



FIRST DIVISION, INNER HOUSE, COURT OF SESSION

[2022] CSIH 49
XA7/22 and XA8/22

Lord President
Lord Turnbull
Lady Wise

OPINION OF THE COURT

delivered by LORD CARLOWAY, THE LORD PRESIDENT

in the appeals under the Town and Country Planning (Scotland) Act 1997

by

LESLIE SINCLAIR

Appellant

against

THE SCOTTISH MINISTERS

Respondents

and

ORKNEY ISLANDS COUNCIL

Interested Parties

Appellant: JD Campbell KC; Campbell Smith LLP
Respondents: Crawford KC, Edwards; Scottish Government Legal Directorate
Interested Parties: N McLean (sol adv); Brodies LLP

5 October 2022

Introduction

[1] The appellant, who lives in Kirkwall, appeals against the respondents' decisions to grant planning permission to construct two community wind farms, each consisting of six turbines, at Quanterness and Lyness in the Orkney Islands. The applications were made on behalf of the interested parties. In broad terms, the purpose of the wind farms is said to be: the generation of income; a response to the climate emergency; and the strengthening of the case for an interconnector between Orkney and the mainland.

[2] The applications were called in by the respondents. The respondents' reporters recommended refusal. The respondents disagreed. They granted permission subject to a condition that no development should take place until final approval for the interconnector is given by the Office of Gas and Electricity Markets. The question is whether the respondents have acted unlawfully in granting these permissions.

[3] The parties were agreed that the Lyness appeal should be determined first and that the same result should follow in the Quanterness appeal. The focus is then on the Lyness case. At the heart of the matter is the fundamental statutory requirement that any determination must be made in accordance with the development plan "unless material considerations indicate otherwise" (Town and Country Planning (Scotland) Act 1997, s 25(1)). Statements in the National Planning Framework are a material consideration (s 25(2)).

NPF3 (2014)

[4] The Scottish Government's National Planning Framework 3 contains a number of policies which are designed to influence future planning decisions. Many are expressed at a

high, almost abstract level. On the subject of sustainability, there is an emphasis on renewable energy and the need to lower greenhouse gas emissions (para 2.7). Specifically in relation to Kirkwall NPF3 records that:

“Improved grid connection will be a vital component in the future success of Orkney’s marine energy sector. As part of this, there will be opportunities to develop new technologies and approaches to harness renewable power generation on and around the islands” (p 28).

[5] Referring to the desirability of Scotland being a low carbon place, NPF3 recognises not only the strong public support for wind energy but also adverse impacts of onshore proposals (3.7). There is a desire to capitalise on Scotland’s wind resource, with an expectation that marine energy will overtake onshore development (3.9). Both terrestrial and marine planning have their places to play, linking generation with consumers and guiding new infrastructure to new locations (3.12; 3.38).

[6] Onshore wind is said to continue to make a significant contribution to the diversification of energy supplies (3.23). Electricity grid enhancements are required to facilitate increased renewable generation, notably a high voltage transmission network (see Annex A map). There was a need for “areas that are remote from the main grid to realise their renewable energy potential” (3.28). The deployment of both onshore and offshore energy is promoted (3.32). Marine planning had identified opportunities for offshore wind farms on the west coast and wave and tidal energy off the north and west coasts and the islands (3.35).

[7] NPF3 refers specifically to the need for an interconnector between Orkney and the mainland (3.40). It states that:

“Strengthening the electricity grid will be essential in unlocking renewable resources, both onshore and offshore. Interconnectors to the Western Isles, Orkney and Shetland and onshore connections for offshore renewables on other parts of the coast

are all required to fully realise the potential for diverse and widely distributed renewable energy development” (see also p 63).

It calls Orkney, the Pentland Firth and North Caithness one of several “areas of co-ordinated action” in which LDPs ought to promote “low carbon infrastructure” (3.41). It states that:

“Onshore and offshore grid connections, including an ... interconnector, will be essential in fully realising this potential” (p 40).

Ofgem

[8] In March 2018, Scottish Hydro Electric Transmission submitted a final needs case to the Office of Gas and Electricity Markets; that is the United Kingdom government department tasked with the approval of major electricity infrastructure proposals (see the Electricity Act 1989 s 3A). The case is for a 220MW interconnector between Orkney and the mainland. SHE-T identified what they said was a significant potential in Orkney for the generation of renewable, notably wind and tidal, energy. This was only realisable if the connector were laid, both to export this energy to the mainland grid and to import power when necessary. On 16 September 2019 Ofgem approved the final needs case. They concluded that the case was “well justified and represents value for money”. It is a condition of the approval that, no later than December 2022, SHE-T demonstrate that there is planning consent and finance for projects which could generate 135MW of new electricity. Applications, including Quanterness and Lyness, have now been made for permission to build a number of windfarms.

The Development Plan

[9] The Orkney Local Development Plan 2017 has a number of policies which are relevant to the proposals. Policy 1 is in very general terms. It provides that development

will be supported where, amongst other things: it takes into consideration the location and the wider landscape and coastal character; it preserves the amenity of the surrounding area; it protects the green infrastructure, landscape and the wider environment; and it protects Orkney's cultural heritage resources.

[10] Policy 7 focuses on energy. It supports the development of renewable schemes, including onshore infrastructure, if it does not result in "significant adverse effects on known constraints" (7Ci). Economic benefits are a consideration to be balanced against adverse impacts (7Ciii). There is specific guidance about onshore windfarms (7D). Several factors are enumerated to ensure that there are no significant adverse impacts (7Di).

[11] Policy 8 deals with landscape development which has a significant adverse impact on cultural heritage assets. It will only be permitted if mitigation is put in place and any impact is outweighed by the social, economic, environmental or safety benefits of the proposal (8A). Exceptional circumstances are needed if there is an adverse effect on the setting of a scheduled monument (8Biv). Policy 9 concerns itself with the Natural Heritage and Landscape. All proposals require to minimise negative impacts (9Gi). If the "wild land" on Hoy is involved, significant effects have to be substantially overcome (9Giv).

The reporters' recommendations

[12] The Quanterness and Lyness applications were made respectively on 31 January and 25 September 2020. Quanterness is on mainland Orkney whereas Lyness is on Hoy. They were called in on 24 March and 16 October 2020, not only because of the obvious conflict of interest but also because the applications raised a matter of national concern, *viz*: their contribution to Ofgem's new generation target of 135MW. Each proposal is for six turbines, generating up to 28.8MW (ie a total of 57.6MW). They are part of a "Community Wind Farm

Project” which is described in a document, namely “*A transmission link for Orkney ...*”, commissioned by the interested parties. This explains that the existing distribution network in Orkney, which connects with the mainland via two sub-sea cables, is operating at full capacity. There has been a moratorium on new grid connections for some ten years. This has severely limited generation growth on islands which are rich in renewable energy sources, including long standing onshore wind developments and a more recent exploitation of wave and tidal energy.

[13] A different reporter was appointed to each application and each was determined on the basis of written submissions and unaccompanied site visits. Each reporter recommended refusal of the application.

[14] The report on Lyness is dated 3 September 2021. The reporter did not consider that the proposal’s contribution to either the Orkney and Scottish economies would be significant, given the “modest numbers of turbines” (12.4). Its contribution to energy targets would be limited. He accepted that the proposal had the potential to assist the delivery of the interconnector, but “the lack of a direct connection between the approval of this scheme and the delivery of the interconnector means this should also be limited” (12.5). The presumption in favour of proposals which contributed to sustainable development was another positive feature, but the adverse effects undermined any contribution to climate change mitigation (12.6).

[15] The reporter addressed each relevant LDP policy (1, 7, 8 and 9). He held that the proposal was not supported by these. On policy 1, the proposal had not been located and designed with the wider townscape, landscape and coastal character in mind. The scale was excessive. Local amenity would not be preserved, although adverse impacts were not so severe as to be unacceptable. The natural heritage, including landscape and the effect on the

former naval HQ, was not protected. There were a number of adverse individual and cumulative impacts in relation to policies 7C and 7D. The proposal would have a significant adverse effect on landscape character and visual amenity, including an effect on the setting of the naval HQ. The impact on the HQ, which is a category A listed building, was an additional feature in relation to policy 8. The proposal was in conflict with policy 9G because of its failure to minimise negative impacts on landscape and seascape character, including the Hoy Wild Land Area. Although the reporter noted that the proposal complied with a number of LDP policies, it did not comply with several others. Overall, it did not comply with the development plan (12.26) and the material considerations in its favour did not overcome that conflict (12.28). The earlier decision (19 January 2021 with an addendum on 5 August 2021) on Quanterness was to a similar effect.

The respondents' decisions

[16] In decision letters dated 21 December 2021, the respondents disagreed with the reporters. On Lyness, the respondents agreed with the reporter on adverse landscape and visual effects (para 22). The proposal was contrary to policies 1, 7D(i) and 9G (24, 25 and 26). There would be effects on the formal naval HQ and nearby cemetery (27). Mitigation measures had not been proposed but, in contrast to the reporter's view, any loss was outweighed by the benefits. The proposal did accord with policy 8 (29).

[17] On the interconnector, the respondents gave considerable weight to the Lyness reporter's observation that it was not disputed that without the proposal "there is no likelihood of [the] 135 Megawatt target being achieved within the identified timescale" (33). The interconnector was a national priority and had to be given substantial weight as a material consideration (34). The respondents agreed that, overall, the proposal did not

comply with the development plan. They accepted that planning permission should not be given unless material considerations indicated otherwise (35). These considerations included the proposal's contribution to climate change mitigation, the transition to a low carbon energy economy, and the net economic and social benefits. Echoing what was also said in the Quanterness decision (at paras 29 and 31) the respondents continued:

"37. ... the contribution ... to the interconnector needs case would be a significant benefit... [The respondents] give this substantial weight as a material consideration. Adding this to the other benefits of the proposed development, [the respondents] consider that the material considerations warrant granting permission for the proposed development as a departure from the development plan. [The respondents] consider that whilst the proposed development would have significant adverse impacts on the landscape... cultural heritage, and visual amenity... its benefits outweigh those impacts.

38. [The respondents] consider it important to prevent a situation whereby the Final Needs Case fails to receive Ofgem's final approval but the proposed development is still constructed. Such a situation would mean the contribution to the needs case ... ultimately proved ineffectual whereas the adverse impacts of the proposed development would still arise. Permission is therefore subject to a condition which prohibits the commencement or development unless and until Ofgem have approved the Final Needs Case for the interconnector project."

Submissions

Appellant

[18] There were two grounds of appeal. The first was that the respondents' decisions were predicated on a factual error. The second was that the respondents' reasoning was "irrational".

[19] The factual error stemmed from the absence of a connection between securing approval for the interconnector and planning permissions for onshore windfarms. The desire for an interconnector came from aspirations for growth in the marine energy sector. The interconnector was designated as one of a series of "areas of co-ordinated action" (NPF3 para 3.41) with "opportunities for marine renewable energy development" and "grid

connections, including an ... interconnector ... essential in fully realising this potential” (p 40). This all related to the potential of marine renewable energy. NPF3 set ambitions for the growth and connectivity of marine and offshore energy but not onshore generation on Orkney. It emphasised the need to protect the Orcadian natural and historic environment as well as producing energy growth and the importance of “[i]mproved grid connection ... in the future success of Orkney’s marine energy sector” (p 28).

[20] It was the potential for “wave and tidal energy” (para 3.35) and “onshore connections for offshore renewables” (para 3.40) which was emphasised. NPF3 discussed opportunities for “marine renewable energy development” (p 40) stating that grid connections, including the interconnector, were essential. It did not encourage the growth of onshore wind projects in Orkney if they did not accord with the LDP. It did not refer to onshore wind turbines fulfilling a quota to secure the final needs case approval.

[21] The respondents had agreed with the reporters’ summaries and descriptions of, and with most of their conclusions on, the significant effects of the proposals on the natural and historic environment. The reporters found that the proposals did not conform with the LDP. The respondents agreed with that, but held that there were material considerations warranting the grant of permission. This was based on the false premise that the aggregate capacity of the proposals would make a significant contribution to the needs case when they were irrelevant to it.

[22] On the reasons challenge, the appellant relied on the summary of the law provided in *North Lanarkshire Council v Scottish Ministers* 2017 SC 88 (at para [27]). The respondents erroneously held that the implications of refusing permission would result in the needs case not being made out. However, the respondents accepted that the proposals did not of themselves secure the delivery of the interconnector. The interconnector’s potential benefits

could not be attributed to the proposal. The respondents said, on the one hand, that there could be no interconnector without the contribution from the proposals, yet, on the other hand, they said that, even with permission, the interconnector could not be secured. The proposals could not reasonably be described as providing any benefit to the needs case. The connection between the contribution, which would be made by the proposals, and the needs case was at best tenuous.

Respondents

[23] The respondents countered that they had carefully set out the considerations and the balancing exercise as explained by the reporters. They concluded that the importance of the interconnector and the contributions from the proposals to the needs case deserved substantial weight as a material consideration. When taken with the economic benefits of the proposals, the contributions to sustainable energy and the climate emergency outweighed any adverse impacts. The respondents had identified these impacts. They had regard to NPF3 and the aims of the interconnector. The condition in relation to approval of the needs case was intended to prevent a situation whereby the latter failed and approval still remained.

[24] Interpretation of planning policy and its application should not be elided; the latter being a matter of planning judgement (*Hopkins Homes v Communities Secretary* [2017] 1 WLR 1865 at para 26). It was well established that planning benefit was a relevant and material consideration; the weight to be placed on this being a matter for the decision-maker (*Tesco Stores v Secretary of State for the Environment* [1995] 1 WLR 759 at 780). In light of the respondents' policy goal of an interconnector, as expressed in NPF3, it was lawful for the respondents to place significant weight on the potential contributions of each of the

proposals in delivering the needs case. The appellant's submission ignored the condition. If Ofgem did not approve the final needs case, development of the windfarms would be prohibited. In the absence of approval of the needs case for the interconnector, the adverse impacts would outweigh the benefits.

[25] The appellant's challenge was no more than a disagreement about the weight to be placed on competing material considerations. The respondents had a policy aim to have an interconnector. The application of policy in particular cases was for the decision-maker, subject only to review on conventional grounds (*Tesco Stores v Dundee City Council* 2012 SC (UKSC) 278 at paras 17-19). The argument that NPF3 only supported sustainable energy on Orkney from wave and tidal sources was misconceived. That was an important potential source, but it was not to the exclusion of onshore windfarms.

[26] The respondents had carefully set out the adverse impacts. They decided to place significant weight on the contribution of the proposals to the needs case. This was a proper and lawful interpretation of their own policy. The weight to be placed upon it was a matter for the respondents. The decisions contained full reasons setting out the material considerations, the views which the reporters took of them, where these were agreed by the respondents and why and when they were not. The letters contained substantial reasons explaining why planning permission was granted. The appellant had no room within which to be unclear or in doubt about the reasons. The test in *Wordie Property Co v Secretary of State for Scotland* 1984 SLT 345 (at 248) had been met.

Interested parties

[27] The interested parties submitted that it was agreed that NPF3 was a material consideration. The need for an interconnector was supported by NPF3. The application of

NPF3 to the interconnector was not restricted to marine and offshore energy generation. NPF3 provided that “[s]trengthening the electricity grid will be essential in unlocking renewable sources, both onshore and offshore” (para 3.40). It stated that key connections included links to Orkney, Shetland and the Western Isles and interconnectors to emerging international grid networks (para 6.4). The Annex (A) to NPF3 described the statements of need for national developments. The need for a high voltage electricity transmission network applied to both onshore and offshore electricity.

[28] LDP policy 8 provided that permission should not be granted unless material considerations indicated otherwise, but these included contributions to climate change mitigation and transition to a low carbon energy economy, along with the net economic and associated benefits. The cumulative benefits of the interconnector had been set out in the interested parties’ Environmental Impact Assessment Report. This referred to a 2019 study that a 220MW connection could produce between £46 and £417 million. The community windfarm projects on Orkney were critical to the interconnector. The interconnector was fairly and reasonably related to the proposal.

[29] The respondents had provided proper, adequate and intelligible reasons which left the informed reader in no real or substantial doubt about what they were. The reasons for departing from the conclusions of the reporters were equally clear (*Moray Council v Scottish Ministers* 2006 SC 691 at 28-30). A reasons challenge could only succeed if the party challenging could satisfy the court that they had been substantially prejudiced. The appellant had not shown any such prejudice.

Decision

[30] Each of the respondents' decisions, following upon their reporters' recommendations:

“... must, in short, leave the informed reader and the court in no real and substantial doubt as to what the reasons for it were and what were the material considerations which were taken into account in reaching it” (*Wordie Property Co v Secretary of State for Scotland* 1984 SLT 345, LP (Emslie) at 348).

There is no difficulty in understanding the respondents' reasons and what material considerations were taken into account.

[31] The respondents agreed with their reporters that the proposals were, overall, not in accordance with the Orkney Local Development Plan (2017). Specific policies which were in conflict with the Lyness proposal (1, 7D(i) and 9G) were highlighted. In order to grant permission, there would have to be material considerations which would “indicate otherwise” in favour of such a grant (Town and Country Planning (Scotland) Act 1997, s 25(1)). The strategic objects in the National Planning Framework 3 might constitute such a consideration (*ibid* s 25(2)).

[32] The reporter found that the limited nature of the Lyness proposal, which was after all for only 6 turbines on islands with many hundreds, meant that its contribution either to the Orkney or the Scottish economy would be limited. Granting permission would not guarantee the construction of the interconnector. That was a matter of planning judgement for the ultimate decision maker, namely the respondents, to assess. The respondents rejected the reporter's reasoning. It was not disputed that, without the contributions from what were admittedly modest community windfarms, there was no likelihood of the interconnector going ahead. That was a national priority. Therefore, as a matter of planning judgement, there were material considerations which dictated that permission ought to be

granted in the face of the LDP policies on, *inter alia*, landscape, seascape and amenity. This much is clear. If it is correct, the reasoning cannot be faulted as inadequate or opaque.

[33] There is no error of fact detectable in the respondents' reasoning. Contrary to the appellant's substantive submission, NPF3 does not confine itself to promoting the interconnector only in relation to the transmission of marine (wave and tidal) energy. It refers on several occasions to the importance of onshore generation in the context of the interconnector, even if it does emphasise the prospects of increasing marine sources. The references commence with the stressed importance of enabling power generation "on and around the islands" (p 28, emphasis added). The pluses and minuses of onshore generation are discussed (para 3.7). Even if marine energy has the potential to overtake onshore sources, terrestrial planning has its place to play (3.12, 3.25, and 3.38). The interconnector is said to be required to unlock renewable sources "both onshore and offshore" (3.40) in order to realise a "diverse and widely distributed renewable energy development" (3.40 and p 63).

[34] The nexus between the proposals and the interconnector is clear. It is true that the grant of permission cannot guarantee that the interconnector will be built. That is not the point. Without contributions from these community projects, there is "no likelihood" of the target of 135MW being met in time. On that basis, the only conclusion is that, if permission is not given, there will be no interconnector. That would amount to a failure to deliver a strategic national objective. The interconnector is "essential" to unlock onshore and offshore resources, of which Orkney has a plentiful supply and which have the capacity of contributing to the mitigation of climate change and the reduction of carbon emissions. The grant of permission is essential for the interconnector and the latter is essential not just in relation to the individual community windfarms, for which applications have been made,

but also in opening up the prospect of further onshore and offshore developments when the moratorium on connecting to the grid is ended with the interconnector.

[35] Given the condition which prohibits development of the proposals until the final go-ahead is given for the interconnector, the respondents' decisions to grant permission cannot be faulted as a matter of law. They amount to planning judgements with which the court will not interfere other than on clear conventional grounds. No such grounds are present. Ultimately, the challenge which the appellant has mounted is one which does no more than to seek to criticise the amount of weight placed by the respondents, as distinct from their reporters, on the importance of the contribution to the interconnector needs case. Such a challenge cannot succeed (see *NLEI v Scottish Ministers* [2022] CSIH 39, LP (Carloway), delivering the opinion of the court, at paras [62] and [63]).

[36] The appeals are refused.