

Neutral Citation Number: [2009] EWHC 679 (Admin)

Case No: CO/1160/2008

**IN THE HIGH COURT OF JUSTICE**  
**ADMINISTRATIVE COURT**

Royal Courts of Justice  
Strand, London WC2A 2LL

Date: 7 April 2009

Before :

**FRANCES PATTERSON QC**  
**Sitting as a Deputy High Court Judge**

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Between :

<b>ENERTRAG (UK) LIMITED</b>	<b><u>Claimant</u></b>
<b>- and -</b>	
<b>THE SECRETARY OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT</b>	<b><u>Defendant</u></b>
<b>- and -</b>	
<b>(1) BROADLAND DISTRICT COUNCIL</b>	<b><u>1st Interested Party</u></b>
<b>(2) GUESTWICK PARISH MEETING</b>	<b><u>2nd Interested Party</u></b>

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**Gregory Jones** (instructed by **Pollok Webb & Gall**) for the **Claimant**  
**John Litton** (instructed by **The Treasury Solicitor**) for the **Defendant**  
**Peter Harrison QC** (instructed by **Fiona Croxen Norfolk County Council**) for the **1<sup>st</sup>**  
**Interested Party**  
**John Pugh-Smith** (instructed by **Overburys, Norwich**) for the **2<sup>nd</sup>** **Interested Party**

Hearing date: 9 March 2009

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Judgment

## **Ms Patterson QC :**

1. This is an application under s 288 of the Town and County Planning Act 1990 (TCPA 1990) for an order quashing the decision of an Inspector appointed by the Secretary of State for Communities and Local Government ( the Secretary of State) dated the 27<sup>th</sup> of December 2007 to dismiss an appeal against the refusal of planning permission for the construction of a wind farm adjacent to Skitfield Road, Guestwick, Norwich.

### Background

2. The planning application was for the construction of 6 wind turbines. They were proposed to be up to 125m high with a maximum hub height of 85m and three blades of up to 45m long. The application for a wind farm had been refused by Broadland District Council ( the First Interested Party) on the 31<sup>st</sup> of March 2005 and an appeal made to the Secretary of State. The appeal was dismissed. That decision was subject to a legal challenge which resulted in the decision being quashed.
3. A new inquiry was held over 8 days before a fresh Inspector between the 26<sup>th</sup> – 29<sup>th</sup> June, 2-3<sup>rd</sup> of July and 10<sup>th</sup>-11<sup>th</sup> October 2007. Site visits were made on the 10<sup>th</sup> and 11<sup>th</sup> of October 2007.

### The Decision Letter

4. The decision letter starts with an introduction over paragraphs 1-5 including reference to the Inspector seeking further information to be added to the ES in connection with the whole of the construction route. That resulted in an addendum in August 2007. The Inspector noted that legal aspects of the access proposals were the subject of submission at the Inquiry.
5. In paragraph 6 the Inspector set out the main issue as follows,

“The need for renewable energy sources and the general sustainability benefits that the proposal would bring were not disputed as a matter of principle. The main areas of contention at the inquiry concerned the visual impact of the proposal, noise effects and the extent to which air safety would be prejudiced. The advantages and disadvantages of the scheme need to be weighed in the balance when all these matters have been considered.”
6. The following paragraphs then set out the Inspector’s reasoning.
7. He dealt with the issue of visual impact, firstly, on the landscape from paragraphs 7 – 13. He proceeded then to consider the likely effects of the scheme from the agreed viewpoints and then from other views in paragraphs 14 – 24. He then examined under separate sub headings the impact of the construction access works and the setting of the listed buildings before coming to his conclusions on visual impact in paragraphs 31 and 32. Paragraph 31 reads,

“I have found that the windfarm would create a major change in the landscape of this part of Norfolk over a substantial area

within 5 km of the site. In itself this change need not be an indication of unacceptable harm but PPS22 indicates that in certain circumstances an adverse effect on the landscape could justify refusal of the scheme. Whilst the irregular pattern of fields has been lost on and near the appeal site itself the area well within the ZVI of the site has remained largely unchanged for many years and retains its considerable rural charm. Overall, I consider this area is not one that can accommodate a group of very large structures without serious visual harm. The intimate nature of the small scale agricultural landscape would be severely disrupted visually by the introduction of man made structures of the size proposed. The height of the towers and blades, and the movement of the latter, would compete visually with some listed buildings, notably the churches of Foulsham and Guestwick and Wood Dalling Hall, which form such key points of reference in the gently undulating landform. The settings of these buildings, which encompass a wide area of countryside would be adversely affected contrary to the express aim of Policy ENV 14 of the Local Plan and the broad thrust of government policy in PPG 15.”

8. The Inspector then proceeded to discuss the topic of air safety. He concluded on that issue in paragraph 38 that the safety of the operations at Norwich Airport would not be compromised. However, the need to maintain safety may have some adverse effect on the operational efficiency of the airport. Whilst that might add some weight to the arguments against the scheme it was not in itself sufficient to justify refusal of the scheme.
9. The Inspector went on to examine noise effects and other matters that are not relevant to this challenge before dealing with the need for renewable energy. He dealt with that in paragraphs 49-51 of his decision letter. He set out the targets to be achieved in the East of England Plan and then said in paragraph 50,

“Against that target, the latest energy production figures supplied by Renewables East show that the region had some 419MW of installed capacity by April 2007 of which nearly 90 MW was from onshore wind power. By far the biggest proposal that is likely to come on stream in the next few years is offshore at Greater Gabbard, where 500MW are planned. Even if this scheme, which obtained consent in February 2007, is started in 2009, the Council accepted that it is not likely to make any significant contribution towards the 2010 energy target. If the appeal proposal were permitted now, further permission is likely to be required for at least some of the access works. There is considerable doubt therefore that the scheme would itself produce electricity for the grid by 2010, given the inevitable lengthy lead in time for a major project of this sort.”
10. He then went on to set out his overall conclusions finally drawing the threads together in paragraph 56 when he said,

“in summary, because of the strong and increasing need for renewable energy, I have found this to be a finely balanced case. But I have come to the final conclusion that the serious harm to the landscape of this part of Norfolk, and to the settings of some fine listed buildings, outweighs the benefit in terms of sustainable energy production, strongly supported by government policy in PPS22, that the scheme would undoubtedly bring. It follows therefore that I have decided that the appeal should fail.”

### Summary of the Claimant’s Grounds of Challenge

11. The Claimant relies on 3 main grounds of challenge. They are
  - i) that the Inspector had misunderstood the meaning of s 66(1) of the Town and Country Planning (Listed Buildings and Conservation Areas) Act 1990 “LBA” or, alternatively, failed to set out adequate reasons as to why there was a serious effect on the setting of the listed buildings;
  - ii) that the Inspector failed to make any findings in support of his conclusions that that need to maintain essential safety requirements might have some adverse effect on the operational efficiency of the airport or alternatively failed to give reasons that were proper adequate or intelligible for that conclusion;
  - iii) that the Inspector erred in concluding that the scheme would be unlikely to produce electricity before 2010 and that there was not evidence to support that conclusion.

### The Legal Framework

12. The legal framework is not in dispute between the parties in this case.
13. Section 66 (1) of the LBA provides that

“in considering whether to grant planning permission for development which affects a listed building or its setting, the local planning authority or, as the case may be, the Secretary of State shall have special regard to the desirability of preserving the building or its setting or any features of special architectural or historic interest which it possesses.”
14. Policy advice is given about the setting of listed buildings in PPG 15 as follows:-

“The setting of listed buildings

  - 2.16 Sections 16 and 66 of the Act require authorities considering applications for planning permission or listed building consent for works which affect a listed building to 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, especially if a garden or grounds

have been laid out to complement its design or function. Also, the economic viability as well as the character of historic buildings may suffer and they can be robbed of much of their interest, and of the contribution they make to townscape or the countryside, if they become isolated from their surroundings e.g. by new traffic routes, car parks or other development.

2.17 Local planning authorities are required under s 67 of the Act to publish a notice of all applications they receive for planning permission for any development which, in their opinion, affects the setting of a listed building. This 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. Even where a building has not ancillary land – for example in a crowded urban street- the setting may encompass a number of other properties. The setting of individual listed buildings very often owes its character to the harmony produced by a particular grouping of buildings (not necessarily all of great individual merit) and to the quality of the spaces created between them. Such areas require careful appraisal when proposals for development are under consideration, even if the redevelopment would only replace a building which is neither itself listed nor immediately adjacent to a listed building. Where a listed building forms an important visual element in a street, it would probably be right to regard any development in the street as being within the setting of the building. 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 historic 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."

15. The requirement for reasons in a decision letter has been restated by Lord Brown in *South Bucks District Council v Porter No2 [2004] UKHL @* paragraph 36,

"The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the "principal important controversial issues", disclosing how any issue of law or fact was resolved. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision. The reasoning must not give rise to a substantial doubt as to whether the decision-maker erred in law, for example by misunderstanding some relevant policy or some

other important matter or by failing to reach a rational decision on relevant grounds. But such adverse inference will not readily be drawn. The reasons need refer only to the main issues in the dispute, not to every material consideration. They should enable disappointed developers to assess their prospects of obtaining some alternative development permission, or, as the case may be, their unsuccessful opponents to understand how the policy or approach underlying the grant of permission may impact upon future such applications. Decision letters must be read in a straightforward manner, recognising that they are addressed to parties well aware of the issues involved and the arguments advanced. A reasons challenge will only succeed if the party aggrieved can satisfy the court that he has genuinely been substantially prejudiced by the failure to provide an adequately reasoned decision.”

16. Against that background I go on to consider the grounds of claim.

Ground One : Setting of Listed Buildings

17. The Claimant submits that the Inspector misunderstood the statutory test and was confused about the setting of a listed building and the visual impact of the development. The Claimant accepted that visual impact is one part of the setting but it is not all. Here, it was submitted that the Inspector had considered only 1 aspect, namely visual impact, of what was essentially a 3 pronged approach to the issue. It was of note that the decision letter only recorded that one aspect of the assessment process. It had to be recognised that an assessment of the landscape impact and the evaluation of the setting of a listed building were different. In particular, it was submitted that the Inspector had a duty to determine what the setting was in relation to each listed building and record what that was in the decision letter.
18. It was contended that there had been an agreed methodology between the parties to the Inquiry as to how to determine setting as set out by Mr Goodrum and that if the Inspector was going to depart from that methodology he should have set out his reasons for doing so.
19. Given that it is apparent that the Inspector was dealing with a finely balanced judgement it was submitted that it was incumbent upon him to be transparent and clear about his reasoning which he failed to be.
20. I have set out above paragraph 2.17 of PPG 15 which makes it clear that setting should not be construed too narrowly. The Claimant expressly accepted that was the case and accepted that there is no clear determination of what is the setting of a listed building. The Claimant accepted in argument also that what constituted the setting would in each case be a matter of fact and degree.
21. Mr Goodrum, who was the Claimant’s landscape witness at the Inquiry, prepared a proof on matters within his discipline in which he set out a methodology (in section 5) which he proposed to use to assess the impact on the heritage features. He listed the various heritage features within 2.5km of the proposed windfarm and his judgement as to the magnitude, significance and nature of the effect of the development. That

was supported by a series of tables which described the heritage feature, its listing grade, integrity of the setting, sensitivity, character effects and visual effects together with magnitude, significance and nature of effect.

22. In her closing submissions to the Inquiry Natalie Lieven QC, who appeared for the Claimants, addressed the issue under the heading “ Impact on landscape/setting of listed buildings” on the basis that the judgements to made were closely intertwined. When dealing with the cultural heritage and setting she submitted “these need to be approached from 2 perspectives. Firstly, the impact on the character of the landscape because of the role of the churches in the landscape and, secondly, the impact on specific settings.” It is clear, therefore, that at the Inquiry the Claimants were placing weight upon the visual aspects of the settings of the various listed building affected. The methodology used by Mr Goodrun was similarly driven by a visual assessment.

23. The Inspector dealt with the impact on the listed buildings as follows,

“11. As part of my landscape impact assessment, I have also considered the effects of the proposal on a number of listed buildings, and the churches within 5km of the site in particular. In this case the visual importance of many of these buildings in the wider landscape, and especially those church towers which stand out above the tree lines of the hedgerows and the woods, indicates that any considerations of the effects of the turbines on the listed churches’ settings should not be drawn too narrowly. Clearly, in some instances topography and vegetation limit the visual influence of the proposed structures in the landscape. I note that the incidence of listed buildings around the site is roughly the same as for other parts of the Broadland District. But nevertheless the churches are such an integral part of the landscape in this part of Norfolk that it would be impossible not to consider the likely impact on both the setting of the churches and landscape together. Although the landscape setting of the churches need not remain exactly the same, section 66(1) of the T & CP ( Listed Buildings and Conservation Areas ) Act 1990 requires me to pay special regard to the desirability of preserving any listed building and its setting.”

24. In the following paragraph the Inspector concluded that the wind turbines as a group would have a “very significant impact on the landscape.”

25. In my judgement it is abundantly clear from those paragraphs that the Inspector was fully conscious of the broader landscape impact and recognised the overlap between that and the setting of the listed buildings. He then considered the individual viewpoints recognising where he had to the distinction between the wider landscape impact and setting. The end of paragraph 15 gives a clear example of that where he says,

“As a result, the intrusion of these alien features into the attractive rural backdrop of the modest country church of St Peter’s, a view of quintessential Norfolk countryside which in

essence would not have changed for many years, would have an adverse effect on the setting of the church.”

26. In his overall conclusions also the Inspector clearly distinguishes between the issues of visual impact of the development which he dealt with in paragraph 53 and the setting of the listed buildings which he dealt with separately in paragraph 54.
27. In my judgement it is pellucid that the Inspector was under no confusion about the various concepts that were before him and with which he had to deal. He had a clear understanding of the statutory test to be applied as is plainly evident from paragraph 11 of the decision letter that I have set out above. Further, the Inspector proceeded in the decision letter to set out clear reasons dealing with the main points in dispute at that time.
28. As to the methodology which was said to be agreed the approach of the Inspector was not that different from it. As a consequence he was under no obligation to set out reasons for departing from it. He did not have to set out the degree of detail that Mr Goodrun went into in his proof in the decision letter. The role of the Inspector was to demonstrate that he had understood what was before him and to grapple with it. He did so, and set out his findings applying that approach and his reason for so doing. His findings were essentially ones of degrees of impact on both the landscape and the settings of the listed buildings. Those are very much matters of planning judgement with which it is not for the court to interfere.

#### Ground Two : the Efficiency of Norwich International Airport

29. The Claimant contends that the Inspector’s finding of adverse effect on the operation of the Airport was not supported in any rational way. It was submitted that there was a clear distinction between what the Inspector characterised as inconvenience at paragraph 36 of his decision letter and operational efficiency. There was nothing in the decision that enabled inconvenience to be elevated to efficiency.
30. Broadland District Council (“the Council”) were clearly raising the effect of the development on the Airport as a factor that should lead to the refusal of planning permission. They called evidence on the topic and cross examined on it. The Appellants (now Claimants) responded with their own evidence and cross examination to the effect that the issue was grossly overstated by the Council and that only a fairly limited number of flights (20%) flew in proximity to the windfarm. If there was an issue the Appellants argued those flights could be diverted to avoid the windfarm.
31. The Inspector found that if the air traffic controllers were in any doubt about the nature of the clutter on a radar screen that they would be likely to take action to divert aircraft flying to or from the airport. Whilst that might be operationally inconvenient safety would be unaffected (paragraph 36.)
32. The Inspector then proceeded to examine the extent of that inconvenience concluding that the proportion of flights that might be diverted would be near to the 20% suggested by the Appellants (paragraph 37). He dismissed concerns, harboured by the Council, that would arise from a proliferation of windfarms as there were no similar schemes that might affect the airport at the time of the Inquiry. He was then able to

conclude that safety was unaffected by the proposals but that to attain that there might be some operational inefficiency based on the possible requirement to divert flights.

33. That was a perfectly logical conclusion for the Inspector to draw faced with the evidence that was presented to him. Airport safety had become one of the main issues that needed to be addressed and operational efficiency is clearly one facet of that. There was a sound evidential basis in part supplied from the Appellants to draw the conclusions that he did. The Inspector's conclusions were quite rational and his reasoning are unimpeachable on this issue.

### Ground Three : Timescale of Electricity Production

34. The Claimant submitted that there was no evidence before the Secretary of State to enable the Inspector to come to a conclusion that the proposed windfarm was not likely to contribute to the 2010 renewables target. Further, in coming to such a conclusion the Inspector should have set out some reasons whereas he expressed none.
35. In paragraph 49 of the decision letter the Inspector had set out the targets for renewable energy by 2010 and 2020 as contained in the proposed changes to the East of England Plan. The appeal proposal was recorded as contributing up to 1% of the target by 2010.
36. In their Closing Submissions the Appellants had tackled the need for the development to meet renewable energy targets by taking the Council to task for its over reliance on the delivery of the Greater Gabbard offshore project before 2010. Their strong submission, based on evidence produced to the Inquiry, was that it was quite unrealistic to expect Greater Gabbard to come online before 2010 at the earliest and that it was unlikely to be generating anything before the end of that year. As a result the renewables target would not be met and so the appeal proposals were extremely important in meeting that need.
37. The issue of timing of the appeal proposals was thus something put into real contention by the Appellants.
38. In paragraph 50 of the decision letter the Inspector held that, as planning permission was likely to be required for at least some of the access works, there was some considerable doubt that the appeal scheme would itself produce electricity for the grid by 2010.
39. The Appellants put their case to the Inquiry that it would be in the region of some 2.5 years post consent for the windfarm to become operational. That would take the period before there was any generation of energy from the windfarm up to mid 2010 from the date of the decision letter.
40. Contemporaneous with the obtaining of supplementary consents and construction processes was the issue of an appropriate access road to the windfarm site. This was a matter upon which the Inspector had sought supplementary information by way of an addendum to the ES as I have set out above. The access route itself though was not part of the planning application before the Inquiry. It was proposed by the Appellants to be dealt with as a later stage in the process.

41. It was the appellant's case that there were 2 alternative ways of dealing with access. Either a temporary road could be constructed or metal plates could be laid. Most of the route proposed was outside Broadland District Council's boundaries and within North Norfolk District Council. It was the view of North Norfolk District Council as reported in a letter dated the 1<sup>st</sup> of August to the Inquiry that the temporary road would need planning permission but that the metal plates solution would not. That was not the view of Broadland District Council which took the view that even the metal plates solution would require planning permission as engineering works would be required to lay the plates. Their case was that planning permission would be required whatever process was required. Thus there would be additional time to be added to the procurement timescale of 2.5 years that was the basis of the cross examination on the part of the Appellants.
42. The Inspector in dealing with this issue was faced not just with the North Norfolk District Council letter of the 1<sup>st</sup> of August but with the totality of the evidence. The timing of the contribution from the proposed windfarm to the regional target for renewable energy was a main issue as it was part of the over-riding need case put by the Appellants. It was quite open to the Inspector faced with the evidential conflict to prefer one side to another provided there was an evidential base to do so. Whilst there was a disagreement as to whether planning permission was required for the laying of plates it was open to the Inspector to conclude that it was likely that permission would be required for at least some of the access works. That together with the likely timescale of the procurement process about which the Appellants had led evidence gave a clear evidence base to the Inspector's finding. As a result his conclusion that there was considerable doubt that the scheme itself would produce electricity for the grid by 2010 is unassailable.
43. As to absence of reasons when the decision letter is read fairly and as a whole the Inspector is clear in paragraph 50 that planning permission was likely to be required for at least some of the access works. As such he was entitled to conclude that that process would add to the timescale anticipated by the Appellants and therefore cast considerable doubt on whether the scheme its self would produce any renewable energy for the first period up to 2010.

#### Overall Conclusions

44. Each of the grounds of challenge fails. The Claimants may well feel hard done by having been through 2 Inquiries and succeeded in having the first decision quashed. Regrettably for them a challenge to a decision can only succeed on a restricted basis, namely, if the decision is not within the powers of the Act or if any of the relevant requirements have not been complied with in relation to the decision. It is only the first ground that has been argued here. In reality though what has been sought is a challenge on the merits. Accordingly I dismiss the claim.