Neutral Citation Number: [2018] EWHC 1270 (Admin)

Case No: CO/4097/2017

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
PLANNING COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25 May 2018

Before :

MRS JUSTICE LANG DBE

Between :

GOOD ENERGY GENERATION LIMITED	**Claimant**
- and -	
(1) SECRETARY OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT	
(2) CORNWALL COUNCIL	**Defendants**
COMMUNITIES AGAINST RURAL EXPLOITATION (CARE)	**Interested Party**

Jenny Wigley (instructed by **Burges Salmon LLP**) for the **Claimant**
Stephen Whale (instructed by the **Government Legal Department**) for the **First Defendant**
The **Second Defendant** and **Interested Party** did not appear and were not represented

Hearing date: 19 April 2018

Approved Judgment

Mrs Justice Lang:

1. The Claimant applies under section 288 of the Town and Country Planning Act 1990 ("TCPA 1990") to quash the decision of the First Defendant ("the Secretary of State"), dated 26 July 2017, dismissing its appeal against the refusal by Cornwall Council ("the Council") to grant planning permission for a wind farm development comprising up to eleven wind turbines, with attendant equipment and infrastructure, on land at Creddacott Farm, Week St Mary, Holsworthy, Cornwall ("the Site").

Planning decisions

2. The Site is some 38 hectares in size. It is situated 11.7 km south of Bude, and approximately 3.7 km from the boundary of the Cornwall Area of Outstanding Natural Beauty ("AONB") and Heritage Coast. The Week St Mary Area of Great Landscape Value is approximately 730 m north of the Site at its closest point.

3. The Council's Planning Committee refused planning permission at a meeting on 23 October 2014 for two main reasons. First, the unacceptable impacts on the landscape and designated heritage assets. Second, the impacts on the living conditions of occupiers of Little Exe Cottage.

4. The Claimant appealed against the refusal of planning permission under section 78 TCPA 1990. The appeal was recovered for the Secretary of State's determination on 30 July 2015, pursuant to section 79 of, and paragraph 3 of schedule 6 to, the TCPA 1990 because it involved a proposal of major significance for the delivery of the Government's climate change programme and energy policies.

5. An Inspector (Mr Paul Griffiths BSc (Hons) BArch IHBC) appointed by the Secretary of State held an Inquiry in April and May 2016. He conducted several site visits. In his report (hereinafter "IR"), dated 7 October 2016, he identified the main issue as "whether any benefits of the proposal are sufficient to outweigh any harmful impacts on the setting and thereby the significance of heritage assets, the surrounding landscape, the living conditions of local residents through visual impact in particular, but also noise and shadow flicker, and various other matters" (IR10.2).

6. At the date of the IR, the development plan comprised the North Cornwall District Local Plan, adopted in April 1999. LP Policy TRU4, LP Policy ENV1, ENV12, ENV13 and ENV14 applied. Many of these policies were out-of-date and inconsistent with the National Planning Policy Framework ("the Framework").

7. The Inspector concluded that the public benefits of the scheme were extensive and very weighty (IR 10.58). There was strong support in Government policy and the Framework for renewable energy. The wind farm could provide almost 90,000 MWh per year. It aimed to function free of subsidy. Moves had been made to enter into a joint venture with Community Power Cornwall Ltd. The scheme had the potential to act as a model for other energy projects. It would generate economic activity and jobs, and financial benefits to farming enterprises.

8. However, the Inspector concluded, applying paragraph 134 of the Framework:

> "10.60 the harm that would be caused to the setting and thereby the significance of the designated heritage assets set out above, whilst less than substantial in Framework terms, would nevertheless be serious. The harm that would be caused to the SAMs needs to be given great weight on the negative side of the balance by dint of the workings of paragraph 132 of the Framework. The harm that would be caused to the setting of the listed buildings attracts great weight by the same process but is underlined by the provisions of section 66(1) of the [Planning (Listed Buildings and Conservation Areas) Act 1990].
>
> 10.61 While I am cognisant of the fact that the harm would be temporary, and reversible, and that as I conclude above, the benefits of the scheme would be extensive, in my judgment, the public benefits of the proposal are insufficient to justify the serious harm to the significance of the designated heritage assets that would be caused."

9. The Inspector also concluded that the harm which the proposal would cause to the landscape generally, and the scenic beauty of the AONB (although it lay just outside it), would not be outweighed by the benefits of the scheme. As such the scheme was contrary to LP Policy ENV1 and LP Policy TRU4, paragraph 115 of the Framework and section 85 of the Countryside and Rights of Way Act 2000 (IR 10.111).

10. The Inspector said, at IR 10.82 – 10.85:

> "10.82 From what I saw, the wind turbines proposed would be an incongruous presence of significant scale, in terms of wind turbine height, and the spread of the array, in many views inland from the AONB and Heritage Coast. Those views are an integral part of the scenic beauty of the designated landscape. Bearing in mind the way the Courts have approached the matter, this alien presence would harm the AONB itself, and the Heritage Coast."
>
> "10.83 Paragraph 115 of the Framework directs that great weight should be given to conserving landscape and scenic beauty in these designated areas. Scenic beauty would not be conserved by the proposal."
>
> .....
>
> "10.85 Turning to LP Policy ENV1, proposals near to the AONB or Heritage Coast that adversely affect character or amenity (the latter is inseparable in my view from scenic beauty) will not be permitted unless the development is required in the proven national interest and no alternative sites are available. Feeding that into LP Policy TRU4, criterion 1 says that schemes which comply with criterion 2 are to be assessed having regard to the provisions of LP Policy ENV1, and the benefits of renewable energy, and will not be permitted where those benefits do not

justify harm to the special features or qualities which led to the national designation."

11. In the alternative, if the tilted balance in paragraph 14 of the Framework applied, the adverse impacts of the proposal, in terms of the harm that would be caused to the significance of designated heritage assets, the landscape in general, and the scenic beauty of the AONB, would significantly and demonstrably outweigh the extensive benefits of the scheme, when assessed against the policies of the Framework, taken as a whole (IR 10.113).

12. In terms of the written ministerial statement ("WMS") of June 2015, the planning impacts identified by affected local communities had not been addressed and could not be made acceptable.

13. On the issue of living conditions, the Inspector found that the proposal would not be contrary to LP Policy TRU4 of the core principle of the Framework on amenity. The issue of Little Exe was specifically addressed through a unilateral undertaking given by the Claimant.

14. The Inspector considered the planning obligations in the unilateral undertaking, made pursuant to section 106 TCPA 1990, which included a proposed Community Benefit Fund, a Local Tariff and a Community Investment Scheme. He concluded, at IR 9.7, that "bearing in mind the strictures of the Community Infrastructure Levy Regulations 2010, these are not matters to which weight can be attached in determining the appeal".

15. The Inspector therefore recommended that the Claimant's appeal be dismissed.

16. On 26 July 2017, the Secretary of State issued his decision letter ("DL") in which he agreed with the Inspector's recommendation and decided to dismiss the appeal and refuse planning permission.

17. In November 2016, the Council adopted the Cornwall Local Plan 2010 – 2030. Therefore in January 2017, the Secretary of State wrote to interested parties inviting representations, which were duly submitted.

18. In his decision, the Secretary of State found that the development plan for the area comprised the Cornwall Local Plan and the relevant saved policies of the North Cornwall District Local Plan (1999), which included ENV1.

19. The Secretary of State agreed with the Inspector that the main issues were those set out at IR 10.2 (DL 11).

20. On the issue of the heritage assets, the Secretary of State agreed with the Inspector's analysis, and his conclusion that there would be harm caused to the significance of a number of designated heritage assets as a result of the proposal. He considered that 25 years was a considerable period of time and he did not give any weight to the reversibility of the proposal. As the heritage assets themselves would be untouched, the harm would, overall, be less than substantial (DL 12).

21. The Secretary of State agreed with the Inspector that the benefits of the scheme were extensive and weighty. There was no good reason to cast doubt on the output figures

and the scheme could potentially act as a model for other renewable energy projects (DL 13).

22. On the issue of landscape, the Secretary of State agreed with the Inspector's findings that the wind turbines would be an incongruous presence of significant scale, in terms of height and the spread of the array, in many views inland from the AONB and Heritage Coast. He agreed that this alien presence would harm the AONB itself and the Heritage Coast (DL 15).

23. The Secretary of State agreed with the Inspector's analysis of the planning obligations at IR 9.6 – 9.8. He did not consider that the obligations overcame his reasons for dismissing the appeal and refusing planning permission.

24. The Secretary of State's overall conclusion was set out in DL 20 - 23:

> "20. The Secretary of State has considered the Inspector's report, evidence presented to the inquiry, together with all representations received following the adoption of the LP. For the reasons given above the Secretary of State considers that the appeal scheme is not in accordance with LP policies 14, 23 and 24. Nor does it accord with saved NCDLP policy ENV1 and is not in accordance with the development plan overall. He has gone on to consider whether there are material considerations which indicate that the proposal should be determined other than in accordance with the development plan.
>
> 21. Weighing in favour, the proposal would generate renewable energy and help combat climate change. The Secretary of State places significant weight on these benefits.
>
> 22. However the harms to heritage assets of the proposal are not outweighed by the public benefits; and the wind turbines proposed would be an incongruous presence of significant scale, in terms of wind turbine height and the spread of the array, in many views inland from the AONB and Heritage Coast. In terms of the WMS, the Secretary of State, like the Inspector, concludes that the planning impacts identified by affected local communities have not been addressed and, as a result, the proposal does not have the backing of the local community.
>
> 23. The Secretary of State considers that there are no material considerations which indicate that the appeal should be determined other than in accordance with the development plan. He concludes that the appeal should be dismissed and planning permission refused."

Legal and policy framework

(i) Applications under section 288 TCPA 1990

25. Under section 288 TCPA 1990, a person aggrieved may apply to quash a decision on the grounds that (a) it is not within the powers of the Act; or (b) any of the relevant requirements have not been complied with, and in consequence, the interests of the applicant have been substantially prejudiced.

26. The general principles of judicial review are applicable to a challenge under section 288 TCPA 1990. Thus, the Claimant must establish that the Secretary of State misdirected himself in law or acted irrationally or failed to have regard to relevant considerations or that there was some procedural impropriety.

27. The exercise of planning judgment and the weighing of the various issues are matters for the decision-maker and not for the Court: *Seddon Properties Ltd v Secretary of State for the Environment* (1981) 42 P & CR 26. As Sullivan J. said in *Newsmith v Secretary of State for the Environment, Transport and the Regions* [2001] EWHC Admin 74, at [6]:

> "An application under section 288 is not an opportunity for a review of the planning merits....."

28. In *Hopkins Homes Ltd v Secretary of State for Communities and Local Government* [2017] 1 WLR 1865, Lord Carnwath giving the judgment of the Supreme Court warned, at paragraph 23, against over-legalisation of the planning process. At [24] to [26], he gave guidance that the courts should recognise the expertise of the specialist planning inspectors and work from the presumption that they will have understood the policy framework correctly. Inspectors are akin to expert tribunals who have been accorded primary responsibility for resolving planning disputes and the courts have cautioned against undue intervention by the courts in policy judgments within their areas of specialist competence. Recourse to the courts may sometimes be needed to resolve distinct issues of law, or to ensure consistency of interpretation in relation to specific policies. But issues of interpretation, which are appropriate for judicial analysis, should not be elided with issues of judgment in the application of that policy.

29. A decision letter must be read (1) fairly and in good faith, and as a whole; (2) in a straightforward down-to-earth manner, without excessive legalism or criticism; (3) as if by a well-informed reader who understands the principal controversial issues in the case: see Lord Bridge in *South Lakeland v Secretary of State for the Environment* [1992] 2 AC 141, at 148G-H; Sir Thomas Bingham MR in *Clarke Homes v Secretary of State for the Environment* (1993) 66 P & CR 263, at 271; *Seddon Properties Ltd v Secretary of State for the Environment* (1981) 42 P & CR 26, at 28; and *South Somerset District Council v Secretary of State for the Environment* (1993) 66 P & CR 83.

30. Two citations from the authorities listed above are of particular relevance to the disputed issues in this case.

    a) *South Somerset District Council*, per Hoffmann LJ at 84:

"...as Forbes J. said in *City of Westminster v Haymarket Publishing Ltd:*

> "It is no part of the court's duty to subject the decision maker to the kind of scrutiny appropriate to the determination of the meaning of a contract or a statute. Because the letter is addressed to parties who are well aware of all the issues involved and of the arguments deployed at the inquiry it is not necessary to rehearse every argument relating to each matter in every paragraph"

The inspector is not writing an examination paper on current and draft development plans. The letter must be read in good faith and references to policies must be taken in the context of the general thrust of the inspector's reasoning ... Sometimes his statement of the policy may be elliptical but this does not necessarily show misunderstanding. One must look at what the inspector thought the important planning issues were and decide whether it appears from the way he dealt with them that he must have misunderstood a relevant policy or proposed alteration to policy."

b) *Clarke Homes*, per Sir Thomas Bingham MR at 271-2:

> "I hope I am not over-simplifying unduly by suggesting that the central issue in this case is whether the decision of the Secretary of State leaves room for genuine as opposed to forensic doubt as to what he has decided and why. This is an issue to be resolved as the parties agree on a straightforward down-to-earth reading of his decision letter without excessive legalism or exegetical sophistication."

(ii) Reasons for decisions

31. The Secretary of State was under a statutory duty to give reasons for his decision, pursuant to Rule 18(1) of the Town and Country Planning (Inquiries Procedure) (England) Rules 2000.

32. In *Save Britain's Heritage v No. 1 Poultry Ltd* [1991] 1 WLR 153, Lord Bridge considered the nature of the statutory duty on the Secretary of State to give reasons under what was then Rule 17(1) of the 1988 Rules. He said, at 166H:

> "The three criteria suggested in the dictum of Megaw J. in *In re Poyser & Mills Arbitration* [1964] 2 QB 467, 478 are that reasons should be proper, intelligible and adequate. The application of the first of these presents no problem. If the reasons given are improper they will reveal some flaw in the decision-making process which will be open to challenge on some ground other than the failure to give reasons. If the reasons are unintelligible, this will be equivalent to giving no reasons.

> The difficulty arises in determining whether the reasons given are adequate, whether in the words of Megaw J., they deal with the substantial points that have been raised or in the words of Philips J. in *Hope v Secretary of State for the Environment* 31 P. & C.R. 120, 123 enable the reader to know what conclusion the decision-maker has reached on the principal controversial issues. What degree of particularity is required? It is tempting to think that the Court of Appeal or your Lordships' House would be giving helpful guidance by offering a general answer to this question and thereby "setting the standard" but I feel no doubt that the temptation should be resisted, precisely because the court has no authority to put a gloss on the words of the statute only to construe them. I do not think one can safely say more in general terms than that the degree of particularity required will depend entirely on the nature of the issues falling for decision."

33. In *South Bucks District Council and another v Porter (No 2)* [2004] 1 W.L.R. 1953, Lord Brown summarised the content of the duty on inspectors at [36]:

> "The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the principal important controversial issues, disclosing how any issue of law or fact was resolved. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision. The reasoning must not give rise to a substantial doubt as to whether the decision-maker erred in law, for example by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds. But such adverse inference will not readily be drawn. The reasons need refer only to the main issues in the dispute, not to every material consideration. They should enable disappointed developers to assess their prospects of obtaining some alternative development permission, or, as the case may be, their unsuccessful opponents to understand how the policy or approach underlying the grant of permission may impact upon future such applications. Decision letters must be read in a straightforward manner, recognising that they are addressed to parties well aware of the issues involved and the arguments advanced. A reasons challenge will only succeed if the party aggrieved can satisfy the court that he has genuinely been substantially prejudiced by the failure to provide an adequately reasoned decision."

34. The *South Bucks* principles have since been applied to planning decision-makers at all levels.

(iii) Decision-making

35. Section 70(2) TCPA 1990 provides that, in deciding whether to grant or refuse planning permission, the decision-maker shall have regard to:

> "(a) the provisions of the development plan, so far as material to the application...
>
> (b) any local finance considerations so far as material to the application, and
>
> (c) any other material considerations."

36. Section 38(6) of the Planning and Compulsory Purchase Act 2004 ("PCPA 2004") provides:

> "If regard is to be had to the development plan for the purpose of any determination to be made under the planning Acts, the determination must be made in accordance with the plan unless material considerations indicate otherwise."

37. In *City of Edinburgh Council v Secretary of State for Scotland* 1998 SC (HL) 33, [1997] 1 WLR 1447, Lord Clyde explained the effect of this provision, beginning at 1458B:

> "Section 18A [the parallel provision in Scotland] has introduced a priority to be given to the development plan in the determination of planning matters... ...
>
> By virtue of section 18A the development plan is no longer simply one of the material considerations. Its provisions, provided that they are relevant to the particular application, are to govern the decision unless there are material considerations which indicate that in the particular case the provisions of the plan should not be followed. If it is helpful to talk of presumptions in this field, it can be said that there is now a presumption that the development plan is to govern the decision on an application for planning permission..... Thus the priority given to the development plan is not a mere mechanical preference for it. There remains a valuable element of flexibility. If there are material considerations indicating that it should not be followed then a decision contrary to its provisions can properly be given.
>
> Moreover the section has not touched the well-established distinction in principle between those matters which are properly within the jurisdiction of the decision-maker and those matters in which the court can properly intervene. It has introduced a requirement with which the decision-maker must comply, namely the recognition of the priority to be given to the development plan. It has thus introduced a potential ground on which the decision-maker could be faulted were he to fail to give

effect to that requirement. But beyond that it still leaves the assessment of the facts and the weighing of the considerations in the hands of the decision-maker. It is for him to assess the relative weight to be given to all the material considerations. It is for him to decide what weight is to be given to the development plan, recognising the priority to be given to it. As Glidewell J observed in *Loup v Secretary of State for the Environment* (1995) 71 P & C.R. 175, 186:

> "What section 54A does not do is to tell the decision-maker what weight to accord either to the development plan or to other material considerations."

Those matters are left to the decision-maker to determine in the light of the whole material before him both in the factual circumstances and in any guidance in policy which is relevant to the particular issues.

.....

In the practical application of section 18A it will obviously be necessary for the decision-maker to consider the development plan, identify any provisions in it which are relevant to the question before him and make a proper interpretation of them. His decision will be open to challenge if he fails to have regard to a policy in the development plan which is relevant to the application or fails properly to interpret it. He will also have to consider whether the development proposed in the application before him does or does not accord with the development plan. There may be some points in the plan which support the proposal but there may be some considerations pointing in the opposite direction. He will be required to assess all of these and then decide whether in light of the whole plan the proposal does or does not accord with it. He will also have to identify all the other material considerations which are relevant to the application and to which he should have regard. He will then have to note which of them support the application and which of them do not, and he will have to assess the weight to be given to all of these considerations. He will have to decide whether there are considerations of such weight as to indicate that the development plan should not be accorded the priority which the statute has given to it. And having weighed these considerations and determined these matters he will require to form his opinion on the disposal of the application. If he fails to take account of some material consideration or takes account of some consideration which is irrelevant to the application his decision will be open to challenge. But the assessment of the considerations can only be challenged on the ground that it is irrational or perverse."

38. This statement of the law was approved by the Supreme Court in *Tesco Stores Limited v Dundee City Council* [2012] UKSC 13, [2012] P.T.S.R. 983, per Lord Reed at [17].

(iv) Planning obligations

39. Section 106(1) TCPA 1990, as amended, provides:

> "Any person interested in land in the area of a local planning authority may, by agreement or otherwise, enter into an obligation (... "planning obligation") enforceable to the extent mentioned in subsection (3) -
>
> a) restricting the development or use of the land in any specified way;
>
> b) requiring specified operations or activities to be carried out in, on, under or over the land;
>
> c) requiring the land to be used in any specified way; or
>
> d) requiring a sum or sums to be paid to the authority ... on a specified date or date or periodically."

40. By subsection (3), a planning obligation is enforceable by the authority identified in the section 106 deed, in accordance with subsection (9)(d).

41. The Community Infrastructure Regulations 2010 ("the CIL Regulations 2010") were made pursuant to section 205(1) Planning Act 2008. The major part of the Regulations introduced a fixed infrastructure levy on new developments. Regulation 122 had a different purpose, providing a statutory limitation on the use of planning obligations, in the following terms:

> **"122. Limitation on use of planning obligations**
>
> (1) This regulation applies where a relevant determination is made which results in planning permission being granted for development.
>
> (2) A planning obligation may only constitute a reason for granting planning permission for the development if the obligation is—
>
> (a) necessary to make the development acceptable in planning terms;
>
> (b) directly related to the development; and
>
> (c) fairly and reasonably related in scale and kind to the development.
>
> (3) In this regulation—

"planning obligation" means a planning obligation under section 106 of TCPA 1990 and includes a proposed planning obligation; and

"relevant determination" means a determination made on or after 6th April 2010—

(a) under section 70, 73, 76A or 77 of TCPA 1990 of an application for planning permission; or

(b) under section 79 of TCPA 1990 of an appeal."

42. The Framework provides:

"Planning conditions and obligations:

203. Local planning authorities should consider whether otherwise unacceptable development could be made acceptable through the use of conditions or planning obligations. Planning obligations should only be used where it is not possible to address unacceptable impacts through a planning condition.

204. Planning obligations should only be sought where they meet all of the following tests:

- necessary to make the development acceptable in planning terms;
- directly related to the development; and
- fairly and reasonably related in scale and kind to the development.

205. Where obligations are being sought or revised, local planning authorities should take account of changes in market conditions over time and, wherever appropriate, be sufficiently flexible to prevent planned development being stalled.

206. Planning conditions should only be imposed where they are necessary, relevant to planning and to the development to be permitted, enforceable, precise and reasonable in all other respects."

43. The National Planning Practice Guidance ("the Guidance") states:

"Planning obligations mitigate the impact of unacceptable development to make it acceptable in planning terms. Obligations should meet the tests that they are necessary to make the development acceptable in planning terms, directly related to the development, and fairly and reasonably related in scale and kind. These tests are set out as statutory tests in the Community

Infrastructure Levy Regulations 2010 and as policy tests in the National Planning Policy Framework."

Grounds of challenge

44. **Ground 1**. The Claimant submitted that, in assessing the planning balance, the Secretary of State and the Inspector erred in law in disregarding the benefits offered by the Claimant in a unilateral undertaking made under section 106 TCPA 1990, as these were material considerations, which were not excluded by regulation 122 of the CIL Regulations 2010.

45. In summary, the main benefits offered by the Claimant were:

i) financial contributions to a community benefit fund;

ii) a community investment scheme open to local residents; and

iii) a reduced electricity tariff, open to local residents.

46. The Claimant's pleaded case was that all three of these community benefits were material planning considerations. They were for a planning purpose since they furthered the Government's legitimate planning policy objectives of encouraging local community involvement in renewable energy schemes and providing positive local benefit from renewable energy development. They also complied with specific aspects of local development plan policy. Furthermore, the benefits were directly related to, and derived from, the use of the land for the operation of the development.

47. However, after the claim was issued, the Court of Appeal decided in *R (on the application of Peter Wright) v Forest of Dean District Council & Resilient Energy Serverndale Limited* [2017] EWCA Civ 2102 that the local planning authority had erred in taking into account a proposed donation to the community (4% of turnover) from the operators of a wind turbine development as a material consideration weighing in favour of the grant of planning permission. It did not serve a planning purpose, nor did it fairly and reasonably relate to the development proposed.

48. In the light of the decision in *Wright*, at the hearing before me, the Claimant abandoned its challenge in respect of the community benefit fund, but continued with the challenge in respect of the community investment scheme and the reduced electricity tariff scheme open to local residents.

49. The Claimant further submitted that, in applying regulation 122 of the CIL Regulations 2010, the Inspector and the Secretary of State failed to exercise their planning judgment in deciding whether or not the obligations were "necessary" on the facts of the case. If they did exercise their planning judgment, they failed to give adequate reasons for their conclusions.

50. **Ground 2**. The Claimant submitted that the Secretary of State failed to have proper regard to the newly-adopted Cornwall Local Plan, and he failed to determine the extent of any conflict with it. Neither the Secretary of State, nor the Inspector, had proper regard to the Council's Supplementary Planning Document "Cornwall Renewable

Energy Planning Advice March 2016" ("REPAD"), nor did they determine the extent of any conflict with it.

Conclusions

Ground 1

51. In the Statement of Common Ground at the Inquiry, the following was agreed between the Claimant and the Council:

> "As part of the Appeal Proposal, a section 106 unilateral undertaking was agreed with and submitted to the Council by the Appellant and the landowners (being the freehold owners of the Appeal Site). All parties executed the section 106 except the mortgagee (as there was not sufficient time for the mortgagee to execute the section 106 prior to the planning committee meeting). The section 106 proposed a suite of community benefits including:
>
> (a) a £5,000 per megawatt of installed capacity community benefit contribution to be paid into a community benefit fund;
>
> (b) a community investment scheme open to local residents; and
>
> (c) a reduced electricity tariff, also open to local residents."

52. When the Council's Planning Committee considered the planning application, members were advised by their planning officer in the committee report not to take into account the "community benefit offer" made by the Claimant. Paragraph 295 of the committee report stated:

> "A community benefit offer has been made with this planning application. Members are advised that any Community Benefit offer is not relevant to the consideration of this application as neither the principle of the undertaking nor the details contained within it have been proposed in order to directly mitigate/remedy a specific planning objection to this proposal, and as such, the requirement for this community benefit is not considered to be compliant with the Community Infrastructure Levy Regulations 2010 (as amended) and cannot be required under planning law. Therefore the community benefit is not material to the determination of the application and no weight has been given to the inclusion of a community benefit scheme when considering this planning application."

53. As I read it, both from the wording of the report and the evidence of the Council's witness at the Inquiry, the phrase "community benefit offer" used in the committee report was intended to encompass all the community benefits offered by the Claimant, including those at issue in this claim. Absent any indication to the contrary, it can be

inferred that the Planning Committee followed the planning officer's advice and did not take these benefits into account when they decided to refuse planning permission.

54. The unilateral undertaking was still in draft form at the Inquiry, although it had been executed by the time the Inspector wrote his report. The Inspector received submissions about its terms at the Inquiry.

55. At IR 9.6 & 9.7, the Inspector found as follows:

> "9.6 Through a Section 106 Agreement the appellant is proposing Community Benefit Fund and Local Tariff scheme. These matters were addressed at paragraph 295 of the committee report.
>
> 9.7. The Obligation deals with a number of matters. I am sure, that if the appeal was allowed and the scheme proceeded, the Community Benefit Fund, the Local Tariff, and the Community Infrastructure Scheme, would provide welcome funding and income. However, bearing in mind the strictures of the Community Infrastructure Levy Regulations 2010, these are not matters to which weight can be attached in determining the appeal."

56. I agree with the Defendant's submission that the Inspector clearly found that the three obligations referred to did not meet the tests in regulation 122 of the CIL Regulations 2010 and therefore they could not, in the language of that regulation, "constitute a reason for granting planning permission for the development".

57. In DL 19, the Secretary of State expressly agreed with the Inspector's analysis at IR 9.6 – 9.8, and I consider that he must have reached the same conclusion as the Inspector.

58. The statutory requirement to have regard to material considerations is, in effect, a statement of the public law principle that all relevant considerations should be taken into account. Whether or not a particular consideration is material is ultimately a question of law for the court to determine: *Tesco Stores Ltd. v Secretary of State for the Environment* [1995] 1 WLR 759, per Lord Keith at 764A. Subject to *Wednesbury* unreasonableness, however, it is a matter for the decision maker to decide the weight (if any) to be attached to a material consideration: *Tesco Stores,* per Lord Hoffman at 780F-H.

59. A useful starting point is the well-known dictum of Cooke J. in *Stringer v Minister of Housing and Local Government* [1971] 1 All ER 65, at page 77, where he said:

> "In principle, it seems to me that any consideration which relates to the use and development of land is capable of being a planning consideration. Whether a particular consideration which falls within that broad class is material in any given case will depend on the circumstances."

60. In *Westminster City Council v Great Portland Estates PLC* [1985] AC 661, at 670, Lord Scarman referred to the principle, set out by Lord Parker CJ in *East Barnet Urban*

District Council v British Transport Commission [1962] 2 QB 484 at 491, that "when considering whether there has been a change of use 'what is really to be considered is the character of the use of the land, not the particular purpose of a particular occupier". Lord Scarman went on to say:

> "It is a logical process to extend the ambit of Lord Parker C.J.'s statement so that it applies not only to the grant or refusal of planning permission and to the imposition of conditions but also to the formulation of planning policies and proposals. The test, therefore, of what is a material 'consideration' in the preparation of plans or in the control of development .....is whether it serves a planning purpose: see *Newbury District Council v Secretary of State for the Environment* [1091] AC 578, 599 per Viscount Dilhorne, and a planning purpose is one which relates to the character of the use of land"

61. *Newbury District Council v Secretary of State for the Environment* concerned the validity of planning conditions, but the principles established have since been applied to planning obligations. Viscount Dilhorne said, at 599F-600A:

> "The power to impose conditions is not unlimited. In *Pyx Granite Co. Ltd. v. Ministry of Housing and Local Government* [1958] 1 Q.B. 554 Lord Denning said, at p. 572:
>
> > "Although the planning authorities are given very wide powers to impose 'such conditions as they think fit,' nevertheless the law says that those conditions, to be valid, must fairly and reasonably relate to the permitted development. The planning authority are not at liberty to use their powers for an ulterior object, however desirable that object may seem to them to be in the public interest."
>
> As Lord Reid said in *Mixnam's Properties Ltd. v. Chertsey Urban District Council* [1965] A.C. 735, 751, this statement of law was approved by this House in *Fawcett Properties Ltd. v. Buckingham County Council* [1961] A.C. 636.
>
> It follows that the conditions imposed must be for a planning purpose and not for any ulterior one, and that they must fairly and reasonably relate to the development permitted. Also they must not be so unreasonable that no reasonable planning authority could have imposed them: see *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation* [1948] 1 K.B. 223; *Hall & Co. Ltd. v. Shoreham-by-Sea Urban District Council* [1964] 1 W.L.R. 240, per Willmer L.J. at p. 248, ..."

62. Ms Wigley submitted that this passage in the speech of Viscount Dilhorne "properly understood" meant that any condition which materially furthered the achievement of planning policy goals would *per se* satisfy the test of being "for a planning purpose" and therefore be a material consideration. However, I agree with Mr Whale that this is

a gloss which is unsupported by authority. It does not follow from the Court of Appeal's judgment in *R (on the application of West Berkshire DC) v Secretary of State for Communities and Local Government* [2016] 1 WLR 3923, at [36]. A matter does not become material merely because it is included in a planning policy. As Hickinbottom LJ said in *R (on the application of Wright) v Forest of Dean DC & Resilient Energy Severndale Limited* [2017] EWCA Civ 2102, at [46], "even planning policy cannot convert something immaterial into a material consideration for planning purposes".

63. The question whether financial considerations may be material to the grant of planning permission was considered by the Court of Appeal in *R v Westminster City Council ex parte Monahan* [1990] 1 QB 87; *Plymouth City Council ex parte Plymouth and South Devon Co-operative Society Ltd* (1994) 67 P & C.R. 78, and by the House of Lords in *Tesco Stores Ltd v Secretary of State for the Environment* [1995] 1 WLR 759. These authorities pre-dated the amendment to section 70(2) TCPA 1990 to include local finance considerations.

64. In *Tesco Stores Ltd v Secretary of State for the Environment*, two developers applied for planning permission for supermarkets outside Witney. One developer, Tesco, offered to provide full funding for development of a link road which had been designed to assist traffic conditions in Witney, under a section 106 TCPA 1990 agreement. The applications were called in by the Secretary of State for his own determination. Planning permission was granted to the rival developer. The Secretary of State decided that, in the light of the low levels of traffic generated by the supermarket which would be using the road, and the distance of the road from the supermarket site, the connection between them was tenuous, and the funding could not be treated as a reason for the grant of planning permission.

65. Tesco challenged the decision on the basis that the Secretary of State ought to have treated its offer of funding as a material consideration. The House of Lords dismissed Tesco's appeal, and concluded that the Secretary of State had not treated the funding as immaterial and had weighed it in the planning balance, exercising his discretion to give it little weight.

66. Lord Keith referred to section 106 TCPA 1990 and said, at 765E:

> "Just before the section came into force on 25 October 1991 the Secretary of State issued Circular 16/91, giving guidance on the proper use of planning obligations under it. Annex B to the Circular commenced by observing that, rightly used, planning obligations might facilitate and enhance development proposals, but that they should not be used to extract from developers payment in cash or in kind for purposes that were not directly related to the development proposed but were sought as "the price of planning permission". That no doubt reflected the dictum of Lloyd LJ in *Bradford City Metropolitan Council v Secretary of State for the Environment* (1986) 53 P. & C.R. 55, 64, to the effect that it has usually been regarded as axiomatic that planning consent cannot be bought or sold."

67. Lord Keith set out the terms of the Circular which provided, inter alia:

> "B7. As with conditions .... planning obligations should only be sought where they are necessary to the granting of permission, relevant to planning and relevant to the development to be permitted. Unacceptable development should never be permitted because of unrelated benefits offered by the applicant ..."

68. Lord Keith then concluded, at 770A-F:

> "An offered planning obligation which has nothing to do with the proposed development, apart from the fact that it is offered by the developer, will plainly not be a material consideration and could be regarded only as an attempt to buy planning permission. If it has some connection with the proposed development which is not *de minimis*, then regard must be had to it. But the extent, if any, to which it should affect the decision is a matter entirely within the discretion of the decision maker and in exercising that discretion he is entitled to have regard to his established policy. The policy set out in the Circular 16/91 is intended to bring about certainty and uniformity of approach, and is directed among other things to securing that planning permissions are not bought and sold. It is not suggested that there is anything unlawful about Circular 16/91 as such. It might be thought the Secretary of State has made a slip in paragraph B12 where it is stated of unilateral undertakings:
>
> > "It should be relevant for planning and should resolve the planning objections to the development proposal concerned. Otherwise, it would not be a material consideration and will not be taken into account ...."
>
> But the context is that of an appeal against refusal of planning permission, which involves that the local planning authority should have taken the view that there were planning objections to the proposed development. If these objections were bad there would be no need for any unilateral obligation. If they were good then something would require to be done to overcome them and a unilateral obligation which would not do so would indeed be irrelevant. As regards the references in paragraphs B5 and B7 to planning obligations being necessary to the grant of permission and in paragraph B8 to their being needed to enable the development to go ahead, I think they mean no more than that a planning obligation should not be given weight unless the exercise of planning judgment indicates that permission ought not to be granted without it, not that it is to be completely disregarded as immaterial."

69. Lord Hoffmann, at 778F – 781C, confirmed the decision of the Court of Appeal in *Plymouth City Council ex parte Plymouth and South Devon Co-operative Society Ltd*, to the effect that the test of necessity in the Circular was merely guidance for the

decision-maker, and not a legal requirement. The test for planning conditions in *Newbury* applied, although the parallel was by no means exact.

70. In *R (on the application of Sainsbury's Supermarkets Ltd) v Wolverhampton City Council* [2011] 1 AC 437, which concerned compulsory purchase not the grant of planning permission, Lord Collins reviewed the authorities and stated:

> "70 What can be derived from the decisions in the planning context, and in particular the *Tesco* case, can be stated shortly. First, the question of what is a material (or relevant) consideration is a question of law, but the weight to be given to it is a matter for the decision-maker. Second, financial viability may be material if it relates to the development. Third, financial dependency of part of a composite development on another part may be a relevant consideration, in the sense that the fact that the proposed development will finance other relevant planning benefits may be material. Fourth, off-site benefits which are related to or are connected with the development will be material. These principles provide the answer to the questions raised in *Ex p Monahan* [1990] 1 QB 87 about the development in Victoria or the swimming pool on the other side of the city. They do not, as Kerr LJ thought, raise questions of fact and degree. There must be a real connection between the benefits and the development.
>
> 71 Given the similar context, there is no reason why similar principles should not apply to compulsory acquisition for development purposes provided that it is recognised that, because of the serious invasion of proprietary rights involved in compulsory acquisition, a strict approach to the application of these principles is required. There must be a real, rather than a fanciful or remote, connection between the off-site benefits and the development for which the compulsory acquisition is made."

71. However, since these cases were decided, regulation 122 of the CIL Regulations 2010 has come into force, and thus where there is a section 106 TCPA agreement, the tests in regulation 122 have to be applied by the decision-maker. Those tests are more stringent than the common law tests set out above. I agree with the observations of Gilbart J. in *R (on the application of Working Titles Films Limited) v Westminster City Council* [2016] EWHC 1855 (Admin) where he said:

> "20 The test of necessity in Regulation 122(2) (a) was originally not a test in law of the materiality of a planning obligation. Indeed that was the reason why the challenge failed in *R v Plymouth City Council ex p Plymouth and S Devon Co-op Society Ltd* [1993] 67 P and CR 78. It was a test of policy, and not a test in law – see Hoffman LJ in Plymouth at page 90, and Lord Keith in *Tesco Stores v Environment Secretary* [1995] 1 WLR 759 at 769 D-770 A, Lord Hoffman at p 777 B-C, 780 A-781C. The tests in (b) and (c) in Regulation 122 also go wider than the law did before its enactment. The test of materiality in

> law was hitherto that to be material, the provisions in a 106 obligation (a) had to have a planning purpose, (b) be related to the permitted development and (c) not be *Wednesbury* unreasonable (see Russell LJ in *Plymouth* at page 82 and Hoffman LJ at page 87). It follows that there are now tests in law which to some degree were not tests of law before their enactment. While I agree with him that the effect of Regulation 122 was drawn from previous Circulars, I respectfully disagree with Lewison J in *Welcome Break Group and Others v Stroud DC and Gloucestershire Gateway Ltd* [2012] EWHC 140 at paragraphs 49 and 50 where he treats the ratio of the *Tesco* case on the issue of necessity as still holding good. It is clear that the question of what is "necessary" is now a test in law, which it was not beforehand."

72. The relationship between the case law on material considerations and regulation 122 of the CIL Regulations 2010 was, in my view, accurately described in the Encyclopedia of Planning at Vol. 2, page 2-3424, paragraph P106.10:

> "To the extent that a planning obligation will overcome a legitimate planning objection to a development, its existence is a material consideration under s.70(2) in determining whether to grant permission, provided that it meets the tests set out in reg. 122 of the Community Infrastructure Regulations 2010. Regulation 122 provides that a planning obligation may only constitute a reason for granting planning permission for the development if the obligation is (a) necessary to make the development acceptable in planning terms; (b) directly related to the development; and (c) fairly and reasonably related in scale and kind to the development. Regulation 122 therefore builds upon certain of the policy guidance previously contained in Circular 05/05 by making compliance with these three tests a legal requirement for the consideration of a planning obligation as a material consideration in support of a proposed development. The reg. 122 requirements remain additionally as policy guidance in the NPPF. As a result, reg. 122 develops considerably the previously evolved case law relating to when a planning obligation could be a material consideration."

73. This issue was not considered in *Aberdeen City and Shire Strategic Development Planning Authority v Elsick Development Company Ltd* [2017] UKSC 66, presumably because regulation 122 of the CIL Regulations 2010 does not apply in Scotland.

74. In this case, neither counsels' submissions adequately analysed the effect of the CIL Regulations 2010 on the earlier case law.

75. In the Court of Appeal in *Wright*, Hickinbottom LJ touched briefly upon the relevance of the CIL Regulations 2010, saying at paragraph 28(iii):

> "For a benefit to be material, it does not have to be necessary to make the development acceptable in planning terms; although,

> by section 106 of the Town and Country Planning Act 1990 and regulation 122 of the Community Infrastructure Levy Regulations 2010 (SI 2010 No 948), a planning obligation may only be taken into account in the determination of any planning application if it is so necessary."

76. In this case (unlike *Wright*) the interplay between material considerations and regulation 122 of the CIL Regulations 2010 is of particular importance because the Claimant relies on the lack of any reference to the question whether the community benefits were material considerations in the Inspector's report and the Secretary of State's decision as support for its submission that they failed to consider it.

77. In my judgment, applying Lord Carnwath's guidance in *Hopkin Homes Ltd*, the Court ought to presume that both the Inspector and the Secretary of State were well aware of the obligation, in section 70(2) TCPA 1990 and section 38(6) PCPA 2004, to have regard to any other material considerations when deciding whether to grant planning permission. Indeed, the Secretary of State referred to it in DL 7. I find it inconceivable that they overlooked the extensive case law in support of the proposition that planning obligations could be material considerations. Moreover, the Inspector had the benefit of the submissions made on the planning obligations at the Inquiry, as well as the Council's committee report.

78. Because of the interplay between material considerations arising from planning obligations and regulation 122 of the CIL Regulations 2010, as discussed in the passage in the Planning Encyclopedia cited above, I consider that it was appropriate for them to consider the two issues together. On a fair reading, the Inspector's statement that "bearing in mind the strictures of the Community Infrastructure Levy Regulations 2010, these are not matters to which weight can be attached in determining the appeal" was his pithy summary of his conclusion that the community benefits could not be treated as material considerations, having regard to regulation 122 of the CIL Regulations 2010. The Secretary of State agreed with the Inspector's approach and his conclusion.

79. In my judgment, the Inspector and the Secretary of State were entitled to conclude, in the exercise of their judgment, that no weight could be attached to the local tariff and the community investment scheme in determining the appeal as they were not material considerations which complied with regulation 122 of the CIL Regulations 2010.

80. The local tariff was a scheme whereby eligible persons would receive at least a 20% reduction in electricity bills.

81. The local tariff was to be a project funded by the community benefit fund and any unallocated funds would be repaid to the community benefit fund. *Wright* established that the community benefit fund was not a material consideration, and it was difficult to make any meaningful distinction between the community benefit fund itself and the projects funded by the community benefit fund. As in the case of *Wright*, the figures chosen by the developer are not explained or justified by reference to the development.

82. It was clear upon consideration of the terms of the unilateral undertaking that the local tariff was entirely discretionary – there was no firm commitment that it would be made available, and even if it was introduced, it could be withdrawn at any stage. Even the eligibility criteria were not specified - it was not clear whether, and to what extent,

members of the local community would benefit. As Lord Collins said in *Sainsbury's Supermarkets Ltd*, there must be a real rather than fanciful or remote connection between the benefit and the development if the benefit is to be treated as a consideration weighing in favour of the grant of planning permission. This nebulous proposal did not meet that requirement.

83. Paragraph 97 of the Framework and the Guidance refer to community-led initiatives, but there was no evidence that the local tariff was a community-led initiative. It was a proposal from the developer, a private limited company. For that reason, it also did not further local development plan policies. I address this further in Ground 2 below.

84. Mr Watson, Head of the Planning Casework Unit at the Ministry of Housing, Communities and Local Government, said in his first witness statement:

> "5. The fourth bullet point of paragraph 97 of the National Planning Policy Framework ("the Framework") refers to "...community led initiatives for renewable...energy...". I appreciate that the meaning of the Framework is a question of law for the Courts. However, on behalf of the Government, I can say that this bullet point is not meant to include either the Claimant's Local Tariff or its Community Investment Scheme. They are not, in the Government's view, community-led initiatives for renewable energy.
>
> 6. The Planning Practice Guidance ("the Guidance") has a section on "Renewable and low carbon energy". There is a subsection within it entitled "Developing a strategy for renewable and low carbon energy". Within the subsection, Paragraph 004 Reference ID: 5-004-20140306 ("Paragraph 004") is entitled "What is the role for community led renewable energy initiatives?" The text of Paragraph 004 refers to "Community initiatives", "renewable and low carbon energy initiatives", "community led renewable energy developments" and "community based initiatives". I appreciate that the meaning of the Guidance is also a question of law for the Courts. However, on behalf of the Government, I can say that Paragraph 004 is not meant to include either the Claimant's Local Tariff or its Community Investment Scheme. They are not, in the Government's view, community led renewable energy initiatives.
>
> 7. Paragraph 004 explains that "Further information for communities interested in developing their own initiatives is provided by the Department of Energy and Climate Change." This is not a reference to the October 2014 Department of Energy and Climate Change document entitled "Community Benefits from Onshore Wind Developments: Best Practice Guidance for England ("the BPG"). Rather it is a reference to the Community Energy Guidance ("the CEG") published by the Department of Energy and Climate Change on 25 March 2013 and last updated on 26 January 2015. The CEG does not refer to either the

Claimant's Local Tariff or its Community Investment Scheme. They are not, in the Government's view, covered by the CEG."

85. The Claimant made no objection to the Secretary of State adducing Mr Watson's evidence. I found it helpful in identifying the intended scope of the Framework and Guidance. Nonetheless, I did not give it any weight in deciding whether these particular schemes came within the scope of the Framework or the Guidance, because of the caution to be applied to *ex post facto* evidence filed by decision-makers.

86. In my judgment, the local tariff was essentially an inducement to make the proposal more attractive to local residents and to the local planning authority. The scheme was not necessary to make the development acceptable in planning terms under regulation 122 of the CIL Regulations 2010.

87. Under the terms of the unilateral undertaking, the community investment scheme was not available from the outset. It was to be established by the developer within six months of First Generation (i.e. export to the national grid on a commercial basis). None of the details of the scheme were disclosed. Instead, it was said that the community investment scheme, when eventually published by the developer, would set out details of:

i) "the type and terms of investment opportunity to be made available to local individual community or institutional investors";

ii) "the mechanism by which the scheme will be administered, including how and when it will be made available, including any preferential terms for investors within the locality";

iii) "how the project company will be structured after the community investment scheme is implemented, including but not limited to management and legal structure, administration and governance".

88. Paragraph 24 of the unilateral undertaking provided that the developer might withdraw the community investment scheme if there was little or no take-up.

89. The lack of any specific details, combined with uncertainty about the scheme's commencement and long-term future, meant that the connection between the benefit and the development was remote and uncertain, rather than real.

90. The Claimant relied, in particular, upon national and local policy in favour of community-led initiatives and community involvement. However an opportunity to invest in the Claimant (a private limited company), for those local residents with cash to spare, along with institutional investors, could not properly be described as community ownership. Nor was it a community-led initiative. The Claimant did not even inform the community of the terms upon which local residents would be able to invest. The potential joint venture with a not-for-profit mutual society, Community Power Cornwall, did not alter this assessment. In any event, the Inspector separately took into account, as a benefit, the model of the proposed scheme, including its potential joint venture with Community Power Cornwall (IR 10.54). The Secretary of State took into account the Inspector's assessment of the benefits (DL 13).

91. Mr Watson's evidence (above) in respect of the Framework and Guidance also referred to the community investment scheme.

92. The community investment scheme plainly was not necessary to make the development acceptable in planning terms, applying regulation 122 of the CIL Regulations 2010. It was merely a potential investment opportunity.

93. The Claimant relied upon the judgment of Hickinbottom LJ in *Wright* at [43], where he referred to other socio-economic benefits which could be material considerations. This was a general proposition which did not assist the Claimant in establishing that the particular community benefits in this case were material considerations or that they met the test in regulation 122 of the CIL Regulations 2010. Hickinbottom LJ helpfully set out in his judgment extracts from the 2014 DECC Best Practice Guidance which describe the community benefits which wind projects may bring but it clearly states that these community benefits will not generally be taken into account when applications for planning permission are decided.

94. The reasons given by the Inspector and the Secretary of State were very brief. However, the Inspector and the Secretary of State were addressing an informed audience who were well aware of the nature of the community benefits and the legal tests to be applied. Whether, and to what extent, the community benefits could be taken into account in the planning balance was not treated as a main issue at the Inquiry. I was told that it was not addressed in either written or oral submissions at the Inquiry, which were confined to identifying the nature of the community benefits. In those circumstances, applying the test in *South Bucks*, the reasons (both in relation to material considerations and the CIL Regulations 2010), were adequate.

95. The Claimant has failed to establish any error of law in the decision on ground 1.

Ground 2

96. The Claimant submitted that the Secretary of State failed to have regard to relevant local policy and failed to determine the extent of conflict or compliance with Cornwall Local Plan Policy 14 and REPAD, the supplementary planning document.

97. Bearing in mind Lord Carnwath's guidance in *Hopkin Homes Ltd*, it can be assumed that the Secretary of State well understood his obligations under section 70(2) TCPA 1990 and section 38(6) PCPA 2004, and the primary of the local development plan. Indeed, he reminded himself of them at DL 7. It was not necessary for the Secretary of State to refer to the local planning policies in any detail in his decision letter, as the parties to whom the decision was addressed were well aware of them. It cannot be assumed that the Secretary of State overlooked any aspect of the local planning policies merely because they were not specifically referred to in the decision letter.

98. Unusually, a new Local Plan was adopted after the date of the Inspector's report but before the Secretary of State made his decision. Therefore the Secretary of State invited the parties to make written representations in the light of the new Local Plan, which they duly submitted. This meant that the Secretary of State had the advantage of up-to-date representations sent direct to him by the parties. He confirmed in his decision, at

DL 6, that he had "given careful consideration to all the representations received". There is no reason to doubt that statement.

99. The Secretary of State correctly concluded, at DL 7, that the adopted development plan for the area comprised the Cornwall Local Plan 2010-2030 (adopted in November 2016) and the relevant saved policies of the North Cornwall District Local Plan (1999). He correctly concluded, at DL 8, that the development plan policies of most relevance to this case were those in the Cornwall Local Plan and saved North Cornwall District Local Plan Policy ENV1.

100. The Secretary of State had the benefit of the Inspector's review of Policy ENV1 of the North Cornwall District Local Plan. The Inspector set out the policy in section 4 of his report, headed "Planning Policy", and then set out the competing submissions of the parties. He concluded that the proposal did not comply with Policy ENV1, stating at IR 10.109 to 10.111:

> "10.109 First, it is my conclusion that the (less than substantial, temporary and reversible) harm the proposal would cause to the setting and thereby the significance of a range of designated heritage assets is not outweighed by the public benefits that would flow from the proposal.
>
> 10.110 On the basis of the judgment of the High Court in *Forest of Dean DC v SoS for Communities & Local Government and Gladman Developments Ltd* (2016) EWHC 421 (Admin), that provides a compelling case for the appeal being dismissed. As well as the failure to accord with the Framework, the proposal would not comply with LP Policies ENV12 and ENV14, and, in that context, given that the overarching LP Policy TRU4 contains no reference to designated heritage assets, the development plan.
>
> 10.111 If the Secretary of State does not accept that conclusion then the situation becomes more complex. While I have found no harmful impacts in relation to living conditions, or a range of other matters, subject to the application of suitable conditions, it is my view that the temporary and reversible harm the proposal would cause to the landscape generally, and the scenic beauty of AONB, albeit as a development outside the AONB, especially, would not be outweighed by the benefits of the proposal. As such, the scheme falls foul of the approach set out in criterion 1 of LP Policy ENV1, and criterion 1 of the overarching LP Policy TRU4, and as a result, the development plan, paragraph 115 of the Framework, and the purposes of Section 85 of the Countryside and Rights of Way Act 2000."

101. The Secretary of State expressly agreed with the Inspector's conclusion that the proposal did not "accord with saved NCDLP policy ENV1" at DL 20. On my reading of the decision letter, the Secretary of State agreed with the Inspector's analysis and reasons for coming to that conclusion.

102. The Secretary of State concluded, at DL 20, that the proposal was not in accordance with Policies 14, 23 and 24 of the Cornwall Local Plan

103. LP Policy 23 protects the Natural Environment and LP Policy 24 protects the Historic Environment. The conclusions of both the Inspector and the Secretary of State, to the effect that this proposal was harmful to the landscape and the AONB, as well to the setting of heritage assets, provide ample justification for the conclusion that the proposal was not in accordance with LP Policies 23 and 24.

104. LP Policy 14 supports development proposals which increase use and production of renewable and low carbon energy generation. Under paragraph 1, the policy supports proposals which, inter alia:

> "c. in the case of wind turbines, they are within an area allocated by Neighbourhood Plans for wind power ....;
>
> d. do not have an overshadowing or overbearing effect on nearby habitations."

105. In the light of the representations made by the Council and Communities Against Rural Exploitation, and the findings on harm to landscape and the setting of heritage assets, the Secretary of State was entitled to conclude that the proposal was in conflict with LP Policy 14.

106. The Claimant submitted that the Secretary of State failed to have regard to, or apply, paragraph 2a which states:

> "Support will be given to renewable and low carbon energy generation developments that:
>
> a. are led by, or meet the needs of local communities;"

107. The Claimant also submitted that the Secretary of State failed to have regard to, or apply, the guidance on paragraph 2a of LP Policy 14 contained in the supplementary planning document REPAD. Ms Wigley referred, in particular, to paragraph 3.1.2 which advises that the needs of local communities may be met by provision of social, economic or environmental benefits, such as community ownership and control, financial benefits and a cheaper and more secure local energy supply.

108. The Claimant was particularly critical of the Secretary of State's failure to refer to REPAD in the decision letter since it was a material consideration. In my view, the Secretary of State would have been well aware of the status of a supplementary planning document of this type. I do not consider that the Secretary of State was required to make separate reference to REPAD, as this supplementary planning document was to be read with the adopted LP, to which he did make express reference. The introduction to REPAD explained its purpose as supporting the implementation of the LP.

109. In my judgment, there is no basis for concluding that the Secretary of State overlooked or ignored REPAD. The Inspector referred to REPAD at IR 23, in the course of his review of local planning policies. It was also referred to in the representations made to

the Secretary of State, to which the Secretary of State gave "careful consideration" (DL 6).

110. In my judgment, the Claimant's real complaint was that the Secretary of State did not accept its submission that this proposal was led by the community or met the needs of the community. However, the Secretary of State was entitled to reach this conclusion, on the evidence before him. This was a commercial development by a limited company, not a community organisation. The proposal was not initiated or promoted by the local community. There was much opposition to it among the local community e.g. from the Communities Against Rural Exploitation. In the context of the WMS, the Secretary of State (and the Inspector) found that the planning impacts identified by affected local communities had not been addressed and as a result the proposal did not have the backing of the local community (DL 22). The local tariff and the community investment scheme were not community-led renewable energy initiatives. Moreover, because of the discretionary and uncertain nature of the local tariff and community investment scheme proposals, there was no convincing evidence that they would meet the needs of members of the local community.

111. The Claimant has failed to establish any error of law in the decision on ground 2.

Conclusion

112. For the reasons set out above, the claim is dismissed.