STEADINGS WIND FARM

OUTLINE LEGAL SUBMISSIONS
ON BEHALF OF THE APPLICANT

Approach

1. The applicant is Steadings Wind Farm Limited ("SWFL").

2. These legal submissions outline SWFL's position on various issues of law which (1) have been raised by one or more of the parties or (2) have otherwise arisen. They are in two parts: first, they respond to various points raised by the local planning authority ("TDC") in its legal submissions[1]; second, they deal with various other matters. These submissions concentrate on matters of law; in a number of areas, though, and with a view to outlining the relevance of the point in the instant case, they also anticipate and outline, to some extent, submissions which SWFL may make on matters of fact and policy.

3. SWFL will amplify or add to these if and as necessary in its closing; in particular, it will respond to any further development of or addition to TDC's submissions.

[1] TDC/0/0A

Part One – Response to TDC/0/0A

TDC/0/0A Points (a), (f), (g) (first part) and (i)

4. It remains SWFL's understanding that these points are not taken by TDC in so far as concerns Steadings.

TDC/0/0A Point (b) – Section 38(6) of the Electricity Act 1989 and the Town and Country Planning Act 1990

5. SWFL's position remains as set out at paragraphs 25 and 26 of its Opening Submissions[2]. It is common ground that the development plan is, on general principles, a material consideration and that the approach here is unlikely to differ whether section 38(6) of the Planning and Compulsory Purchase Act 2004 is engaged or not. The only possible nuance of difference between SWFL and TDC depends upon what precisely is meant by the latter's suggestion that the development plan here should be "*at the forefront*" of any decision. For the avoidance of doubt, SWFL submits that, as where section 38(6) is unambiguously engaged, the precise weight to be attached to any aspect of the development plan depends upon matters such as relevance,

[2] SWFL/0/1

whether the development plan is up-to-date and the extent to which the development plan is or is not consistent with national policy etc.

6. Additionally, where, as here, the dominant policy theme turns on climate change and the provision of renewable energy, the context of the development plan can only be derived from the higher tier of policy (and law) at the (inter)national level. In so far as practicable therefore, the development plan falls to be construed and applied so as to accord with that higher-tier material. If and in so far as the development plan fails so to accord with higher-tier material, the latter falls to be regarded as a most material consideration indicating "otherwise".

TDC/0/0A Point (c) – Relationship between law and policy

7. It is far from clear what point TDC here pursues. The following propositions appear tolerably clear and beyond sensible challenge:

   a. The content of Government policy is not an appropriate subject for discussion and review at a pubic inquiry; the inquiry's role is, rather, to apply such policy[3]. [Yet at one stage TDC did apparently indicate it would argue that paragraph 5.3.67 (first bullet) of the White Paper on

[3] **Bushell v SoSE** [1980] 2 All ER 608 HL

Energy 2007[4] was unlawful. It still remains to be seen whether such an argument is ultimately advanced and, if so, upon what basis.]

b. Self-evidently, no policy can transmute an immaterial consideration into a material one, or vice versa.

c. The policy-maker is not bound slavishly to follow his/her/its own policy – but any departure from such policy must be justified by clear and cogent reasons[5].

d. Policy is not to be treated as law and may be given a range of lawful interpretations, all of which depend upon the particular circumstances of the given case[6].

8. Here the whole context in which the development operates is derived from a higher tier of policy (renewable energy/climate change). Additionally, (1) the weight to be attached to the benefits of renewable energy development is, unusually, not a matter which is left to the decision-maker to determine but provided for expressly by national policy[7]; (2) where policies in other PPSs (and, logically, elsewhere) differ in emphasis from those in the relevant policy

[4] CD 102
[5] **Gransden v SoSE** [1986] JPL 519, at 521; upheld at [1997] JPL 365
[6] **Cranage PC v First Secretary of State** [2004] EWHC 2949 (Admin); [2005] JPL 1176, at 1184 et seq
[7] PPS 22 para 1(iv)

document on Planning and Climate Change, the latter prevails[8]. It can be seen that national policy itself imposes a hierarchy in considering the various policy aspects.

TDC/0/0A Point (d) – The status of policy

9. See under previous heading.

10. It is not accepted that TDC's approach to policy, as set out in TDC/0/0A paragraphs 12 to 13, is correct. Generally, the weight to be attached to the various material considerations is a matter for the relevant decision maker. Here, as noted above, and most unusually, the weight to be attached to the benefits of renewable energy is expressly provided for, and pertains, indeed, ... *whatever* [the] *scale* of those benefits[9]. By contrast, the weight to be attached to the landscape and visual impacts, to which TDC refers in this portion of its legal submissions, is left to the decision maker. The courts will generally only interfere with a decision maker's view in respect of weight in so far as that view is irrational or perverse. But it would be perverse here to allow any such landscape or visual impacts – even assuming they are found to be adverse – to outweigh the benefits to be unlocked. Not only is there

[8] PPS 1 Supplement on Planning and Climate Change at page 1 – CD 71A
[9] PPS 22 para 1(iv) -

here no relevant impact on any designated landscape, but also any effect is, in any event, accepted to be reversible at the end of the scheme's life.

TDC/0/0A Point (e) – The relevance of alternative sites

11. This is not the first time that a local planning authority has sought to oppose a renewable energy scheme on the basis of an alleged failure to consider alternative sites. The argument remains misconceived.

12. First, the relevant EIA Regulations impose a requirement that an ES includes *an outline of the main alternatives considered and an indication of the main reasons for* [the promoter's] *choice*...[10]. This requirement is only engaged if and to the extent that a promoter has actually considered alternatives. There is and can be no suggestion that this requirement has been breached.

13. Second, there neither is, nor can be, any suggestion that the relevant provisions of the Habitats Regulations – and the concept of *alternative solutions* thereunder - have here been engaged.

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[10] Reg 4(1) and para 4 of Sched 4 Pt 2 of the Electricity Works (EIA) (England & Wales) Regulations 2000

14. Third, so far as concerns the relevant case law dealing with consideration of alternatives in the (extended) planning context, the following points are relevant:

a. Any requirement to consider alternatives is very much the exception rather than the rule; there must thus be some particular and exceptional reason in any given case[11]. No such exception here arises.

b. Where a proposal does not conflict with policy and involves no planning harm, the concept of 'alternatives' has no relevance; even in exceptional circumstances, where such a concept may have potential relevance, inchoate or vague schemes and/or those that are unlikely or have no real possibility of coming about – even assuming there is some evidence of the existence of such schemes - are either irrelevant or attract very little weight[12].

c. Various indicators of when it might, or might not, be appropriate to consider alternative sites were canvassed in *Trusthouse Forte v Environment Secretary* by Simon Brown J[13]. The Court of Appeal (in the case of *Edwards*) has subsequently identified four criteria ("the

[11] **R (Jones) v N Warwickshire BC** [2001] EWCA CIV 315 at para 30
[12] **R (Mount Cook) v Westminster CC** [2003] EWCA 1346 at para 30
[13] (1986) 53 P&CR 293

Edwards criteria")[14], namely; (1) the presence of a clear public convenience or advantage in the proposal under consideration; (2) the existence of inevitable and adverse effects or disadvantages to the public, or some section of the public, in the proposal; (3) the existence of an alternative site for the same project which would not have those effects or would not have them to the same extent; (4) a situation where there could only be one permission for such development, or at least only a very limited number of permissions. All four criteria need to be satisfied before the concept of alternatives becomes potentially relevant. Demonstrably here, even assuming Criterion 2 were met (which it is not), Criteria 3 and 4 cannot be. This, of itself, is sufficient to defeat TDC's argument.

d. Alternatives do not exist *in vacuo*. The availability, potentially or in actuality, of alternatives can only be determined after the need has been defined. Here the need is unconfined for there is no upper limit and the 'targets' are in fact *minima*, not ceilings; they are expressly made subject to upwards review. The need is such that as many sites as possible are required; in other words the need is unconstrained. The only question is whether a given site can or cannot be brought forward acceptably. No one site can logically be regarded as an alternative to another[15]. Thus *Edwards* Criterion 3 cannot be satisfied.

[14] **Edwards v SoSE** [1994] 1 PLR 62 CA
[15] PPS 22 paras 3 and 16. The latter expressly rehearses that local planning authorities should not use a sequential approach in considering renewable energy proposals.

e. Even were that not the case, *Edwards* Criterion 4 cannot be met. This is not a situation where there will only ever be a need for only one, or only a very limited number of consents.

f. There can be no basis here for arguing that consideration of ‘alternatives’ arises as a matter of law.

g. It is also of note that Government policy expressly rehearses that, in the case of renewables proposals, *applicants will no longer have to demonstrate either the overall need for renewable energy or for their particular proposal to be sited in a particular location*[16].

h. The Northumberland Structure Plan itself expressly provides that a sequential approach is not to be followed when considering schemes for renewable energy from wind[17]. This point alone makes TDC’s submissions untenable.

i. There is here no policy requirement to consider ‘alternatives’; indeed the reverse is the case.

[16] 2007 White Paper para 5.3.65 (first bullet) - CD 102
[17] JSP policy M5 (disapplying policy S11); the recent RSS makes similar provision

j. As a matter of fact and degree, and common sense, there can, in any event, be no alternatives here given the unconstrained nature of the need.

k. Various key points arise. First, the relevant criteria are not here met. Second, even if they were, the prevailing matrix established by the case law could only establish that alternatives are a potential consideration; a requirement to consider alternatives can only arise if and to the extent that there can, in fact, be alternatives to what is proposed – here there is no logical basis upon which any other site, whether identified or not, could be an alternative to what is here promoted.

15. This very argument has recently been advanced in apparently identical terms, in respect of another wind turbine scheme. It was rejected and the present inquiry may be aided by consideration of the relevant decision letter[18]

[18] Carsington decision letter dated 17th September 2008, see paras 80 et seq

TDC/0/0A Point (g) (second part) – The absence of EIA for grid connections; the position even if the proposals are clarified

16. This point has already been fully argued and the Inspector has ruled thereon[19]. SWFL refers to, but without repeating, the submissions made earlier in that respect.

TDC/0/0A Point (h) – Decision-making in the context of listed buildings and conservation areas

17. Section 66(1) of the Planning (Listed Buildings etc) Act 1990 applies when considering whether to grant "planning permission". The academic question arises whether deeming such permission to be granted pursuant to section 90(2) of the 1990 Act is the same thing. Irrespective, however, of any distinction in law, it is accepted that the requirement under section 66(1) applies here, whether *de facto* or *de jure*. Any debate on whether section 66 strictly applies is thus sterile and unnecessary.

18. Section 72(1) of the Planning (Listed Buildings etc) Act 1990 requires special attention to be paid to the desirability of preserving or enhancing the character or appearance of a conservation area. It applies, *inter alia*, whenever considering the exercise of functions under the Planning Acts and is clearly engaged here.

[19] X/17

19. The key point to note is that, even assuming there were a materially adverse effect on the relevant conservation area or listed building, neither of these two sections requires the refusal of the relevant consents. The test is merely to have special regard/attention to the desirability of achieving the relevant aims. Three points warrant attention: (1) the development here proposed is only temporary[20] and, in any event, reversible; (2) the importance of renewable energy, and the weight to be attached to the benefits, is expressly provided for (see above); (3) those benefits extend to the cultural built heritage.

TDC/0/0A Point (j) – Setting of listed buildings and scheduled ancient monuments

20. The precise setting of a given listed building is a matter of fact and degree to be determined by evidence. For present purposes, SWFL makes two points. First, SWFL does not accept that the matters to which regard must be had in determining questions of setting are to be limited to those apparently suggested by TDC. Nor does it accept TDC's apparent views on weight in this respect.

[20] PPS 22 para 20

Part Two – Other points

Other points A – The approach to the development plan

21. The correct approach can be summarised thus;

a. As to section 38(6), see above.

b. The courts will only intervene where a decision maker reaches an interpretation of policy which the words of that policy are incapable of bearing[21].

c. Decision makers cannot sit *in the planning world of Humpty Dumpty making a particular policy mean whatever the decision maker decides that it should mean* and a note of caution is appropriate[22]. In particular, here, it is crucial that development policy be interpreted in the context of, and to accord with, the higher tiers of policy, namely at national, European and international levels.

[21] **R v Derbyshire CC ex p Woods** [1997] JPL 958 CA; **Cranage** (supra) at para 46 et seq
[22] **Cranage** (supra) at para 50

d. It is not at all unusual for policies in a development plan to pull in different directions. Breach of a particular policy does not, of itself, mean that the development cannot be said to be *in accordance with the plan*. Where polices pull in different directions it may thus be necessary to decide which is the dominant policy or theme[23]. This is particularly important here, given the (inter)national importance attached to the bringing forward of renewables. It is essential that, in considering any question of accord with the development plan, the plan is construed and applied in the context of that need and the wider policy context.

Other points B – The approach to the use of Grampian-style conditions

22. The position can be summarised thus:

a. Grampian style conditions can lawfully be imposed[24].

b. Whilst the Secretary of State has a policy that *such a condition should only be imposed ... if there are at least reasonable prospects of the action in question being performed within a the time limit imposed by the permission*[25], the mere fact that such a condition appears not to

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[23] **R v Rochdale MBC ex p Milne** 31st July 2000 at paragraphs 48 to 49; **R (Cummins) v Camden LBC** [2001] EWHC 1116 (Admin) at paras 163 et seq
[24] **Grampian Regional Council v City of Aberdeen** [1984] JPL 590
[25] Circular 11/95 para 40

satisfy that test does not mean that consent must, as a matter of law be refused[26].

c. If a condition meets the reasonable prospects test, then there is no bar to the issue of consent subject to an appropriate condition. Even if that test is not thought to be met, the decision maker is still bound to consider his discretion whether to impose a condition, having regard to, but not bound by, that policy test[27]. Indeed, the Deputy Judge in *Merritt* expressly referred to the dangers inherent in having, as here, a policy couched in absolute form.

Having regard to the (inter)national importance of achieving renewable energy benefits, it would here be surprising were the Secretary of State – even assuming, however artificially, that there was some material doubt as to the reasonableness of any relevant prospects – to shut off the possibility of bringing forward the schemes before this inquiry by refusing them in preference to imposing a Grampian-style condition.

Francis Taylor Building

Temple **ANDREW NEWCOMBE**

25th September 2008

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[26] **BRB v SoSE** [1994] JPL 32 HL
[27] **Merritt v SoSETR** 5th August 1999 at page 25G to 26C – SWFL/0/4