SOUTH CAMBRIDGESHIRE DISTRICT COUNCIL

REPORT TO:	Planning Committee	2 December 2009
AUTHOR/S:	Executive Director (Operational Services) / Corporate Manager – Planning and Sustainable Communities	

APPEALS AGAINST PLANNING DECISIONS AND ENFORCEMENT ACTION: SUMMARIES OF DECISIONS OF INTEREST – FOR INFORMATION AND ACTION

S/1018/06/F – WEST WRATTING
13 wind turbines, electricity transformers, access tracks, crane hardstandings, control building, substation, permanent anemometry mast, highway modifications, temporary construction compound and two temporary anemometer masts – Land at Wadlow Farm, Six Mile Bottom Road, West Wratting for RES Developments Ltd – Appeal allowed

A. Update to the report

Agenda report paragraph number 11 – Written advice of Counsel
Counsel's written advice has now been received. Whilst that is privileged and thus not disclosable to Committee, the key points are as follows:

1. Counsel's opinion is that the conditions attached to the Wadlow Windfarm permission are not valid.

2. In considering the noise case, the inspector has made some rather dubious points. The Inspector appears to have misunderstood much of the noise case and also to have enmeshed himself in considering the difficulties of addressing excess amplitude modulation (i.e. blade swish) rather than giving careful consideration to imposing enforceable conditions to limit noise imissions.

3. The inspector recognises that the conditions need to be enforceable. The noise conditions imposed are reliant on a series of Notes, attached to the noise conditions. These contain matter which was not accepted by the third parties at the inquiry as sound. (It should be remembered that the Council did not present its own technical evidence, as there had been no outright reason for refusal on this ground).

4. The conditions themselves are problematic. Condition 7(b) expects that the noise expert will be employed within 28 days. However that noise expert has to be approved by the LPA. There is no procedure for prior approval of that expert or a requirement for it. The developer's compliance with the condition rests upon him obtaining not just the services of such an expert but on obtaining the LPA's approval of him before the 28 days elapses. The obtaining of LPA approval within that time limit is not within the developer's control.

5. Condition 7(c) has several areas of difficulty. Firstly, it requires the identification of an "established breach" in noise limits. There is no link in the conditions between hiring the expert in (7b) and having an "established breach" in (c). The methodology for establishing whether there is a breach is in the Notes. The condition only incorporates the Notes for the purpose of calculation and not for the purpose of identifying the breach, communicating that to the LPA, or identifying by who the

breach can be said to be “established”. Yet all of those things have to be done before arriving at (c). Carrying out that calculation requires the turbines to be shut down but no condition empowers the LPA to demand that. It is arguable that the Notes are insufficiently incorporated to allow of a breach of condition notice or enforcement notice to be issued if the developer declines to follow the procedure and turn off the turbines.

6. The Notes require that certain measurements be taken in specified ways to define a rating level for wind speed. At its request, the LPA will be provided within 28 days with all the data collected. There is no requirement for the operator to provide an opinion of the expert that the rating levels are in excess of those permitted. The condition requires that the developer propose a scheme to the LPA. There is no requirement for that scheme to be approved. The scheme has to specify the time scales for implementation. It is arguable that this is insufficient to operate as a requirement to actually implement the scheme as proposed.

7. The Authority would have to use ‘statutory nuisance’ as the sole mechanism for addressing the receptor’s complaints. The developer would no doubt raise the defence that he alone is in control of the means of establishing what noise levels are being emitted and from what cause. The LPA would be in difficulty demonstrating that the noise issued from the turbines and not from increased background noise, let alone in demonstrating that something other than best practical means to control noise was being applied. In short it would run into similar difficulties with that process as it would with enforcement.

8. The wording in condition 7(e) is not clear. A representative for the operator is to be nominated for “dealing” with a complaint and liaising with the LPA. Dealing implies hearing and resolving. LPA’s deal with complaints: nominated representatives do not. LPA’s do not need liaison but reporting of complaint so that they may consider whether enforcement action is appropriate. This “middle man” appears to be a potential block rather than a facilitator for complainants.

As such, this means that should it be necessary, the Council may be unable to take appropriate enforcement action where a noise complaint from the operation of the turbines was received and considered to be of a scale and extent that warranted its remediation.

Agenda report paragraph number 14 – The wind farm operator’s position

RES has become aware of a possible challenge to the appeal decision. Their solicitors have now written to the Council and a copy of their letter dated 26 November 2009 is set out below.

“Wadlow Wind Farm - Report to the Planning Committee of 2 December 2009

We are writing in response to the report that has been prepared for the Planning Committee on the 2nd December. We wish to comment on the concerns that have been raised in the report in respect of Condition 7 that deals with noise.

Paragraph 12 of the report records two concerns, namely that ;

paragraph (b) of condition 7 lacks precision as the noise assessment required in the event of complaints being received is not stated to be required to be communicated to the Local Planning authority, and that

paragraph (c), which looks for a scheme of mitigation in the event of a breach of the noise limits, does not require the approval of the Local Planning authority, or that the scheme is in fact implemented.

RES do not believe there is any uncertainty in this condition that will give rise to any valid challenge or that there is any prejudice to the local planning authority in its ability to enforce compliance with the noise conditions.

The only circumstance in which a valid ground of challenge would arise is where the Local Planning Authority was unable to enforce proper standards of noise control so as to ensure the protection of amenity of local residents. Condition 7 imposes clear noise standards to be observed during the operation of the scheme, set out in Tables 1 and 2 attached to the decision letter.

Those levels are capable of enforcement by the Local Planning authority through any of the usual means of enforcement, including planning contravention notice, enforcement notice, breach of condition and injunction.

Condition 7 then goes on to provide additional mechanisms that were believed by the parties to the inquiry to assist the Local Planning Authority in its enforcement of the noise limits in Condition 7. Those additional steps are not stated in any way to limit the powers of enforcement of the Local Planning Authority and it is clear from their drafting that it is not the intention that they should.

The concerns expressed in the Committee report were not expressed to the Inspector at the conditions discussion on the final day of the public inquiry, either by the Local Planning authority, or the Stop Wadlow action group. The condition as presented in the Inspectors report is that which was agreed by all parties at this session.

For these reasons, RES considers that a section 288 challenge brought on the basis of the Condition 7 points set out in the report to the Planning Committee would be misguided and without substance. RES would therefore vigorously oppose any such challenge and if successful, would seek to recover its costs for doing so. Although RES would prefer not to take such action, particularly as this would needlessly expose the public purse, it feels that it would be left with little choice were the Council to make An unnecessary challenge.

There is one clear error within condition 7c which is the reference to condition 6 that should have been referring to condition 7. RES will be notifying the Planning Inspectorate and DCLG of this in order that the Secretary of State can correct this error under section 56 of the Planning and Compulsory Purchase Act 2004.

If the Council, or any other of the parties to this inquiry believe that its evidence in respect of the enforcement of noise limits is not properly reflected in the decision reached by the Secretary of State it will be open to them to indicate how that wording in the decision, including condition 7, ought properly to have reflected that evidence. If there is an appropriate wording that either the local planning authority or third party considers should have been used, they can raise that point now prior to the end of section 56 period in order that the Secretary of State can consider whether the failure to have adopted that wording falls within the class of correctable errors. At the same time, the other parties can make representations upon it. If all the parties and the Secretary of State agrees on the suggested wording being a correctable error, then the Council's concerns will have been met.

If that opportunity is not taken, the failure to have attempted to have the wording corrected, if it is adjudged to have been a correctable error will count against any challenge that the Council might make and increase the risk of costs being payable by the Council.

We ask that this letter is brought to the attention of the Council's Planning Committee Members when considering this issue at the committee meeting of 2 December 2009."

Counsel has been asked to advise further and her further comments will have to be reported verbally at the meeting.

B. Further Information received after publication of the agenda report.

All information should be in the public domain for five clear working days before the meeting. Under certain circumstances, the Chairman can agree to admit late information if

- Unforeseen Circumstances exist (this does not include administrative inconvenience), or
- it is urgent, or
- delay in taking the decision (in the light of all appropriate facts) could seriously prejudice the Council's or the public's interests

This additional information has arisen as a result of Counsel's written advice. This was not received until Thursday 26 February 2009. The letter on behalf of RES was written the same day. A delay in taking a decision on the possibility of a High Court challenge would mean that the Committee could not address the matter until its next meeting in January 2010. This would post-date the time limit for writing to the Planning Inspectorate or submitting a legal challenge. It would thus have the potential to seriously prejudice the Council's and the public's interests.

Additional Background Papers: the following background papers (additional to those referred to in the agenda report) were used in the preparation of this update:

Letter from Burgess Salmon LLP dated 26 November 2009

Contact Officer: John Koch – Appeals Manager
Telephone: (01954) 713268