

Briefing: The East Anglia One North and East Anglia Two Offshore Windfarm Litigation

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Agenda

1. The Suffolk Energy Action Solutions case (First Instance)
2. The Suffolk Energy Action Solutions case (Court of Appeal)
3. Substation Action: flood risk
4. Substation Action: alternatives
5. Substation Action: securing benefits
6. Substation Action: cumulatives

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R (Suffolk Energy Action Solutions Spv Ltd.) v. SSESNZ

Introductory points

Important to consider both the High Court ("H.Ct") and Court of Appeal ("CA") Judgments:

- The Claimant/Appellant's case changed significantly between the H.Ct and CA, and the issues covered in the Judgments are not the same.
- The factual context is dealt with in more detail in the H.Ct Judgment and is important when considering the implications of the CA's finding.
- There are useful practical and tactical points to be gleaned from the H.Ct Judgment.

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Overview of the factual context

- **The Claimant**
- **The development and the significance of its status as a NSIP**
- **SEAS's 'complaint': the Heads of Terms ("HoT") and Option Agreements ("OA"), and their effect on the process.**
- **The four grounds of challenge in the H.Ct**
- **Absence of any challenge to the lawfulness of the HoT or OA in the H.Ct**

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Key points from the H.Ct Judgment [2023] EWHC 1796 (Admin)

Context for the central issue of law

- **The inquisitorial nature of the PA 2008 examination [43]-[51]**
- **HoT not binding, and no evidence of "chilling effect" [75] and [146]**
- **ExA's response to the SEAS complaint [96]-[99] and the ExAR**
- **The facts (and the way the complaint was pursued) did not help the Claimant (see e.g. [26], [94], [110], [160], [164])**

Other useful points

- **What is "full information" for the purposes of EIA [60] (CA [23])**
- **Links to post-examination representations in the DL [142]-[144]**
- **Use of CPR Pt. 18 to attack loose Claimant pleadings [155]**

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The Court of Appeal's Judgment [2024] EWCA Civ 277

Introduction

- The Appellant's change of tack [9]-[11]
- *Fulham FC v. Cabra Estates* (1993) 65 P&CR 284
- The Appellant's alternative argument – non-objection clauses are only lawful if confined in scope to the land to be acquired



The two (inter-related) main reasons for rejecting the Appellant's main argument

1. An applicant who owns the site is unlikely to object, and that does not undermine the integrity of the process [61]
2. The planning process is inquisitorial in nature; it is for the decision-maker to ensure there is sufficient information; and whether the effect of a non-objection clause has meant there is insufficient information "must always be a fact-specific inquiry" [62]



The rejection of the Appellant's alternative argument

- There is only one scheme, and the developer is entitled to require the landowner not to object, even if the scheme involves other land
- This is for the same two main reasons in [61]-[62]
- It was not therefore necessary to determine the exact meaning of the RICS Guidance ("landowners may be prevented from objecting to any planning applications in relation to their land ...") [64]



Reasons to be cautious

- The reasoning in relation to the inquisitorial process is specific to the PA 2008: [63] and [23]-[24] (*Halite Energy Group Ltd.*)
- Reliance was also placed on the operation of the EIA Regulations, which will not apply in all cases [63].
- The effect of those factors meant that "in general" such clauses should not prevent the decision-maker making a properly informed decision [63].
- "Of course, whether this is so in an individual case will always depend on the particular facts" [63].



The “particular facts” relied on by the Court of Appeal

- **HoT not binding**
- **Landowners had legal advice**
- **The Applicant made clear the HoT were not binding**
- **No OAs until just before the decision (and then only 2)**
- **39 of the 55 landowners who signed HoT objected, and none withdrew**
- **“In these circumstances there was, in our view, no conduct interfering with the administration of justice” (emphasis added).**

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R (Substation Action Save East Suffolk Ltd.) v. SSESNZ

Plethora of issues in H.Ct and CA:

- **Flood risk sequential test** (H.Ct and CA)
- **Cumulatives** (H.Ct and CA)
- **Alternatives** (H.Ct)
- **Securing benefits** (H.Ct)
- **Noise** (H.Ct)
- **Heritage** (H.Ct)

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SASES: flood risk sequential test

- **NPPF para 168:**
 - *"The aim of the sequential test is to steer new development to areas with the lowest risk of flooding **from any source**. **Development should not be allocated or permitted if there are reasonably available sites appropriate for the proposed development in areas with a lower risk of flooding.** ..."*
- **NPS EN-1 para 5.8.21:**
 - *"... steer new development to areas with the lowest risk of flooding, taking **all sources of flood risk** and climate change into account. Where it is not possible to locate development in low-risk areas, the Sequential Test should go on to **compare reasonably available sites** with medium risk areas and then, only where there are no reasonably available sites in low and medium risk areas, within high-risk areas."*
- **PPG Section 7, especially 7-023 to 7-030.**



SASES: flood risk sequential test

- **All sources** (per 2021 NPPF and 2023 NPS EN1)
- **Site selection / design:**
 - **Applicant:** *"the National Grid substation location was selected in full cognisance of the presence of a shallow surface water flow route (comprising approximately 4cm of water depth during a 1 in a 100 year storm event), noting that such features can be diverted and their continued conveyance ensured using well established and proven techniques."*
 - **SoS:** Sequential Test passed
 - **CA:** *"The relevant provisions of EN-1, the Framework, and the PPG do not require that wherever there is a risk of flooding from surface water, an application for development consent must demonstrate that there is no other reasonably available site with a lower risk of flooding." [44]*



SASES: flood risk

- **Exception test:**
 - **Test:** (1) wider sustainability benefits (incl. need for renewable energy); (2) development safe for its lifetime.
 - **'Essential infrastructure':** incl. wind turbines, solar farms, electricity supply / generation / storage. Can be in Zone 3.
 - **But only get to ET if pass ST.**

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SASES: flood risk sequential test

- **Sequential test: search area**
 - Need to justify with evidence?
 - **PPG 7-028:** *"For nationally or regionally important infrastructure the area of search to which the Sequential Test could be applied will be wider than the local planning authority boundary."*
- **Sequential test: alternative sites**
 - **PPG 7-028:** *"'Reasonably available sites' are those in a suitable location for the type of development with a reasonable prospect that the site is available to be developed at the point in time envisaged for the development. These could include a series of smaller sites and/or part of a larger site if these would be capable of accommodating the proposed development. Such lower-risk sites do not need to be owned by the applicant to be considered 'reasonably available'."*

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SASES: flood risk sequential test

- **Sequential test: alternative sites cont.**
 - ***Mead Realisations Ltd v SSLUHC [2024] EWHC 279 (CA pending)***
 - *“Some development may be of a specialised or highly specific nature with particular or intrinsic requirements as to the site, form and scale of development, access, and catchment.” [99]*
 - *“... the need for flexibility on all sides.” [108]*
- **Link to alternatives more generally**



SASES: alternatives

- **Focus for objectors?** I.e. can't challenge need, so challenge option chosen.
- **Extensive case law:** *Trusthouse Forte v SSE (1995)*; *Jones v North Warwickshire (2001)*; *Derbyshire Dales v SSCLG (2010)*; *Langley Park School for Girls v Bromley LBC (2010)*; *Save Stonehenge WHS v SST (2021)*.
- **H.Ct:**
 - No *“principle of law that, in any case where a proposed development would cause adverse effects, but these are held to be outweighed by its beneficial effects, the existence of alternative sites inevitably becomes a mandatory material consideration” [211]*
 - *“the case law does indicate that consideration of alternative sites will only be relevant to a planning application in exceptional circumstances” [214]*



SASES: alternatives

- **H.Ct cont:**
 - **EIA Regs:** requirement to consider reasonable alternatives
 - **HRA:** possible requirement (if is adverse effect on integrity)
 - **Policy:** in NPS EN-1 (4.3.22ff especially)
 - **Alternatives within the site:** no need to show exceptional circumstances [209, 227]



SASES: generating capacity

- **Total generating capacity:** up to 800MW for EA1N and 900MW for EA2
- **DCO:**
 - For EA1N described authorised work as generating station with output “of over 100MW comprising up to 67 wind turbine generators) ...”
- **H.Ct:**
 - “161. Aside from the requirements of section 15(3) PA 2008, there is no legal or policy requirement for the generating capacity to be formally secured. Furthermore, as a general principle, there is no legal requirement that all benefits which are given weight in a planning balance must be formally secured, in order to be treated as material considerations. In this case, the decision to give weight in the planning balance to the generating capacity was a matter of judgment for the Defendant.”



SASES: generating capacity

- **Environmental statement**
 - Even if benefits assessed in ES, may not need to be secured
 - In same way that assumptions in ES may not need to be secured
- **Flexibility around capacity:** may wish to retain?
- **Query whether offer up requirement in alternative to SoS?**
- **Calculation of capacity:** see *Galloway v Durham County Council* [2024] EWHC 367 – may be important and not straightforward



SASES: cumulatives

- **Nautilus** and **Eurolink** interconnectors might connect into National Grid substation, albeit far from certain and both at early stage
- Applicant, on request of ExA, submitted **extension appraisal** of substation
- **IP (EIA) Regulations 2017 reg. 21(1):**
 - (a) SoS must “*examine the environmental information*”
 - (b) SoS must “*reach a reasoned conclusion on the significant effects of the proposed development on the environment, taking into account the examination referred to in subparagraph (a)*”



SASES: cumulatives

- **H.Ct and CA:**

- It is the examination that has to be taken into account in reaching a reasoned conclusion on LSE, not every single piece of environmental information, some of which may not affect the conclusion (e.g. may be irrelevant or flawed etc).
- SoS entitled to conclude that consideration of cumulative effects should be deferred given absence of adequate information on which a cumulative assessment could be based (as per *Larkfleet v South Kesteven DC* (2015) and *Pearce v SSBEIS* (2022)).



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