

GS/379/IK

**Electricity Act 1989**

**Town and Country Planning (Scotland) Act 1997**

**Town and Country Planning (Appeals) (Scotland) Regulations 2008**

**PRECOGNITION – IAN KELLY MRTPI – PLANNING POLICY**

**On behalf of**

**SPEYSIDE BUSINESS ALLIANCE (SBA) and other local objectors**

**For a Public Local Hearing and Inquiry**

into an application for a wind power station at Dorenell, Glenfiddich consisting of 59 turbines, each 126m high and associated facilities and tracks, all known as the Dorenell Wind Farm

DPEA Reference: Dorenell Wind Farm

Submitted 2<sup>nd</sup> November 2010

## Background

1. I am Ian Kelly MRTPI, Head of Planning at Graham and Sibbald.
2. The Reporter, in his Procedure Note defined what the Planning Policy evidence should address. This has been reconfirmed in an email of 28<sup>th</sup> October which stated *“the policy issues session should be limited to the development plan and the council’s strategy for wind farm location”*.
3. As advised during the Hearing Sessions I provide technical and business support and advice to the Cabrach Community Association (CCA). During my work with the CCA there has been no contact with the CCA by either the Estate or the applicants.

## The Statutory Tests

4. I would comment, briefly, on the applicant’s position as set out in the paper APP-P2. In short, in section 2, Mr Bell asserts that the Electricity Act (Sch 9) test is the principal test; that a deemed planning permission should almost automatically follow, that the well understood Development Plan s.25 test should not apply, and that the need to deliver national renewable energy targets effectively overwhelms any local objections.
5. I consider it virtually impossible to fail the Electricity Act “tests” since all that an applicant has to do is to say it has “had regard” to them. The ultimate outcome of the applicant’s position is that there would be no role for any form of democratic operation of the land use planning system at all for these, the very largest type of land based development which the planning system now struggles to accommodate. Ministers could just consent large wind farms in any location where the wind resource and the grid coincided with a willing landowner. That would be a complete affront to the inclusive, transparent, and plan led system that Ministers want to see in Scotland. It is my clear professional opinion that a s.25 Planning Act test should be carried out.

6. I now consider the Development Plan and the other material consideration of the Council's SPG.

### **The Proposed Development and Its Benefits**

7. Mr Bell has listed a number of claimed benefits in section 6.8 of his paper. I would simply comment that five of these sets of benefits could have been brought forward at anytime by the Estate and would have been welcomed openly by the local community. Currently, that local community has had to approach regeneration on the basis of avoiding any land or property owned by the Estate. The link, therefore, between the purported bestowal of benefit and the s. 36 consent is inescapable. It is understood that the landowner has been *in situ* for more than 20 years.
8. The Council has set out its position on the application of planning policy. I respectfully agree with it. In addition, in the context of the clearly plan-led nature of the Scottish Planning System, I would also say that this Inquiry should not be used as a platform to challenge policies in an up to date Local Plan that Ministers have not sought to modify before its adoption. A Local Plan Inquiry is the place to do that.

### **Additional Evidence affecting the Planning Policy Assessment**

9. This precognition has had full regard to the evidence of Mr Mark Steele and Professor Terry Stevens, to the SBA material for the Hearings, and the evidence to be given by the two local witnesses.

### **Consideration in relation to the Development Plan**

10. Normally, my evidence would include an assessment of a full range of planning policies from the relevant Structure Plan and Local Plan. However, in this case there is a very specific policy provision and it is possible to go directly to **Local Plan Policy ER1: Renewable Energy Proposals**, adopted as recently as December 2008. That policy has a supportive approach, as guided by the Scottish Government –

renewable energy proposals will be favourably considered where they meet certain criteria. However, the policy also states:

*“Commercial wind energy developments should be located within a Preferred Search area identified in the Wind Energy Policy Guidance **and** (my emphasis) meet the above criteria.”*

11. Therefore, the **first** test is whether or not this proposal, which is a commercial wind energy proposal, is within a Preferred Search area in the WEPG. **It is not so located.** Therefore, the proposal is in clear breach of the subject specific policy in the Adopted Local Plan. In terms of the precise wording of the policy there is no need to consider the criteria since the proposal is not in a Preferred Search area.
12. Because this Policy is so fundamental to the assessment of this proposal I asked the Council if Infinergy had challenged the policy approach either at the WEPG formulation stage, or through the Local Plan objection and Inquiry process. The Council confirmed that whilst there were some objections to the draft WEPG, including trade body objections, Infinergy did *not* object. In terms of the Local Plan only AMEC Wind objected and those objections were not sustained through to the Local Plan PLI either as written representations or position statements. The Council advised me that their policy ER1 was not even considered at the Local Plan PLI.
13. The first bullet point in paragraph 8 of the consolidated and recently published SPP 2010 (**CD-B-9**) makes it clear that the planning system should be genuinely plan led with succinct up to date Plans. That is what we have here. Therefore, it seems to me that there can only be one outcome from the policy assessment and that is that this application fails the policy test and is refused deemed planning permission. That has been the situation since this Local Plan was adopted.
14. It is difficult to see how any other approach can be justified without striking at the heart of a plan led system, but if the Reporter were to decide to address the criteria in

the ER1 policy, **which are to be applied to sites in the Preferred Search area for this scale of proposal**, then, having regard to the evidence, my position would, in brief, be as follows (following the numbering of the criteria in the policy):

- a. There is concern that there would continue to be adverse effects on raptors in general and on golden eagles in particular
- b. There would be no permanent loss of or damage to prime agricultural land
- c. There would be a **potential** adverse effect on brand image and potential direct and indirect adverse effects on local tourism businesses
- d. There would be unacceptable impact in terms of visual appearance and landscape character
- e. There would be unacceptable cumulative impact in terms of landscape and visual impacts

15. The proposal would therefore fail on four out of the five criteria.

16. I have considered the terms of Policy E7 on AGLVs following consideration of Mr Steele's evidence. I had considered that the policy is more directed at general built development rather than commercial scale wind farms. However, the evidence of Mr Steele shows that the development would have an adverse effect on the landscape character and the AGLV. Therefore, there is a breach of this policy.

17. Therefore, I conclude that the proposed development does not accord with the Adopted Moray Local Plan 2008 on account of its breach of the directly relevant Policy ER1, and the breach of Policy E7, all as set out above. Therefore, the presumption is for deemed refusal of the proposed development.

### **Material Considerations**

18. The Local Plan policy ER1 provides the link to the Council's WEPG. The Council has decided that this WEPG will be updated through the new Local Development Plan. Therefore, this guidance remains in force and is a material consideration.

19. The WEPG defines different scales of wind farm developments. Large wind farms are those over 25 turbines. The WEPG concludes with maps showing preferred search areas and unlikely areas for the different scale of wind farms. The Dorenell site falls into the “unlikely area” category for large wind farms. The guidance, in paragraph 3.2.2, advises that commercial wind farms will only be permitted within these unlikely areas where it can be demonstrated that there will be no unacceptable adverse impact on biodiversity, the natural and built environment and the landscape of the area, comply fully with the policies of the Development Plan or where adverse effects are outweighed by the wider environmental, social and economic benefits of the development.
  
20. If we did not have the Adopted Local Plan, it would have been the case for SBA that there were such adverse impacts and that these could not be outweighed by the benefits since these are only the generic benefits.
  
21. However, the Adopted Local Plan provides a different and quite simple test. This scale of wind farm should be within a Preferred Search area, and it is not.
  
22. Therefore, if this application is to be approved it can only be on the basis that the decision maker takes the view that the claimed benefits from this scheme outweigh the clear non compliance with the key Local Plan Policy. In such circumstances it would be only right that the benefits should be specified, verified and guaranteed in some way.
  
23. It might be that the proposed installed capacity of a scheme could be seen as a key indicator of the benefit of a wind farm. The applicants see this as a key aspect in favour of this large proposal. However, the ECDU is content that there is no material variation if a developer installs a capacity of up to 20% less than that proposed. This means that the assessor/decision maker should not rely on the proposed installed

capacity as a measure of benefit either in absolute terms or in terms of the planning balancing exercise.

24. Having regard to the WEPG there is nothing that leads me to change my conclusions based on the Development Plan assessment that this proposal should be rejected and, indeed, that such a policy conclusion is an inevitable consequence of a directly relevant, unchallenged and Adopted Local Plan policy.

### **Conclusions**

25. In approaching this evidence I have sought to consider both the benefits of the scheme and the likely adverse impacts of the scheme although this precognition only addresses the points required by the Reporter. I consider that the benefits of the scheme are only those generic benefits associated with wind energy generation that are already factored into the favourable policy environment for this type of development.
26. In relation to the tests in the Electricity Act, I do not consider that these provide any valid basis for the *detailed* assessment of the acceptability of the scheme.
27. In terms of the deemed planning permission aspects, I conclude that the proposed development is contrary to the Development Plan on account of its fundamental breach of the key relevant Local Plan policy ER1, and also of E7. That breach arises from the site not being located in a Preferred Search area and from adverse effects on the AGLV. Even if the criteria in policy ER1 were applied, the development is in breach of four of the five criteria. Finally, even if we only had the WEPG and not policy ER1, then the proposal should be rejected on account of unacceptable significant adverse environmental impacts which are not outweighed by the generic benefits of the proposal.
28. Therefore, the presumption, in law, is in favour of the refusal of deemed planning permission for this application.

29. I have considered the Council's WEPG. If it applied to this proposal in this location I consider that the development would not be in accord with the guidance. Therefore, I conclude that there are no material considerations that would change the conclusion that arises from the Development Plan assessment.

30. I would respectfully request that you should recommend rejection of this s36 application.

Ian Kelly

November 2010

[END]