

WINDS OF CHANGE?

Can planning meet the renewable energy challenge?



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Summary

1. There are reasons to be cheerful for those involved with renewable energy. The political environment is shifting towards a recognition of the essential role that renewable energy will play in meeting the net zero by 2050 goal.
2. The role of the renewables sector in the economic recovery from the Coronavirus crisis is also on the political radar.
3. For those with existing sites or looking to develop new schemes, there is a short and a medium term game that needs to be run:
 - 3.1. In the short term, those with existing onshore wind schemes must consider how to address repowering and extension. The time may be now to bring forward those applications seeking to test the limits of the meaning of repowering.
 - 3.2. Also for the short term, the window may be there to test schemes against footnote 49.
 - 3.3. In the medium term, engaging with local plan development will be essential. Engaging at the earliest opportunity to shape the evidence base for the need for renewables in a local authority area, and then the policies that facilitate schemes coming forward. It is imperative to engage from the early stages through to examination in public to ensure that the policy stays in place through to adoption.
4. With the energy white paper on the horizon, there will (hopefully) be the strategic framework through which new renewable energy development can come forward over the coming years.

The UK Target

5. The Paris Agreement on climate change entered into force on 4 November 2016. It was ratified by the UK on 18 November 2016. Parties to the Paris Agreement are required to prepare, communicate and maintain successive Nationally Determined Contributions (NDCs). As a Member State, the UK is part of the joint EU/Member State NDC for the period of 2021-2030, which commits the EU to at least 40% reduction in greenhouse gas emissions by 2030 compared to 1990 levels.
6. As confirmed recently in the Court of Appeal judgment in *Plan B Earth v SoS Transport* [2020] EWCA Civ 214, the commitments made as part of the Paris Agreements are “Government policy”. That required the commitments to be taken into account when deciding upon a National Policy Statement under s.5 Planning Act 2008.
7. Climate change policy, including planning policy, is devolved. This goes some way to explaining the differing successes in recent projects to bring forward renewable energy schemes. Perhaps most notably in the contrasting success of wind turbine scheme between England and Scotland.
8. The different approaches in the Home Nations is also apparent in the different targets on renewable energy. In Scotland the Scottish Climate Change Plan¹ and the Scottish Energy Strategy² aim to generate 50% of Scotland's overall energy consumption from renewable sources, and by 2050 to have decarbonised their energy system almost completely. In Wales, the target is 70% of Wales electricity demand to be met from Welsh renewable electricity sources by 2030, for 1GW of renewable electricity capacity in Wales to be locally owned by 2030 and for new renewable energy projects to have at least an element of local ownership by 2020³.

¹ <https://www.gov.scot/publications/scottish-governments-climate-change-plan-third-report-proposals-policies-2018/>

² <https://www.gov.scot/policies/renewable-and-low-carbon-energy/>

³ <https://gov.wales/sites/default/files/publications/2019-10/energy-generation-in-wales-2018.pdf>

9. The specific targets on renewable energy in England and Northern Ireland are not yet set. This is disappointing and does not create a climate for investment and innovation, particularly given the legally binding commitment of net zero greenhouse gas emissions by 2050.
10. The UK's draft National Energy and Climate Plan was due to be with the EU Commission by 31 December 2019. As it stands there are no specific renewable energy targets or details of an adopted energy strategy. The Energy White Paper seems to have stalled.

The trouble with the English....

11. Whilst there has been some continuing success in the promotion of onshore wind schemes in Scotland – see for example the recent success for Vincent Fraser QC⁴. In England the picture has been less rosy of late.
12. The NPPF sets out the Government's policy on renewables at §148, 151 – 154. In short:
 - 12.1. Planning should support renewable and low carbon energy and associated infrastructure.
 - 12.2. Local development plans should provide strategies for energy from renewable and low carbon sources, including considering the identification of sites.
 - 12.3. Community led schemes should be supported, including those promoted in neighbourhood plans.
 - 12.4. For decision making there is no requirement to show the overall need for renewable or low carbon energy.

⁴ <https://www.kingschambers.com/latest-news/cases/vincent-fraser-qc's-further-wind-farm-success>

- 12.5. Then the kicker, “*approve the application if its impacts are (or can be made) acceptable*”. That is defined by footnote 49 that “*Except for applications for the repowering of existing wind turbines, a proposed wind energy development involving one or more turbines should not be considered acceptable unless it is in an area identified as suitable for wind energy development in the development plan; and, following consultation, it can be demonstrated that the planning impacts identified by the affected local community have been fully addressed and the proposal has their backing.*”
13. The NPPF puts the emphasis on local plans for setting a strategy, this places an enormous additional burden upon the local plan system. With a Government set target of all local authorities having an up to date LP by December 2023, there is clearly significant work to be done. For those developing local plans, in addition to the high level policy in the NPPF, there is detailed guidance in the PPG, and in the National Policy Statements. It is a complex field and one that requires careful navigation.
14. When one turns to promoting wind turbine schemes, the bar is set very high – it must be in an area identified as suitable in the DP; and it can be demonstrated that the planning impacts have been fully addressed; and the scheme has the backing of the affected local community.
15. The PPG sets out what is meant by these three tests, all of which must be met. Helpfully, depending on your approach, the backing of the community is entirely left to planning judgment. Some potential assistance is provided by Inspector Baird in the Storefreight Services appeal decision⁵, where he says as follows with regard to the demonstration of clear local community backing:

Neither the WMS nor PPG, in my view, tilts that weight in favour of local opinion rather it re-emphasises that the degree of weight to be attached to the material consideration is a matter for the decision maker. The February 2018 Judgement concludes that the WMS does not elevate those members of

⁵ APP/E2001/W/17/3187387

the local community who have views which are most vehemently opposed to a proposal into the arbiters of the local community as a whole.

16. It is also worth noting that the Framework is a material consideration, but it does not displace the development plan and s.38(6) PCPA. If the development plan is favourable to a renewable scheme, then the scheme should be interpreted in line with it – see for example the appeal decision in Selbrigg Farm⁶. We will turn to the importance of local plans for the sector in due course.
17. Of course appeal decisions are not binding and whilst Inspector Baird’s interpretation is certainly helpful, that high bar of the test remains. Clearly this creates a difficult task for those promoting wind schemes and goes some way to explaining the significant reduction in new proposals since the written ministerial statement introducing this policy on 18 June 2015⁷.
18. Also, requiring that all planning impacts have been addressed is opaque and does not serve to assist those bringing forward renewable schemes, despite both the stated aim of the Government towards renewables and the direction of the NPPF. Wind turbine schemes are going to have planning impacts – landscape, seascape, heritage. How one can conclude that these are “fully addressed” is difficult ground for developers. It is also does not compel elected members to find solutions if the political winds do not favour the turbines.
19. The exception to the requirements of FN49, are repowering schemes. There is no definition of repowering in English policy or guidance. However, the issue of repowering was considered in the Kirkby Moor Wind Farm Appeal⁸ from which some guidance can be taken – recalling that appeal decision are not binding. That site had consent for 12 turbines, granted in 1992, with a condition as follows:

⁶ APP/&2620/W/16/3143028

⁷ <https://www.gov.uk/guidance/renewable-and-low-carbon-energy>

⁸ APP/M0933/W/18/3204360

The turbines hereby approved shall be removed from the site on the expiration of 25 years from the date of the turbines being first brought into use or within 1 year of the turbines being decommissioned or becoming disused for any reason, whichever is the sooner.

20. The original approved scheme was for 15 two-blade turbines (40.5m to tip). The Council approved an amendment to this scheme to provide 12 three-blade turbines (42.4m to tip) – this was the scheme as constructed. The application which originated the appeal proposed a revised date for the cessation of power generation by March 2027, and an end date for decommissioning in March 2028.
21. An application under section 73 sought to vary the condition to allow the retention of the turbines until 31 March 2027, followed by a further year to carry out decommissioning works. Inspector Philip Ware identified four main issues: the effect on the character and appearance, including the setting and character of the Lake District National Park (LDNP) and the World Heritage Site; the effect on designated heritage assets; the extent of any benefit accruing from the decommissioning and restoration schemes; and the extent of any benefit arising from renewable energy generation. Alongside those issues was the fundamental question of whether the application was a repowering, and therefore outside the scope of FN49, or whether it was a fresh application and therefore subject to the high bar within the footnote.
22. The Inspector considered that the appellants broad definition, influenced by the Scottish Government's Onshore Wind Policy, was to be preferred, meaning the replacement, replanting and extension of life. The Scottish policy states:

34. Many established onshore wind sites will be coming to the end of their consented life during the coming decade and beyond. As the need and demand for renewable power increases, we expect developers to review the potential for "repowering" at existing sites. This could be in the form of measures designed to extend the life of components and turbines at such sites, or replacing and replanting existing turbines with new turbines.

23. The Kirkby Farm case was for the extension of life of the existing turbines. Perhaps the least controversial of the actions within the scope of the Scottish definition of

repowering. Since the Kirkby Moor decision there has been no addition to the NPPF or the PPG to seek to define repowering. Therefore, on the broad definition, there may be scope to test the definition of repowering in the NPPF as more sites come towards the end of their first iteration. Up to the point of proposing new turbines, perhaps of a larger tip height.

24. There is around 8GW of onshore wind that is coming up for repowering. In the context of the need to be net zero by 2050, it will be essential to get these applications right. Furthermore, it will need a sensible discussion, with applications and most likely, appeals, that test the scope of repowering.
25. In such circumstances there will be some key considerations for developers:
 - 25.1. The new ES should measure the impact of the new turbines against the ‘no development’ position.
 - 25.2. The proposal will need to be realistic within its own environmental context.
 - 25.3. The sector will need to be cautious not to spook local residents, pressure groups and politicians into imposing a more draconian approach to the definition of “repowering”.
 - 25.4. The back up of seeking community backing should still be sought in case the decision maker, or the Secretary of State, decide the scheme does not fall within the scope of repowering.
 - 25.5. When seeking the views of local community views, open them up to as wide an audience as possible. Be innovative in the approach and use digital technology.
26. Assuming that those with existing schemes want to repower and extend, what is the best mechanism for achieving that. Kirkby Moor was an application under section 73 Town and Country Planning Act 1990, which permits development of land without complying with conditions subject to which a previous planning permission was granted. The scope of that power for changing the turbines, including increased tip

height or even increased number, has been removed in the recent judgment of the Court of Appeal in *Finney v Welsh Ministers* [2019] EWCA Civ 1868.

27. In *Finney*, the question before the court was whether s.73 permitted the authority to change the description of development on the earlier permission. The lower courts had found that the power to permit this, provided that it did not amount to a fundamental alteration in what had been earlier permitted.
28. The Court of Appeal judged that the power did not allow for an amendment to the description of development:
 - 28.1. S.73(2) says that the LPA must “consider only the question of conditions”.
 - 28.2. An LPA cannot permit a s.73 application that would change a condition which would then conflict with the description of development. In this case the description limited the wind turbines to 100m tip height. Therefore it would be unlawful to grant a s.73 application to change a condition to allow up to 125m tip height.
29. So, if an operator of an existing site wishes to repower and test the limit of FN49 by bringing onto site new turbines, then it will have to be a new application for planning permission. Of course that there are existing turbines on site can be a useful rhetorical tool, but it is not the baseline against which the new application will be tested. That is because it is not a genuine fallback position, it is a time limited operation that will cease and be decommissioned.
30. Clearly, whether a section 73 application or an application for a new consent that seeks to fall within the scope of repowering, proper project preparation and planning will be essential from the outset.

The role of NSIPs

31. Some schemes will fall to be considered under as National Significant Infrastructure Projects under the Planning Act 2008. The thresholds for such scheme are:

- 31.1. Energy from biomass or waste over 50 MW.
- 31.2. Offshore wind over 100 MW.
32. Therefore, a key decision in the early preparation of a renewable energy scheme can be balancing the size of the scheme with viability and one eye on the potential route to consent. Both the ‘normal’ route to consent and the NSIP route have their positives and negatives. The NSIP route is potentially longer, but it takes out the issues of local politics. Whilst it is arguable that the existing planning policy framework is designed to refuse onshore wind, the NSIP regime for those schemes that qualify is designed to consent. It is a key consideration at an early stage of project development.

Playing the long game

33. Engagement with Local Plan development. Planning for the Future⁹, published in March this year, said that all LPAs will be required to have an up to date local plan by 2023¹⁰.
34. In the context that LPAs will be reviewing existing or developing new plans, the requirements of the NPPF to provide a positive strategy for energy, and that as of 6 February 2020, 67% of Local Authorities have declared a climate emergency¹¹, then engagement with the development of plans will be essential to all seeking to promote renewable schemes.
35. For those seeking to bring forward new renewables schemes, it is essential to get involved at the earliest stage of development plan formulation. This goes from the earliest stages through to the examination in public.

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https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/872091/Planning_for_the_Future.pdf

¹⁰ Although the document disappointingly contained no reference to renewable energy.

¹¹ <https://www.climateemergency.uk/blog/list-of-councils/>

36. In the absence of national targets in England – although we wait to what is in the Energy White Paper – local authorities will need to assess what level of energy they are looking to produce. Once this is identified, which the energy sector must play a part in doing, then it falls to develop policies and identify sites that can meet that need.
37. A considerable amount of effort and engagement is needed from the energy sector to work with LPAs to produce these favourable policies.

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