accordingly, even where there is ETSU compliance, it is in my opinion necessary also to consider actual noise effects as they would be perceived in the real world. Policy G3(D) of the South Northamptonshire Local Plan requires developments not unacceptably to harm the amenities of neighbouring properties. It is therefore necessary to consider this question pursuant to s38(6) of the Planning and Compulsory Purchase Act 2004, as well as in relation to the EIA Regulations.

27. Further, the scale of the increases in actual noise levels, whether they have been minimised, and what they mean in terms of the actual effect on the living conditions of nearby occupiers, are relevant matters under the requirements of the EIA Regulations, as material planning considerations under s70(2) of the Town and Country Planning Act 1990, and pursuant to PPS22. The Government's policy in PPS22 is that authorities "should ensure that renewable energy developments have been located and designed in such a way to minimise increases in ambient noise levels".¹⁷ The local planning authority's Supplementary Planning Document (SPD) on Wind Turbines in the Open Countryside also requires noise assessments to consider not only compliance with ETSU but also other guidance and to consider noise impacts generally including on the living conditions of local residents.

28. The PS itself notes in Section 5 that:

"it is necessary, through careful consideration of location, scale and design, to ensure that proposed developments do not result in unacceptable adverse impacts upon the amenities of residential properties through either noise... "

29. I understand that the need to look beyond mere ETSU compliance and consider the noise effects of wind turbine developments in amenity terms was recently endorsed by the Court of Appeal in the case of *Tegni Cymru Cyf v*

¹⁷ PPS22, para 22; see also the PPS22 Companion Guide, p167, para 41.

Welsh Ministers (C1/10/1426, 24 November 2010). Although a transcript of the Court of Appeal's judgment is not yet available, a summary report of that judgment states:¹⁸

“An Inspector had dismissed an appeal against a refusal of planning permission on the basis that, although the proposed windfarm could operate within the noise limits recommended by ETSU-R-97, residents who already experienced noise disturbance from existing windfarms (which also operated within the ETSU-R-97 limits) would experience such disturbance for longer periods, giving rise to unacceptable adverse effect on residential amenity. Wyn Williams J had quashed the Inspector's decision, holding that it was inconsistent for the Inspector to conclude that, on the one hand the existing and proposed windfarms would operate within the relevant limits, but on the other hand local residents would suffer noise disturbance that was unacceptable.

The Court of Appeal held that there was no such inconsistency and allowed an appeal against the Judge's decision. It held that whilst the ETSU-R-97 limits were a matter to which the Inspector was required to have regard, he was not bound by them. In particular, the ETSU-R-97 limits represented only one view as to the appropriate balance to be struck between the adverse effects of noise disturbance and the wider beneficial effects of windfarms, and it was for the Inspector to form his own planning judgment as to whether the noise generated by a particular proposal would be unacceptable, taking into account the evidence of local residents and his own experiences on site visits.”

30. Even accounting for the slightly different wording in PPS22 and the Welsh guidance in TAN8 in relation to ETSU, the Court of Appeal's judgment appears to confirm the position that compliance with ETSU-derived noise limits is not the only relevant consideration and that it is necessary for decision-makers to consider the acceptability of noise impacts more generally.
31. In the instant case, noise issues have been considered in a letter dated 5 December 2010 from Robert Davis Associates. That letter makes it clear that in this particular case compliance with ETSU-derived noise limits does not mean that there will be no adverse noise impact and that the effect of noise on residential amenity should not be discounted in the way that the ES does.

¹⁸ See www.4-5.co.uk/news/index.cfm?id=2552.

Mr Davis's letter also draws attention to a number of concerns about the noise assessment in this case and the limitations of the ETSU approach.

32. In terms of environmental impact assessment, as noise impacts have not been considered beyond the question of compliance with ETSU-derived noise limits, there is in my opinion a failure properly to describe the likely significant effects of the development on the environment in terms of noise.
33. Moreover, Schedule 4 to the EIA Regulations requires that an ES includes "the data required to identify and assess the main effects which the development is likely to have on the environment". This includes those arising effects from noise. I consider that the ES in this case fails to comply with this requirement as the noise information provided in the ES (background noise measurements, wind speed and direction, etc) is presented only in graphical, summary form, and the actual data is not provided. I understand that data has been provided to the local planning authority, but that it is not generally available publicly. I note that a failure publicly to provide noise-related data has led to the quashing of planning permission in the past.¹⁹

Conclusion on EIA Regulations

34. For the reasons I have given above, and those I give below in relation to bats, there are a number of important omissions or failures in relation to compliance of the ES with the EIA Regulations, which mean that, in my opinion, the ES is not adequate to form an environmental statement for the purposes of the EIA Regulations. It would therefore be unlawful to grant planning permission based on the ES submitted by Broadview. I consider that the local planning authority should make a request for the provision of further information under Regulation 19 of the EIA Regulations. I would also recommend that in those circumstances it has the ES reviewed by expert consultants before so doing, so

¹⁹ See for example the consent order dated 4 August 2008 agreed in the Court of Appeal proceedings related to Den Brook (*Hulme v Secretary of State for Communities and Local Government*, C1/2008/0793). See also the argument in the *Barnes* case.

that the Regulation 19 request may identify all the significant omissions or faults in the ES and allow them to be subjected to one Regulation 19 request.

European protected species: bats

35. The PS notes that the “main potential adverse effect” of the development on non-avian ecological receptors would be likely to be on bats (PS 3.3.4.2, ES 9.6.2.1). The PS also notes that the ES has (i) considered the risks for each species recorded during the study, and (ii) concluded that the risks to bats are very low because of the “low levels of activity” recorded. No mitigation is proposed by Broadview in relation to the effects on bats (PS 3.3.4.4, ES 9.1).
36. It is clear from the ES that the reasoning underlying the conclusion that there would not be significant effects on bats from the operation of the development is the “low level of bat activity” found during surveying (ES table 9.12, ES 9.6.2.1). This includes both high and medium risk species, including rare species such as barbastelle. As the ES itself notes, the risk of collision and barotraumas “will be affected by patterns and levels of activity across a proposed development site” (ES 9.6.2.1). The validity of the ES’s assessment and conclusions is therefore entirely dependent upon the quality of the survey work done and the assumption that the findings of the survey accurately and properly reflect that actual levels of bat activity across the site.
37. The survey work for the ES found that the development site was used by bat species whose populations are at greatest risk from wind farm developments as a consequence of their rarity and/or flight characteristics, including noctule, Leisler’s, barbastelle and Nathusius’ pipistrelle.²⁰
38. A review of Broadview’s bat survey work has been undertaken by Mr P W Richardson of the Northants Bat Group and set out in a letter dated 25 November 2010. That letter contains numerous criticisms of Broadview’s

²⁰ See the October 2010 Bat Survey report by Andrew McCarthy Associates in the ES.

bat survey work which appear on the face of it to be valid. The letter also draws attention to the fact that four species found in the survey work are rare, such that any loss of bats of those species would be important. The letter's conclusion is that Broadview's bat surveys have failed accurately to determine bat activity across the site. It follows from this conclusion that the ES's assessment of and conclusions on the impact of the development on bats cannot be taken as being reliable.

39. The Northants Bat Group's conclusions are corroborated by the view of Natural England, the Government's statutory adviser on ecological matters. Natural England's letter dated 15 December 2010 records its agreement with the view that the bat surveys undertaken have failed accurately to determine bat activity across the site and the effects that the turbines would have on local bat populations. Natural England objects to the development. This objection would be a very weighty consideration for the local planning authority, given Natural England's statutory role.

40. In a number of recent appeal decisions,²¹ planning permission has been refused for wind turbine developments because inspectors have not been satisfied on the basis of the information provided that bat populations would not be adversely affected at a local or regional level. Relevant factors have included the absence of sufficiently robust survey information including in particular bat counts at the levels of turbine blades, and the presence of rare bat species such as barbastelle and Leisler's bats which are at risk at a population level from only a few mortalities due to their rarity. These factors are present in the instant case.

41. These recent appeal decisions have been in accordance with the law and policy applicable to bats as European protected species. In *R (Woolley) v Cheshire East BC* [2009] EWHC 1227 (Admin), planning permission was granted for the demolition of an existing dwelling and its replacement by a larger building. The planning officer's report proposed that a condition be imposed

²¹ Dated 8 December 2009 at Hempnall (2084443) and dated 27 October 2010 at Linton (2108277).

to secure a method statement for the mitigation of the effects of the development on bats. The High Court considered the duty which fell on the planning authority in the development control decision-making process as a result of the application of the provisions of the Habitats Directive where European protected species might be affected.²² The High Court held that imposing a condition as was proposed was not sufficient to satisfy the statutory requirements (para 28).

42. Moreover, the Court in *Woolley* also referred to the provisions of paragraph 116 of Circular 06/2005 and the obligations which fall on planning authorities in cases where a European protected species might be affected. The position was further considered by the Court of Appeal in *R (Morge) v Hampshire CC* [2010] EWCA Civ 608,²³ where at paragraph 61 Ward LJ summarised the position as follows:

“It seems to me that the Planning Committee’s duty is prescribed by Regulation 4(3).^[24] it must have regard to the requirements of the Habitats Directive so far as they may be affected by the proposed development. The Planning Committee must grant or refuse planning permission in such a way that will “establish a system of strict protection for the animal species listed in Annex IV(a) in their natural range.” If in this case the Committee is satisfied that the development will not offend Article 12(1)(b) or (d) it may grant permission.^[25] If satisfied that it will breach any part of Article 12(1) it must then consider whether the appropriate authority, here Natural England, will permit a derogation and grant a licence under Regulation 44. Natural England can only grant that licence if it concludes that (i) despite the breach of Regulation 39 (and therefore of Article 12) there is no satisfactory alternative; (ii) the development will not be detrimental to the maintenance of the population of bats at favourable conservation status and (iii) the development should be permitted for imperative reasons of overriding public importance. If the Planning Committee conclude that Natural England will not grant a licence

²² See Reg 9 of the Conservation of Habitats and Species Regulations 2010.

²³ The High Court also considered what was required in relation to the effect of wind turbine developments on bats in the case of *R (Hulme) v SSCLG* [2010] EWHC 2386 (Admin) at paras 92-97. In that case an inspector’s decision was upheld as he had concluded on the evidence that the turbines would not constitute a threat to local bat populations.

²⁴ See now Reg 9 of the 2010 Regulations.

²⁵ Article 12(1)(b) relates to disturbance of European protected species and Article 12(1)(d) relates to destruction of breeding sites or resting places of European protected species. European protected species include bats.

it must refuse planning permission. If on the other hand it is likely that it will grant the licence then the Planning Committee may grant conditional planning permission. If it is uncertain whether or not a licence will be granted, then it must refuse planning permission.”

43. The requirement for the provision of adequate information prior to the determination of planning applications is also set out in Government policy.²⁶ Paragraph 99 of Circular 06/2005 provides that where there is a reasonable likelihood of protected species being present on the site and affected by the development (as is at least the case here):

“It is essential that the presence or otherwise of protected species, and the extent that they may be affected by the proposed development, is established before the planning permission is granted, otherwise all relevant material considerations may not have been addressed in making the decision.”

44. The Circular provides that surveys should be completed and necessary measures proposed before planning permission is granted.

45. The document *Planning for Biodiversity and Geological Conservation: A guide to good practice* (2006) explains that in development control the onus falls on the applicant to provide enough information to enable the planning authority to assess the impacts on biodiversity (para 5.3). The development control process plays a critical part in ensuring that the statutory protection of species is applied (para 5.10). The guidance is that where there is a reasonable likelihood of legally protected species being present (as is at least the case here), full ecological surveys must be provided in advance of the planning application.²⁷

46. In my opinion, given the information set out in the Northants Bat Group’s letter dated 25 November 2010 and Natural England’s letter dated 15 December 2010, the bat survey material contained within the ES would not

²⁶ And is also reflected in the local planning authority’s SPD on Wind Turbines in the Open Countryside.

²⁷ See paras 5.7, 5.10-5.15.

be sufficient to allow the local planning authority to discharge its legal obligations in relation to European protected species if it were to grant planning permission. It follows that it would not in my opinion be open to the authority lawfully to grant planning permission for the development based on the current application documentation. For the same reasons, the ES would not in my view fully comply with the requirements of the EIA Regulations in relation to bats, in that it would not contain either a proper description of the aspects of the environment likely to be significantly affected by the development and/or a proper description of the likely significant effects of the development on the environment.

Assessment of prospects of success

Planning policy matrix

47. As with any planning decision, the decision in this case will have to be made in accordance with the statutory development plan, unless material considerations indicate otherwise.²⁸ Here, as with any significant proposal, there are particular policies which ostensibly pull in different directions. Section 38(6) does not require accordance with each relevant policy of the plan, but rather the development plan considered as a whole.²⁹ It is necessary therefore to identify the overall theme or thrust of the development plan in relation to this application.

48. Broadview's PS was prepared on the basis that the Regional Strategy, the East Midlands Regional Plan (2009), was not part of the statutory development plan. The PS did not therefore address the policies of that Plan. However, in November 2010 judgment was given in the case of *Cala Homes v SSCLG* [2010] EWHC 2866 (Admin), where the revocation of the regional strategies was quashed. The East Midlands Regional Plan is therefore currently part of

²⁸ Section 38(6) of the Planning and Compulsory Purchase Act 2004.

²⁹ *R (Cummins) v SSETR* [2001] EWHC 1116 (Admin).

the statutory development plan. The precise status of regional strategies is somewhat unclear given ongoing litigation.³⁰

49. In the Local Plan, the main relevant policies appear to me to be G3, EV1, EV11 and EV12. These policies seek to protect important elements of the local environment. They reflect the considerations set out in more up-to-date or specific policy such as Policy 40 of the East Midlands Regional Plan, PPS22 and the local planning authority's SPD on Wind Turbines in the Open Countryside.

50. Broadview's PS said that the SPD should be afforded "little weight" as it was only a consultation draft document (PS 4.3.1.2). The PS did not address the contents of the SPD. However, I understand that the SPD was formally adopted by the local planning authority as SPD in December 2010. As up-to-date and directly relevant planning guidance, it would in my opinion be a weighty material consideration in the determination of the current application.

51. Given the relevant policy matrix, I conclude that the statutory development plan is in principle essentially supportive of onshore wind energy developments, subject to compliance with the provisos or qualifications set out in policy. This is in accordance with national planning policy in PPS22 which provides that wind farms should be accommodated in locations where environmental impacts can be addressed satisfactorily, and that the environmental and social impacts of wind farms should be minimised through careful consideration of location, scale, design and other measures.

Need and benefits

52. Part of the exercise in assessing the planning balance in any case is assessing the weight to be given to the benefits arising from the particular wind farm scheme. This is why national planning policy requires developers to

³⁰ See the subsequent judgment in *Cala Homes v SSCLG* [2010] EWHC 3278 (Admin).

“demonstrate” the benefits of their scheme.³¹ In this Opinion, I have assumed that the benefits as set out by Broadview are correct. I have assumed that the benefits will be accepted by the local planning authority and be given significant weight in the overall balance.³²

53. However, it appears to me that Broadview has not sought to “demonstrate” the benefits of the scheme. The installed capacity of the wind farm is described as being of “10 to 15 Megawatts”. It is not known whether it will be 10 MW or 15 MW or something in between. In these circumstances it would be difficult for the local planning authority to be certain as to how much weight to give to the benefits of the development in the overall balance when the output could vary by up to 50%.

54. Broadview’s PS notes that of the 122 MW renewable energy target for onshore wind contained in the Regional Plan for 2010, there is 138 MW in operation or under construction, with a further 230 MW in planning (PS 4.2.2). The target for 2020 is 175 MW. Whilst such targets are to be treated as minimum figures, the achievement of the 2010 target means that there is no urgent or pressing need to permit further schemes in the East Midlands in order to meet the 2010 target or the 2020 target. In my view, this is relevant to the weight to be attributed to the additional capacity that this scheme would add in the East Midlands. It is commonly accepted that there is some relationship between the extent to which targets remain unmet and the weight to be attached to the renewable energy benefits of a development. I consider that the local planning authority would be likely to attribute the benefits of this scheme significant weight, in line with Government policy, but not give additional or special weight to the benefits because of any likely failure to meet targets – because there is no such likelihood.

³¹ PPS22, para 1(viii).

³² In line with the 2007 Energy White Paper (box 5.3.3) and other national policy documents.

Environmental impacts

55. Section 5 of Broadview's PS recognises that the development would have residual adverse environmental effects. Those effects are described in the ES. The PS effectively takes the view that the effects would be relatively limited. The ES concludes that the environmental impacts of the development "will be within acceptable limits" (ES 19). As well as the ES, I have had regard to the various reports produced on behalf of objectors to the development, as noted in paragraph 3 above, and an advanced draft of the objection document to be submitted by HSGWAG. I have also been able to judge matters myself on my site visit.

56. Having regard to all this material, I consider it likely that the local planning authority will find that there are substantially adverse environmental impacts from the development in relation to the likely and potential effect of the development on:

- (i) the character and amenity of the landscape;
- (ii) the settings of a number of important cultural heritage assets, as well as the historic character of settlements and of the local landscape;
- (iii) the amenity of the local communities and the character of the settlements in which they live, arising from the visual and noise impact of the turbines, including in relation to nearby settlements and public rights of way;
- (iv) the living conditions of the occupants of a number of nearby residential properties, arising from the visual and noise impact of the turbines; and
- (v) bats, including a number of important European protected species.

57. I consider it likely that the local planning authority will attach significant weight to these adverse effects, given the apparent scale of the effects and the importance of the interests affected.

Overall balance

58. Section 5 of Broadview's PS concludes that the adverse environmental effects of the development would be outweighed by the benefits of the scheme. However, it seems to me that the nature and scale of the environmental effects of the development are such that it is likely that the local planning authority would conclude that, in the circumstances of this case, the provisos or qualifications in relevant policy would not be met, such that the proposal would be contrary to the development plan and relevant national planning policy. Whilst the need for and benefits of the development are to be given significant weight, I consider it unlikely that the local planning authority would conclude that they outweighed the harmful impacts of the proposal and the resultant non-compliance with the development plan and other policy. As a result, I consider it likely that planning permission would be refused by the local planning authority.

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BROADVIEW ENERGY
DEVELOPMENTS LIMITED

SPRING FARM RIDGE WIND FARM

OPINION

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