RICHARD BUXTON
SOLICITORS

ENVIRONMENTAL PLANNING & PUBLIC LAW

19B Victoria Street
Cambridge CB1 1JP
Tel: (01223) 328933
www.richardbuxton.co.uk
law@richardbuxton.co.uk

Secretary of State for Business, Energy and Industrial Strategy
c/o Keith Welford
Energy Infrastructure Planning
Department for Business, Energy and Industrial Strategy
1 Victoria Street
London SW1H 0ET

By post and email: Keith.Welford@beis.gov.uk

Your ref.

Our ref. HKG1-001/PT/RB

27 November 2018

Dear Sir

Re Ecotricity Heckington Wind Farm Variation of Consent (2018) 4038P0242. NKDC Application Reference 18/1384/S36.

1. We are instructed by a community group of residents ("Heck Off") to write in response to the application by Ecotricity for a variation of Condition 4 of the s.36 Consent and Condition 8(2) of the deemed planning permission under s.90 of the TCPA.

Background

2. On 8 February 2013, consent was granted under s.36 of Electricity Act for Construction and Operation of a Wind Turbine Generating Station at Six Hundred Farm, East Heckington.

3. The Consent was granted subject to a number of conditions:

Condition 4.

The Development shall be commenced before the expiration of five years from the date of this consent, or such longer period as the Secretary of State may hereafter direct in writing.

Condition 5.

No development shall commence unless and until a Radar Mitigation Scheme has been submitted to and approved in writing by the Secretary of State, having consulted with the Ministry of Defence and NATS (En Route) plc, to address the impact of the wind farm upon air safety.

Condition 8.

The Secretary of State in exercise of the powers conferred upon him by section 90(2) of the Town and Country Planning Act 1990 hereby directs that planning permission for the Development be deemed to be granted subject to the following conditions:

(2) The Development hereby permitted shall be commenced before the expiration of five years from the date of this permission.

Reason: To strike a balance between the time it may take to put in place the necessary pre-construction measures required – for example, tendering, obtaining the necessary funding, micrositing of the turbines – and minimising the impact of any period of uncertainty for those who may be affected pending the decision to begin construction works.

Applications for variations

4. On 6 February 2015 Ecotricity submitted their first Variation of Consent Application:

   - To amend condition 5 from "No development" to "No construction of a wind turbine ....."
   - To increase the size of the turbine blades.

5. This application was published and consulted on but there has been no decision yet.

6. On 2 February 2018 Ecotricity submitted their second Variation of Consent Application:

   - To amend the wording of Condition 4 of the s.36 Consent to extend the date before which the development shall be commenced from 5 years to 10 years;
   - To amend the wording of Condition 8(2) of the deemed planning permission under s.90 of the TCPA to extend the date before which the development shall be commenced from 5 years to 10 years.

Submission 1

7. **The power to vary a licence under s.36A of the 1989 Act does not include the power to extend time within which a development must be started.**

8. The application in question is under s.36A of the 1989 Electricity Act but also requires consideration of s.90 TCPA 1990. This is because the granting of the licence under s.36 requires the deemed planning permission under s.90 TCPA 1990. Similarly, the variation of a licence requires the amendment of the conditions relating to the deemed planning permission.

9. Section 90 TCPA 1990 applies where an application is made to vary a consent under s.36 of the Electricity Act 1989.

(2ZA) On varying a consent under section 36 or 37 of the Electricity Act 1989 in relation to a generating station or electric line in England or Wales, the Secretary of State may give one or more of the following directions (instead of, or as well as, a direction under subsection (2))—

a) a direction for an existing planning permission deemed to be granted by virtue of a direction under subsection (2) (whenever made) to be varied as specified in the direction;

b) a direction for any conditions subject to which any such existing planning permission was deemed to be granted to be varied as specified in the direction;

c) a direction for any consent, agreement or approval given in respect of a condition subject to which any such existing planning permission was deemed to be granted to be treated as given in respect of a condition subject to which a new or varied planning permission is deemed to be granted.

10. As noted, the second Variation of Consent Application includes an application:

To amend the wording of Condition 8(2) of the deemed planning permission under s.90 of the TCPA to extend the date before which the development shall be commenced from 5 years to 10 years.

11. Although the application is made under s.36 of the Electricity Act, it is nonetheless an application to amend the conditions that relate to the deemed planning permission under s.90 TCPA.

12. Section 73 TCPA 1990 applies where an application is made[1] to develop land without compliance with conditions:

(1) This section applies, subject to subsection (4), to applications for planning permission for the development of land without complying with conditions subject to which a previous planning permission was granted.

...

(5) Planning permission must not be granted under this section to the extent that it has effect to change a condition subject to which a previous planning permission was granted by extending the time within which—

b) a development must be started

13. Whilst there is nothing explicitly stated in s.36A Electricity Act about variations which relate to extensions of time, the part of the application which seeks a variation of the conditions to the deemed planning permission under s.90 TCPA 1990 is subject to s.73 TCPA 1990.

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[1] Although this section (at s.73(2) to "the local planning authority" it can be called in by the Secretary of State under s.77(4). It can therefore also apply to decisions made by the Secretary of State.

14. Since s.73(5) TCPA 1990 does not allow for extensions of the time within which a development must be started, it follows that the application to amend the wording of Condition 8(2) of the deemed planning permission must fail.

15. In this context, we note the following passage from paragraph 17 of the guidance note issued by the Department of Energy and Climate Change – "*Varying consents granted under section 36 of the Electricity Act 1989 for generating stations in England and Wales*" July 2013.

> *17. The aim of the variation process is to reduce the time that might otherwise be taken to authorise the development which is not consistent with an existing section 36 consent. It is not intended to relax the standards to which a consent must conform.*

Submission 2

16. Extensions of time of this sort are not contemplated by reference to the corresponding regulations.

17. This submission (that the regulations and guidance do not contemplate extensions of time) is related to the first submission (that extensions of time are not permitted) and supports the analysis above.

18. An application for variation under s.36A of the Electricity Act requires compliance with the Electricity Generating Stations (Variation of Consents) (England and Wales) Regulations 2013. These provide an indication of the type of application contemplated:

> *4. (8) For the purposes of this regulation, a variation application is suitable for publication in accordance with regulation 5 if it appears to the appropriate authority that—*
>
> *a) the applicant wishes to construct, operate or extend a generating station in a way which the relevant section 36 consent does not authorise it to do;*
>
> *b) the proposed development does not differ from the generating station to which the relevant section 36 consent refers to such an extent (in its construction, extension, operation or likely environmental effects) that it requires authorisation by—*
>
> *(i) an order granting development consent within the meaning of section 31 of the Planning Act 2008….*

19. It is clear that the variations that are contemplated are those that relate to construction, extension and operation.

20. This point is reinforced by reference to the guidance note issued by the Department of Energy and Climate Change – "*Varying consents granted under section 36 of the Electricity Act 1989 for generating stations in England and Wales*" July 2013. We have underlined key sentences.

> *Varying a section 36 consent: the problem*

12. Generating station development consents are often not implemented until some years after they are granted. Each consent reflects technology and industry practice at the time it was applied for, but such practices do not stand still, even in relatively mature sectors. This means that when a developer comes to construct a generating station, it will sometimes be uneconomic or have more detrimental effects on the environment to do so according to all of the details specified in the consent. In practice, this means changes to the original proposals to make the project feasible. The changes concerned may not be very great, but they may nevertheless involve work which would not be consistent with the terms of the existing consent, for example installing more efficient technology generating more power without radically changing the physical dimensions of the buildings and/or structures.

13. .....a way of authorising minor changes to a proposal which has already been given consent.

22. The variation process is designed to apply to projects that have been consented under section 36, where the operator wishes to carry out development that is inconsistent with the existing section 36 consent. As noted above, the legislative change brought about in relation to section 36 consents by the 2013 Act were primarily aimed at projects which had been consented but not constructed. However, it should be noted that there are two broad categories of case in which it is likely that the Secretary of State or the MMO may consider it appropriate to exercise the power in section 36C – namely, to enable:

a) The construction or extension of a generating station (whose construction or extension has either not yet commenced or has not yet been completed) along different lines from those set out in the existing consent;

b) the operation of a generating station (whether or not it is already operational) in a way that is different from that specified in the existing consent (this may sometimes involve making limited physical alterations to a generating station, but should not involve work that could be characterised as an "extension" of an existing generating station which has been granted section 36 consent).

21. The variation does not fit within either a) or b). It is not "construction or extension of a generating station along different lines" or "the operation of a generating station in a way that is different from that specified in the existing consent".

22. The document continues (with emphasis added):

26 ... it is very hard to lay down any meaningful general statements of principle, because of the variety of consented generating station projects and the range of circumstances in which applications to vary them may be made. The appropriateness or otherwise of granting a variation therefore has to be considered by reference to what has been consented already and the changes that are contemplated in each case where a variation is proposed. However, without prejudice to such case-by-case consideration of individual applications, we would expect to

start from the following broad assumptions as regards what it is and is not appropriate to authorise under the section 36C variation procedure.

- *Changes in the plant's main fuel or other power source are unlikely to be considered suitable subject-matter for a variation. In the case of an existing generating station, this could involve constructing again substantial parts of the plant (see below). In the case of a plant that has been consented but not yet constructed, such changes could well result in the modified plant having fundamentally different environmental impacts from those that would have been likely to arise from the originally consented design.*

- *Some less significant changes to the particular type and/or operation of technology used may, however, be suitable for consideration under the variation procedure (for example different boiler or turbine designs, or operating a combined cycle gas turbine (CCGT) generating station in open-cycle (OCGT) mode). However, as regards existing generating stations, it should be noted that since section 36 consent to construct a generating station is granted on a "one-off" basis, to construct a particular project, it does not entitle the holder of the consent to construct a series of new generating stations on the same site over a period of time.*

- *Changes in the design of generating stations which have been consented but not constructed which would allow them to generate an amount of power that would be inconsistent with the original consent are likely to be appropriate subject matter for a variation application, provided there are no major changes in the environmental impact of the plant. Similar changes to an existing plant could be appropriate subject matter for a variation application only if they did not involve physical extension of the generating station, relocation of generating plant, or the installation of new equipment that would amount to the construction of a new generating station.*

- *It should generally be possible to consider authorising changes which only affect the operation of an existing station (and do not involve construction of a new generating station or extension of an existing one) under the section 36 consent variation procedure.*

23. In summary, the guidance repeatedly provides examples which correspond to changes in design, technology and operation which are consistent with the original application. There is no suggestion that extensions of time for commencing the construction/development should be covered by this procedure.

Submission 3

24. **Blight – generally speaking, the reason why grants of planning permission include time limits for commencing development/complying with conditions is to minimise the impact of any period of uncertainty for those who may be affected by the grant of permission.**

25. This submission sets out the reasoning why extensions of time are not permitted.

26. It is noted that the avoidance of uncertainty for those who may be affected is specifically stated in relation to Condition 8:

Condition 8.

The Secretary of State in exercise of the powers conferred upon him by section 90(2) of the Town and Country Planning Act 1990 hereby directs that planning permission for the Development be deemed to be granted subject to the following conditions:

(2) The Development hereby permitted shall be commenced before the expiration of five years from the date of this permission.

Reason: To strike a balance between the time it may take to put in place the necessary pre-construction measures required – for example, tendering, obtaining the necessary funding, micrositing of the turbines – and minimising the impact of any period of uncertainty for those who may be affected pending the decision to begin construction works.

27. In this context we also refer to paragraph 296 of the Inspector's Report:

"The presence of 22 wind turbines would affect both military and civilian radar by 'painting' on the radar returns and causing the potential for confusion and reduction in safety. However, the Applicant has been in negotiation with the respective safety bodies and has reached agreement on suitable mitigation for radar. This has been confirmed in writing by the bodies concerned. I am therefore satisfied that these matters do not form an impediment to the grant of consent.

297. Whilst I note that some residents are concerned that the 'in principle' agreements appear to give a long period for the matter to be resolved, this period reflects the usual time available for starting a project of this nature. There would be no extension of the time set aside for resolving this matter."

28. In summary, it was clear that the 5 year condition was carefully considered at the time and that it was felt that the 5 year period was a reasonable time limit balancing the competing demands.

Submission 4

29. **The Radar Mitigation Scheme – the reason that Ecotricity require additional time for the now expired consent is that it has failed to resolve the ongoing difficulties caused by the potential interference by the wind turbines with Ministry of Defence bases. This is not an application for a variation of the type contemplated by the regulations and guidance but has been made because the applicant has failed to resolve a separate issue. The application is misguided.**

30. Condition 5 states:

No development shall commence unless and until a Radar Mitigation Scheme has been submitted to and approved in writing by the Secretary of State, having consulted with the Ministry of Defence and NATS (En Route) plc, to address the impact of the wind farm upon air safety.

31. It is said in the application that additional time is necessary because:

3.3 The implementation of the original consent is conditional (Condition 5) on a Radar Mitigation Scheme (RMS) being agreed with the Ministry of Defence (MOD). To date, despite best endeavours, the Applicant has not yet been able to agree an RMS with the MOD and therefore has been unable to commence the development. However, progress is being made with a view to agreeing an ongoing mitigation strategy which is aiming to deliver a solution within a 3-5 year timeframe.

A decision on the 2015 Variation of Consent Application, submitted 6th February 2015, has not been forthcoming. The 2015 Variation of Consent Application proposed that the wording on Condition 5 was amended to allow for an RMS to be agreed prior to the installation of the turbines, as opposed to prior to commencement of the development, thereby allowing development to commence while discussions continued with the MOD. As a decision has not yet been made on the 2015 Variation of Consent Application, the Applicant is currently unable to commence development within the specified timescales set out under Condition 4 of the s.36 Consent.

32. A general assertion has been made in the application that:

"progress is being made with a view to agreeing an ongoing mitigation strategy which is aiming to deliver a solution within a 3-5 year timeframe."

33. The radar issue was first bought into focus in 2002 when the then Parliamentary Under Secretary of State for Defence and Minister for Veterans stated in the Wind Energy and Aviation Interests Interim Guidelines that the MOD fully supported, and made every effort to assist in achieving, the Government's renewable energy targets. However, he also stated that the MOD had concerns about the effects of wind turbines on a number of MOD activities including radar and low flying and that whilst efforts must continue to ensure flight safety and optimum radar coverage throughout the United Kingdom, the MoD awaited the results of a number of studies into these problems. 16 years on and these difficulties have not been resolved yet.

34. Ecotricity are now seeking an extension for another 5 years, i.e., to at least 21 years after the problem first arose.

35. Ecotricity was aware of the radar problem when the application was originally made for development at this site. It took a commercial risk in proceeding while the issue remained unresolved.

36. When seen in this context, the misconceived nature of the Variation of Consent Application is clear.

Submission 5

37. **The Noise Assessment Issue – although distinct from the primary submissions which all relate to whether an application for a variation is intended to relate to applications for extensions of time, we have been asked to point out the application relies upon noise assessments which are contested.**

38. The second Variation of Consent Application relies upon the Noise Assessment performed in 2011.

Noise (Appendix 5)

5.26 A review of the 2011 Environmental Statement (and 2015 where relevant) has been undertaken as against the current baseline, policy and in consideration of the proposed variation.

5.27 ETSU-R-97 remains the relevant methodology, as recommended in national planning policy. The 2015 ES reviewed the 2011 assessment in light of the IOA Good Practice Guidance and concluded it was consistent with that guidance.

5.28 In terms of the baseline, although a number of new dwellings have been identified, the assessment locations previously considered remain representative of the properties in the area neighbouring the Development. There has also been no significant change to the road and general infrastructure in the vicinity of the development such that there would be a significant change to the noise environment.

5.29 Given traffic levels on the roads neighbouring the development are likely to have increased since 2011, the previous measurements are likely to represent a conservative representation of the noise environment at these locations.

5.30 As the baseline remains representative of the area, the assessment of impacts remains as in 2011.

39. No mention is made in this application to the criticisms made of the original noise assessment that was submitted by Dr Yelland in response to the first Variation of Consent Application in 2015.

40. Dr Yelland concluded that the wind farm design is not compliant with ETSU or the IOAGPG and if constructed the wind farm would have produced noise well in excess of government limits. He was particularly critical of the six background noise surveys used by the applicant which in his view do not adequately represent the background noise levels in the area. Dr Yelland states that Heckington Fen is a very quiet rural location except for properties close to the A17 and this does not fit comfortably with the background noise levels reported by the applicant.

41. During the consultation in response to that application, North Kesteven DC, Lincolnshire County Council, all of the local Parish Councils and both local MPs called on DBEIS to commission a new Wind Turbine Noise Impact Assessment as a result of Dr Yelland's report.

42. Although the first Variation of Consent Application has not been determined yet, we have been asked to make it clear that the criticisms raised by Dr Yelland at that time apply equally to the noise assessment relied upon in this application. Dr Yelland is preparing a detailed response to this latest application.

43. In summary, it is our submission that this variation application is refused

44. We would be grateful if you would acknowledge safe receipt of this letter.

Yours faithfully

Richard Buxton Solicitors
Environmental Planning and Public Law