NORTH NORFOLK DISTRICT COUNCIL

Norfolk Boreas Offshore Wind Farm

REPRESENTATIONS FOLLOWING VIRTUAL ISSUE SPECIFIC HEARING 5 24 JULY 2020

NORTH NORFOLK DISTRICT COUNCIL

(INTERESTED PARTY REF: 20022969)

DEADLINE 13 – 29 JULY 2020

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1. Introduction

1.1. These are the written submissions of North Norfolk District Council ("**NNDC**") following Virtual Issue Specific Hearing 5d on the Draft Development Consent Order ("**dDCO**") and other matters. As the hearing focused on the implications for this examination of the Secretary of State's decisions granting development consent for Norfolk Vanguard (SI/2020/00) and indicating he is minded to grant consent for Hornsea 3 (EN010080), that is the focus of these written submissions.

1.2. These submissions address the following:

- Consistency in decision-making
- 10 year aftercare and replacement period for planting;
- Tourism Impacts.

2. Consistency in Decision-Making in DCOs

Legal Submissions

2.1. Previous planning decisions can amount to a material consideration in relation to later decisions. The classic statement of this principle is set out by Mann LJ in *North Wiltshire DC v Secretary of State for the Environment* (1993) 65 P&CR 137 and endorsed in *Dunster Properties Ltd v First Secretary of State* [2007] 2 P&CR 26 at §12:

> "One important reason why previous decisions are capable of being material is that like cases should be decided in a like manner so that there is consistency in the appellate process. Consistency is self-evidently important to both developers and development control authorities. But it is also important for the purpose of securing public confidence in the operation of the development control system. I do not suggest and it would be wrong to do so, that like cases must be decided alike. An inspector must always exercise his own judgment. He is therefore free upon consideration to disagree with the judgment of another but before doing so he ought to have regard to the importance of consistency and to give his reasons for departure from the previous decision."

2.2. In the context of development consent orders, the High Court in *R(Mynydd y Gwynt Ltd) v SSBEIS* [2017] Env LR 14 rejected a challenge based partly on inconsistency in decision-making. Hickinbottom J emphasised that there is not a principle of law that like cases must always be decided alike: see §20(x). Consistency in decision-making is important, but cases are usually fact-specific and the relevant decision-maker must exercise her own judgment on the question, if it arises.

2.3. The courts have dealt with consistency in decision-making in the planning context in a number of recent cases. In *HJ Banks and Co Ltd v SSHCLG* [2019] JPL 348, Ouseley J took issue with the suggestion that the *North Wiltshire* principle established "some special rule requiring reasons when a purportedly or actually indistinguishable previous decision was raised" (§112). Ouseley J

emphasised that the *North Wiltshire* case in fact does not create any different rule for reasons about previous decisions than for any other material consideration – the issue is not materiality, but whether the decision goes to an important issue and whether it illuminates a principal area of controversy (§112).

2.4. In *HJ Banks*, the Secretary of State adopted a deliberately different approach from earlier decisions, on a critical issue (in that case, the weight to be given to reducing greenhouse gas emissions). The High Court rejected a challenge based on lack of consistency in decision-making, finding that the overall clear reasons for the change in position were sufficient (§121).

2.5. In *DLA Delivery Limited v Baroness Cumberlege of Newick* [2018] EWCA Civ 1305, [2018] JPL 1268, the Court of Appeal was concerned with two decisions of the Secretary of State in which the question of whether or not a Local Plan policy was "up to date" had been determined in quite different ways. In the first, the Secretary of State had found the relevant policy to be up to date on the basis that it was not inconsistent with the NPPF. In the second decision, issued only nine weeks later, the Secretary of State concluded the same policy was out of date. The second decision was made without reference to the first, it not having been placed before the Secretary of State by either of the parties.

2.6. Lindblom LJ outlined a number of general principles applicable to such circumstances, two of which are relevant here:

(a) First, because consistency in planning decision-making is important, there will be cases in which it would be unreasonable for the Secretary of State not to have regard to a previous appeal decision bearing on the issues in the appeal he is considering (§34). Whether it is unreasonable not to have regard to the earlier decision will depend on the facts and circumstances of the particular case (§36); and

(b) Second, the Court refused to prescribe or limit the circumstances in which a previous decision can be a material consideration. However, Lindblom LJ gave three non-exhaustive examples of when a case may

be “alike”: because it relates to the same site; or to the same or a similar form of development on another site to which the same planning policies relate; or to the interpretation or application of a particular policy common to both cases (§34).

2.7. In the *DLA* case, the Court of Appeal held that the earlier decision was indistinguishable on an issue of critical importance in its determination from the later decision, and that the Secretary of State’s failure to engage with the earlier decision, let alone explain the inconsistency between the decisions, was an error of law.

2.8. The principles in *North Wiltshire*, *DLA Delivery* and *HJ Banks* were very recently discussed by the High Court, in relation to local plan examinations, in *Keep Bourne End Green v Buckinghamshire Council* [2020] EWHC 1984 (Admin) at §127. There the Claimant challenged the report of an Examining Authority, concerning the proposed Wycombe Local Plan on the basis, inter alia, that it took an inconsistent approach concerning housing need from that taken by the Examining Authority dealing with the proposed Guildford Local Plan. The two plans were submitted for Examination in Public within months of each other and the hearings took place similarly close in time; the Examining Authorities were addressing the same overall question (use of the 2016-based household projections) going to the same overall issue (the extent of housing need).

2.9. Holgate J held that the case did not involve any issue on the interpretation of national policy, but rather its application to the circumstances of the case, so the cases were not sufficiently alike in any material respect to require explanation for the adoption of a different approach.

2.10. Two final cases deserve mention – both concerning grants of planning permission where the decisions concerned the same site:

(a) The Court of Appeal in *R(Tate) v Northumberland CC* [2018] EWCA Civ 1519 concerned “infill” development on a site, which was dealt with in

opposite ways in 2009 and 2016. The Court of Appeal held that the later grant of planning permission was vitiated by an error of law, on the basis that neither the officer's report, nor the planning committee, gave reasons for departing from the approach and conclusions of the previous inspector. The fact that the issue was one of planning judgement and relatively straightforward did not remove the need for reasons.

(b) The High Court in *Moulton Parish Council v SSCLG* [2017] JPL 1144 held that the Secretary of State had performed a complete and unexplained volte face in his assessment of the highways impacts of two proposals for housing development on the same site in Newmarket, finding the later decision unlawful as a result.

Application in the Instant Matter

2.11. There is no legal principle requiring the Examining Authority ("**ExA**") to determine the issues in the instant examination in the same way as they have been determined in relation to Hornsea 3 or Vattenfall Vanguard. However, consistency in decision-making is important and those decisions can amount to material considerations where they are indistinguishable from the current proposed development, on issues of critical importance in their determination, given that they are "alike" since they relate to the same form of development to which the same planning policies relate and, in some circumstances, concern the same sorts of impacts on the same places.

2.12. It should, however, be recalled that the DCO process is often iterative – later DCOs can refine matters and include different, or differently drafted, provisions from earlier DCOs as the Examining Authorities and the Secretary of State build on and refine previous approaches.

3. Landscape – Maintenance Period

3.1. In NNDC's Local Impact Report [REP 2-087] at §§13.4-13.12 and in Appendices B-D, NNDC made submission and provided evidence supporting the adoption of a period of 10 years of aftercare and replacement for planting.

3.2. In light of this evidence, further representations made by NNDC for Deadline 6 [REP 6-043] and further discussions with the Applicant, amendments were made to Requirement 19(2) and Article 27 of the dDCO. These amendments secured a 10-year period for North Norfolk, while retaining a five-year period for other authorities whose climatic and soil conditions are different from those in North Norfolk.

3.3. The Applicant has indicated that it does not intend to propose any changes to the dDCO concerning the 10 year period in light of the Hornsea 3 and Vanguard decisions.

3.4. The ExA's report concerning Hornsea 3 addresses the 10 year period in §§12.4.13 – 12.4.15, and finds that "effective landscape planting and its management would be an especially important part of the Applicant's proposed mitigation of landscape and visual impacts". The ExA found sound justification for a 10 year landscaping management period across the whole of the onshore works, in light of the particular impacts relevant to that proposal (including those relevant to a HVAC design). This is reflected in Requirement 9(2) of the Hornsea 3 dDCO.

3.5. The Secretary of State, in his letter concerning Hornsea 3, agreed in §12.4 with the ExA's conclusions on landscape and visual impacts. The 10 year period is not specifically addressed, nor is there any suggestion that the Secretary of State disagrees with Requirement 9(2) of the dDCO, so NNDC understands that those matters are agreed by the Secretary of State.

3.6. Turning to Norfolk Vanguard, the ExA found NNDC's evidence concerning a 10 year period "persuasive in terms of growth rates" and recommended that requirement 19(2) refer to a 10 year period (§§4.5.104 – 4.5.106).

3.7. The Secretary of State addresses the 10 year period in §§4.20-4.21 of his Decision Letter. Those paragraphs record the Applicant's concerns about land access rights, and willingness to include the 10 year period in the OLEMS but not in the DCO. The Secretary of State accepted that approach, with the result that a five year period is secured in Requirement 19(2), but a 10 year period is referred to in the OLEMS.

3.8. The concern animating the Secretary of State's decision in relation to Vanguard does not arise in the instant examination. The Applicant and NNDC have worked together to resolve the issue, resulting in the drafting in the dDCO making the 10 year period specific to North Norfolk and securing access rights in Article 27 for that period.

3.9. In light of the case law above, the issues of critical importance which is common to the determination of the applications is the potential adverse landscape impact. In relation to the same area, NNDC's evidence of the necessary mitigation measure – the 10 year period – was accepted by both ExAs and in both Secretary of State's letters, albeit that the mechanism for securing that period differed in each instance. In light of the agreed approach of the Applicant and NNDC in the instant examination, there is a clear and lawful basis for the Secretary of State to adopt that approach and the ExA is asked to recommend that the DCO include Requirement 19(2) and Article 27 as proposed in the updated dDCO (Version 7) [REP 10-006].

4. Tourism Impacts

4.1. NNDC's LIR [REP2-087] provided significant detail and evidence in relation to tourism impacts, starting from §14.21, including suggested wording for a DCO Requirement relating to tourism and associated businesses.

4.2. In its submissions following ISH 3, NNDC recorded the Applicant's acceptance at that hearing that the sensitive tourism receptors listed by NNDC may not all have been assessed as part of the ES, instead being left for assessment when particular out-of-hours works are proposed [REP 4-031 §5.3]. This evidence is specific to the instant examination.

4.3. NNDC's approach to tourism impacts has been refined over the course of the three examinations concerning Hornsea 3, Vanguard and Boreas. In relation to Hornsea 3, NNDC provided some evidence of the potential for significant impacts on tourism during the construction phase and asked that a mitigation strategy be identified, including a Community Benefit Fund. NNDC did not propose the type of draft requirement before the ExA in the instant examination.

4.4. In the Hornsea 3 ExA's Report, tourism impacts are dealt with at §§15.4.9 – 15.4.19. The ExA accepted that the construction impacts "could have the effect of dissuading potential visitors from visiting" the areas of Weybourne and Kelling (§15.4.11). However, the ExA did not find evidence of impacts on tourism of such magnitude as to jeopardise the livelihood of local tourist-dependent businesses (§15.4.16) and decided that any Community Benefit Fund could be agreed outside of the DCO (§15.4.18). The Secretary of State accepted these conclusions in §§19.9 – 19.10 of his letter.

4.5. Accordingly, differently from the instant examination, the Hornsea 3 ExA did not have before it a draft requirement, nor as extensive evidence of potential tourism

impact, nor acceptance by the Applicant that certain impacts were not assessed in the ES.

4.6. Turning to Vanguard, NNDC did propose a draft requirement to address tourism impact. The ExA addressed tourism impact in §§4.8.35 – 4.8.40. It identified a shortfall in NNDC's evidence concerning tourism impact and also decided that "a Requirement in the dDCO to provide for eventual compensation for an indeterminate loss would be a speculative exercise" (§4.8.36). However, the ExA concluded that it "would not discount the possibility that difficulties in drafting might be overcome in other scenarios." (§4.8.34).

4.7. Again, in the instant examination, there is slightly refined drafting and a difference on the evidence given the Applicant's admissions concerning the ES. However, NNDC is determining whether any further evidence of potential tourism impacts can be provided and whether the draft requirement can be further refined to overcome the concerns expressed by the Vanguard ExA. NNDC will work towards providing updated drafting to the Applicant as soon as practicable and will aim to provide any further evidence by Deadline 14.

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