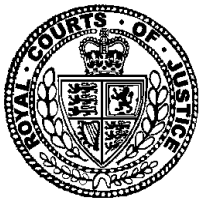

Neutral Citation Number: [2012] EWHC 861 (Admin)

IN THE HIGH COURT OF JUSTICE **CLAIM NO: CO/10414/2011**
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT sitting at Manchester
His Honour Judge Waksman QC sitting as a Judge of the High Court
IN THE MATTER OF AN APPLICATION UNDER S. 288 OF THE TOWN AND COUNTRY PLANNING ACT 1990

Date: 4 April 2012

BETWEEN:

DUDGEON OFFSHORE WIND LIMITED

Claimant

and

(1) SECRETARY OF STATE FOR COMMUNITIES & LOCAL GOVERNMENT
(2) SECRETARY OF STATE FOR ENERGY & CLIMATE CHANGE
(3) BRECKLAND DISTRICT COUNCIL
(4) NORFOLK FARM PRODUCE LIMITED

Defendants

Richard Kimblin (instructed by Cobbetts LLP, Solicitors) for the Claimant

James Maurici (instructed by the Treasury Solicitor) for the Defendant

Hearing Date: 23 March 2012

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

INTRODUCTION

1. This is an application made by the Claimant, Dudgeon Offshore Wind Limited ("Dudgeon") pursuant to s288 of the Town and Country Planning Act 1990 ("the 1990 Act") to challenge the joint decision of the First and Second Defendants ("the Secretaries of State") made in a decision letter dated 20 September 2011 ("the DL"). By the DL the Secretaries of State adopted the recommendation made by the Inspector in his report dated 7 July 2011 ("the IR") to dismiss Dudgeon's appeal against the refusal by the Third Defendant local planning authority, Breckland Council ("the Council") to grant it planning permission to build an electricity substation in a field near the village of Little Dunham in Norfolk. Dudgeon need to build a substation as part of the infrastructure required to bring onshore and to connect to the National Grid the electricity to be supplied from an offshore wind farm to be constructed by Dudgeon off the Norfolk coast. The application for permission to build the wind farm itself is currently with the Secretary of State for Energy and Climate Change. Breckland Council has already granted permission to Dudgeon to run an underground cable from the boundary with North Norfolk District Council to the intended substation site. Permission for the underground cable in the North Norfolk District Council area remains the subject of an appeal.

2. The IR followed a hearing conducted by the Inspector on 7 and 8 June 2011, pursuant to paragraph 11 of the Town and Country Planning (Hearings Procedure) (England) Rules 2000 ("the Rules"), as opposed to an inquiry. However nothing turns on this for present purposes.

THE CHALLENGE

3. The essential challenges to the DL are as follows:

   (1) The hearing conducted by the Inspector was procedurally unfair because his recommendation (followed by the Secretaries of State) took into account the possibility that another site for the substation was available when he had told the parties at the outset of the hearing that the question of alternative sites was not in issue before him (Ground 1 - "the Alternative Sites Issue");

   (2) Both in the DL and the IR there was a failure to mention two policies which formed part of the Development Plan, a failure to articulate what the Development Plan was and a failure to apply s38 (6) of the Planning and Compulsory Purchase Act 2004 ("the 2004 Act") in relation to it (Grounds 2-5 - "the Development Plan Issue").

4. Given that the Secretaries of State recovered the Inspector's report and in the key respects followed it, the challenges require an analysis of both the IR and the DL.

BACKGROUND

5. The location of the proposed wind farm can be seen on the plan at p56 of the bundle. Once operational it would have a capacity representing 3% of the UK 2020 target for energy supply from renewable energy, sufficient to supply the electricity needs of 400,000 households.

6. The application for permission for the substation was made on 18 December 2009. The proposed development was an EIA development and so the application was accompanied by a very detailed Environmental Statement ("the ES"). As required by the 1999 EIA Regulations,

part of the ES dealt with the alternatives, including alternative locations, to the development for which permission was being sought. That section, consisting of some 51 pages, is at divider 3 of the bundle. It shows that a total of 112 possible site locations were considered with groups of such locations being progressively screened out to leave a final shortlist of five sites of which the instant site was one. The final analysis at pages 76 and 77 of the bundle revealed this site as being the preferred location "following detailed consideration of all the environmental and planning constraints".

7. At no stage was the adequacy of this (or any other) part of the ES challenged and it was accepted as adequate in paragraph 4 of each of the IR and DL.

8. Although the Council's planning officer recommended the grant of permission, it was refused on 4 November 2010.

RELEVANT POLICIES

East of England Plan

ENG 2

9. The revised Regional Spatial Strategy for the region, known as the East of England Plan, dated May 2008, contained Policy ENG 2, "Renewable Energy Targets". It states that the development for new facilities for renewable power generation should be supported so that by 2010 10% and by 2020 17% of the region's energy should come from renewable sources. Details of the targets and the relevant studies are then given. The relevant renewable energy includes wind power. The targets equated to at least 1192 MW by 2010 and 4250 by 2020.

The Buckland Core Strategy and Development Control Policies Development Plan Document ("the Core Strategy")

10. This includes, among other things Core Strategy Policies (CP) and Development Control Policies (DC). The latter are said to build on the framework set out in the Spatial Strategy and Core Strategy Policies and provide detailed guidance to be used in the determination of planning applications.

Policy CP 11

11. Headed "Protection and Enhancement of the Landscape" this provides that:

> "The landscape of the District will be protected for the sake of its own intrinsic beauty and its benefit to the rural character and in the interests of biodiversity, geodiversity and historic conservation. Development should have particular regard to maintaining the aesthetic and biodiversity qualities of natural and man-made features within the landscape, including a consideration of individual or groups of natural features such as trees, hedges and woodland or rivers, streams or other topographical features……
>
> High protection will be given to the Brecks landscape, reflecting it's role as a regionally significant green infrastructure asset. Proposals within the Brecks Landscape Character Areas will not be permitted where these would result in harm to key visual features of the landscape type, other valued components of the landscape, or where proposals would result in a change in the landscape character."

Policy CP 12

12. Headed "Energy", this provides that:

> "The Local Authority encourages and will support the provision of renewable and low-carbon technologies, secured through new residential, commercial or industrial development….
>
> Commercial scale renewable energy generation developments will be supported throughout the District. Large scale developments of this type will be subject to a comprehensive environmental assessment which will be based on the individual and unique circumstances of the case. When considering such assessments, regard will be given to the wider environmental benefits of providing energy from renewable sources as well as effects on amenities and the local environment…
>
> **Reasoned justification**
>
> 3.87 The purpose of the policy is to promote the use of renewable energy and to set out the strategic mechanisms through which an increase in the use of renewable energy will be achieved…
>
> 3.90 Schemes for decentralised renewable or low carbon commercial energy generation development will need to have particular regard to the impacts upon the visual amenities of the area or the residential amenity of neighbouring residents, this will include the consideration of all of the necessary supporting equipment or infrastructure. The Development Control Policies Development Plan Document will set out local criteria for the consideration of commercial scale renewable energy generation developments."

13. Paragraph 3.91 refers to the 10% target in the East of England Plan which will be applied by the Council.

Policy DC 10

14. Headed "**Renewable Energy**" this states that:

> "Proposals for renewable energy development, will be supported in principle. Permission will be granted for these developments unless it, or any related infrastructure such as power lines or access roads etc, has a significant detrimental impact or a cumulative detrimental impact upon:
> a. Sites of international, national or local nature and heritage conservation importance;
> b. The surrounding landscape and townscape;
> c. Local amenity as a result of noise, fumes, electronic interference or outlook through unacceptable visual intrusion;…
>
> Where development is permitted, mitigation measures will be required as appropriate to minimise any environmental impacts, such measures will be secured via condition or legal agreement. All development proposals for a renewable energy generation scheme should, as far as is practicable, provide for the site to be reinstated to its former condition should the development cease to be operational."

15. Under "**Reasoned Justification**" at 4.83 reference is made to the East of England targets. Then paragraph 4.84 states that:

> "The Council will support commercial scale renewable energy developments unless the environmental impacts of allowing the proposal would outweigh the wider social, economic and environmental benefits derived from it, the criteria for which is set out in the policy. Due to the likelihood of renewable energy technology changing rapidly over time the policy sets out provisions should the use cease to be operational."

16. Paragraph 4.86 refers to mitigation measures and paragraph 4.87 refers to further detailed guidance in national policy PPS22.

National Policy

17. PPS 22 "Renewable Energy" states that the wider environmental and economic benefits of proposals for renewable energy projects, whatever their scale, are material considerations that should be given significant weight in determining whether proposals should be granted planning permission.

THE HEARING BEFORE THE INSPECTOR

18. According to the witness statement of Mr John Stubbs, Dudgeon's company secretary, during the first morning of the hearing, after the Inspector said that the main issues were landscape noise and traffic impact, one of the objectors raised the possibility of other sites also being an issue. The Inspector replied that the Secretary of State would make a decision based on the appeal site. There might or might not be superior sites but that was not to be taken into account. Later another objector sought to raise the issue of better alternative sites and again the Inspector dismissed this as not to be taken into account. The recollection of Mr Paul Vertigen, Dudgeon's Consultant Project Engineer, was similar: an objector raised the availability of other sites but the Inspector said that the Secretary of State would decide on this site and if the application failed, Dudgeon might look elsewhere. On the second day the Inspector had referred to 5 sites being identified and summarised in the ES with Breckland Council having an impact on scoping when an objector interjected to say that the site selection process had been flawed. The Inspector said that this site would be assessed on its merits and if not acceptable, Dudgeon would have to look to alternative sites and the hearing could not extend into considering other sites and options. Finally, Mr Brett, Dudgeon's Planning Consultant, recalled also that on the first morning the Inspector said that the Secretary of State would make a decision on this site and alternatives were not to be taken into account. On the second day an objector queried the areas looked at and suggested that the substation could be sited anywhere between King's Lynn and Norwich. The Inspector said that the substation's location had been scoped with the National Grid and this confirmed the preference for the southern circuit. Mr Patterson of Dudgeon then confirmed that considerations of reliability, capability costs and construction had been properly scoped. The recollections of all these witnesses were confirmed by notes they took at the time.

19. The Inspector has said in a recent witness statement dated 1 March 2012 at paragraph 4 that he agrees that these accounts of events and of what he said were broadly accurate. I shall return below to other parts of his statement.

20. Mr Brett was permitted to make a closing address at the end of the hearing on behalf of Dudgeon. He made no reference to any question of alternative sites but did make reference to policies PPS22, ENG 2, CP11, CP12 and DC15. He said that the latter required permission to be refused only where there is a significant detrimental impact on, inter alia, the surrounding landscape, local amenities and highway safety. There would therefore need to be compelling reasons to reject the proposals on such grounds.

THE INSPECTOR'S REPORT

21. Under the heading "Planning Policy" the Inspector noted at paragraph 7 that the Core Strategy was the Council's Development Plan document and that the refusal notice referred to DC15 and CP11. At paragraph 8 he noted that the Regional Spatial Strategy was the East of England Plan and that none of its policies were referred to in the Council's decision notice.

22. In paragraphs 5 and 6 the Inspector described the existing site being a field of 16.9 ha, with Little Dunham to the north, which includes a conservation area and within that area three listed buildings. The nearest residential buildings were on Necton Road to the east of the site.

23. Paragraph 10 described the proposed substation which included an array of switchgear up to 12m high, with cable gantries up to 15m running along the axis of the existing 400kv transmission line above, and 4 DC converter buildings each 70m long, 25m wide and 15m high.

24. In paragraphs 11 – 17 he summarised the various parties' cases. In paragraph 13, in noting the Council's case he recited its acknowledgment that planning polices gave substantial support for renewable energy projects but that

> "this general support is tempered by a need to consider carefully the environmental effects of specific proposals. Here the harm that would be caused to the local environment would outweigh the general policy support for renewable energy projects."

25. In paragraph 15 he noted the Little Dunham Parish Council's submission that the proposed industrial development would be wholly inappropriate so close to the village, harming the immediate and wider landscape. The noise emitted would also ruin the enjoyment of the quiet rural village. There were traffic and safety concerns as well. In paragraph 16 he noted further concerns about the need for the project and the transparency of the site selection process.

26. In paragraph 20 the Inspector stated the main considerations as follows:

(a) whether the visual consequences of the proposed development, including mitigation measures, would be consistent with maintaining the aesthetic qualities of the surrounding rural landscape, taking into account the contribution the facility would make towards the utilisation of renewable energy;

(b) whether noise associated with operation of the proposed substation would be compatible with preserving reasonable living conditions for nearby residential occupiers and also the wider effects of noise on the locality;

(c) whether the impact of additional traffic in the locality would be acceptable in terms of safety, convenience and highway wear and tear.

(d) Whether there are other matters of concern to local residents that tell significantly against the proposals.

27. He considered the landscape question in detail in paragraphs 21-31 concluding that there would be a significant adverse and permanent effect. He then concluded as follows on this issue:

> "31. The need to protect and enhance the landscape is fully explained at Core Strategy policy CP 11. While efforts have been made to offset the effects of the proposed development by way of landscape design, the consequences of this development would represent a failure to protect or enhance the landscape at a location where it is particularly vulnerable. This arises in view of the close association with Little Dunham and the rôle this area of landscape plays in providing an appropriate and traditional rural setting for this rural village.
>
> 32. Core Strategy policy DC 15 expresses support, in principle, for renewable energy development. However, this is with the proviso that any significant detrimental impact upon the surrounding landscape and townscape are avoided. Here such impact cannot be said to be either avoided or adequately mitigated. Accordingly, the scheme cannot be said to conform with this policy.
>
> 33. I recognise that a substation such as this is required and is vital to the utilisation and distribution of off-shore wind energy. This places a strong imperative on the developer to find a suitable location for this necessary infrastructure. However, the limitations associated with this site strongly indicate that it is unsuitable in view of the effects it would have on Little Dunham and its surrounding landscape. I understand that the developer has undertaken assessment of other possible sites which he has rejected for various reasons (including economic, environmental and practical considerations) [12]. However, thus

far, this is the only site that has become subject to public scrutiny at any appeal proceedings. In terms of landscape impact, this scrutiny of the scheme indicates that planning permission should be withheld at this particular location."

28. In paragraphs 34-39 he considered the question of noise and concluded that there would also be a negative effect on the amenity of the area due to the character of the noise produced. In paragraphs 40-43 he rejected other stated concerns, including those relating to traffic.

29. He then gave his overall conclusions as follows:

> "44. It is clear that an onshore substation is required in order to facilitate the connection of a substantial source of offshore generated electricity into the National Grid. Also, the site at Little Dunham satisfies the technical requirements necessary to enable this connection to be made. Other sites have been examined and rejected for various reasons, although the process of site-selection has not been the subject of public scrutiny. No other sites have been the subject of a planning application or any appeal proceedings.
>
> 45. Examination of the proposals for the Little Dunham site reveals that it would have significant environmental consequences arising from its location close to Little Dunham village along with the nature of the landscape around Little Dunham. While this site offers significant opportunities to incorporate mitigation measures…, these would not overcome the difficulties encountered in attempting to locate this large infrastructure project into a rural landscape close to an established rural community.
>
> 46. The consequences of allowing this proposal to go ahead would be significant and harmful to the intrinsic beauty of the landscape and its rural character… severely compounded by its proximity to Little Dunham village as important aspects of its character such as its rural ambience and setting would be degraded by the presence of the substation…The perception of harm would be greatly increased by the close proximity of the site to the village of Little Dunham, within which a strong sense of community has been demonstrated.
>
> 47. The shortcomings associated with the scheme demonstrate that it would not accord with adopted Core Strategy policy CP 11. This suggests that planning permission should be refused. While Core Strategy policy DC 15 supports renewable energy projects in principle, this is balanced by a need to consider detrimental impacts and mitigation measures. Here, there is good reason to consider that the balance lies against the granting of planning permission in view of the impact on the landscape and the limitations of site specific landscape measures in offsetting harm.
>
> 48. PPS 22 indicates that the wider environmental and economic benefits of all proposals for renewable energy projects, whatever their scale, are material considerations that should be given significant weight in determining whether proposals should be granted planning permission. I have already set out the wider benefits of this proposal and its importance in facilitating the use of an important and substantial source of renewable energy.
>
> 49. In the light of PPS 22 it is reasonable to accept that policies lend a significant amount of support for this project. However, there would be substantial environmental consequences and these indicate that planning permission should be withheld. Subject to further assessment, there may be alternative sites, although at present it cannot be determined that any would necessarily offer more attractive solutions in planning terms. Nevertheless, in current circumstances the possibility of locating an acceptable site elsewhere tells against acceptance of the environmental consequences that would be associated with this particular development at Little Dunham."

30. Accordingly he recommended dismissal of Dudgeon's appeal.

THE DECISION LETTER OF THE SECRETARIES OF STATE

31. Under the heading **Policy Considerations** the DL stated, among other things as follows:

> "8. In deciding the application, the Secretaries of State have had regard to section 38(6) of the Planning and Compulsory Purchase Act 2004 which requires that proposals be determined in accordance with the development plan unless material considerations indicate otherwise.
>
> 9. In this case, the development plan comprises the East of England Plan…and the Breckland Core Strategy and Development Control Policies.. document adopted in 2009 (the Core Strategy). The Secretaries of State consider that the development plan policies most relevant to the appeal are Core Strategy policies DC1, DC15 and CP11…
>
> 11. Other material considerations which the Secretaries of State have taken into account include: …. PPS22: *Renewable Energy* and its Companion Guide: *Planning for Renewable Energy*;…"

32. Paragraphs 14 – 24 of the DL set out what are described as the "**Main Issues**". At paragraph 14 itself, under "National planning policy for renewable energy" the Secretaries of State take into account the national policy in PPS 22 in the same terms as the Inspector did in paragraph 48 of the IR. They also recognised, as the Inspector did in his paragraph 33, the requirement for a substation such as this and that it was vital for the utilisation and distribution of off-shore wind energy. They continue:

> "The Secretaries of State have taken full account of the wider environmental and economic benefits of this proposal, and its importance in facilitating the use of an important and substantial source of renewable energy. They accord these benefits significant weight."

33. At paragraphs 15 -17, the Secretaries of State considered "Landscape", and agreed with the Inspector that the development would have an industrial character with a significant influence and scale and would result in a significant change to the perception of the village and damage its ambience and the intrinsic beauty of the landscape. They concluded, like the Inspector, that:

> "the proposals would not accord with Core Strategy policy CP11 (IR47) and cannot be said to conform to Core Strategy policy DC15 (IR32). They share the Inspector's view that the landscape impact of the scheme in this respect indicates that planning permission should be withheld at this particular location (IR33)."

34. In paragraphs 18-20 the Secretaries of State differed from the Inspector (see his paragraph 38) in concluding that there were no significant unacceptable noise consequences. In paragraph 21 they agreed with him about traffic and safety concerns not being an obstacle.

35. Then, under "Alternative sites" they state at paragraph 22:

> "The Secretaries of State have had regard to the Inspector's comments at IR33 and IR49 regarding the appellant's assessment of alternative sites. Notwithstanding their conclusion regarding the Environment Statement at paragraph 4 of this letter, they agree with the Inspector (IR49) that there is a possibility of locating an acceptable site elsewhere, and that this tells against acceptance of the environmental consequences, in particular the visual impact on the landscape adjacent to Little Dunham, that would be associated with this particular location for the proposed development."

36. The "Overall Conclusions" in the DL were stated as follows:

> "25. The Secretaries of State have had regard to the Inspector's overall conclusions at IR44-49. They consider that a substation is required and is vital to the utilisation and distribution of off-shore wind energy. In accordance with national policy set out in PPS22, the Secretaries of State have attached significant weight to the wider environmental and economic benefits of the proposals. However, they conclude that there would be visual impacts on the landscape adjacent to Little Dunham that would result in a significant change in the perception of the village which would be damaging to its hitherto rural ambience along with the intrinsic beauty of the landscape. In this respect they

conclude that there is conflict with Core Strategy policies CP 11 and DC 15. The Secretaries of State are satisfied that the harm from the visual impact on the landscape is such that planning permission should be withheld at this particular location. Furthermore, they consider that the possibility of locating an acceptable site elsewhere – as to which, as the Inspector indicated, there is scope for further assessment - also tells against the acceptance of the environmental consequences that would be associated with this particular development at Little Dunham.

26. Having weighed up all the relevant considerations, the Secretaries of State conclude that the factors which weigh in favour of the proposed development do not overcome the conflicts with the development plan which they have identified. They do not consider that there are any material considerations of sufficient weight to justify granting planning permission."

37. Accordingly, in paragraph 27, the Secretaries of State agreed with the Inspector's recommendation for the reasons given, dismissed the appeal and refused permission.

GROUND 1 – THE ALTERNATIVE SITES ISSUE

The Challenge

38. At root, Dudgeon's point here is a simple one. On any fair reading of paragraph 49 of the IR (quoted in paragraph 29 above) the Inspector has taken into account, as a factor weighing against the grant of permission, the possibility that there is another available site elsewhere for this substation. The expression "tells against" makes that clear. This had been preceded by earlier references to the same point in paragraphs 33 and 44 (quoted in paragraphs 27 and 29 above). Dudgeon does not contend that it would not have been open to the Inspector to consider the question of alternative sites but rather that if he wished to do so, the parties, and in particular Dudgeon, had to have a proper opportunity to address that issue. This it did not have because the Inspector had ruled out any such consideration at the outset. It was therefore unfair for the Inspector to have brought it in as part of his considerations. The unfairness was perpetuated, and not removed, by the DL because the Secretaries of State conclude to the same effect in paragraphs 22 and 25 of the DL (quoted in paragraphs 35 and 36 above) having already labelled "Alternative Sites" as one of the "Main Issues". It is worth adding that the Secretaries of State would not have been alive to any potential unfairness since they did not know what transpired at the beginning of the hearing before the Inspector.

Analysis

39. At face value it is impossible to disregard the references to alternative sites as being of no significance. Apart from how they appear, there are potential difficulties with the Inspector's reasoning, on which one could expect submissions to be made. First, there is a question as to the weight to be given to what may be no more than a theoretical possibility of a site available elsewhere. Second, there was in fact a considerable body of material in the ES which suggested that none of the other 112 sites considered would be as suitable as this one for the reasons given. It is true that such information as to alternatives had to be given as part of the required content of the ES in any event but this does not negate its potential value if alternative sites were to be considered by the Inspector. Third, the references to the fact that none of the other sites had been subject to "public scrutiny" would seem to require further discussion. The meaning of such references is not entirely clear but appears to suggest that while Dudgeon may have rejected the other sites, including on planning and environmental grounds, one could not say that a local planning authority or Inspector would necessarily refuse planning permission - because no application had yet been made in respect of them. If that meant that Dudgeon should somehow have already put in multiple applications to make their point good, one can reasonably see that it might want to make submissions against such a point.

40. Mr Maurici for the Secretaries of State submitted that any point which Dudgeon wished to make about alternative sites would be attenuated now anyway, given that the effect of the Inspector's conclusions as to the environmental impact of this application means that Dudgeon must have got its environmental impact "ranking" wrong in respect of the other sites. But first, this does not follow – the other sites may still be worse from this point of view. And second, if the point has any relevance at all, it is within a proper discussion of the alternative sites – it is not a ground for saying there was no unfairness.

41. I accept that the question of alternative sites was not listed as a main consideration by the Inspector in his paragraph 20 – but it was so listed by the Secretaries of State and in any event this point is not determinative given the language of the Inspector's paragraph 49.

42. The Secretaries of State then make a substantial submission to the effect that in truth the Inspector was not simply weighing the possibility of another site in the balance. What he was doing was effectively saying that (a) planning permission should be refused purely because of the environmental impact on this site but then (b) he considered, but rejected, any notion that permission should nonetheless be granted because of a potential argument that this was in fact the only site where the substation could be located ie it was uniquely suitable. If so, the Secretaries of State submit that again this diminishes the significance of the point and/or it places a burden on Dudgeon in terms of its appeal under s288 which it cannot discharge.

43. To understand this point, something needs to be said first about the legal context for alternative sites. In paragraphs 29-31 of his Skeleton Argument, Mr Maurici identifies three possible ways in which alternative sites may be relevant to a planning application. First, the main alternatives studied may have to be addressed because it is an EIA case and an ES is required. That is so, as noted above (Category 1). Second, there may be a case where the existence of an alternative site militates against the grant of permission, though ordinarily such cases may be rare (Category 2). Third, there may be cases where the non-availability of alternative sites militates in favour of planning permission being granted (Category 3).

44. Dudgeon does not disagree with this analysis as such but cautions against rigid definitions of when alternative sites may be relevant. I agree. This is made plain by the decision of Carnwath LJ (sitting at first instance) in *Derbyshire Dales v Secretary of State for Communities & Local Government* [2010]1 P&CR 19. In that case, the Inspector did not have regard to alternative sites and it was held that he did not err in law in that respect. In other words there was no necessity for him to have done so. The key point made by Carnwath LJ was that while it may be difficult to say that a decision-maker has erred when he has considered the question of alternative sites, it does not follow that he must have erred when he has not. On the law, he put the matter thus:

> "15…….Common sense suggests that alternatives may or may not be relevant depending on the nature and circumstances of the project, including its public importance and the degree of the planning objections to any proposed site. The evaluation of such factors will normally be a matter of planning judgment for the decision-maker, involving no issue of law.
>
> 16. A useful starting-point is the judgment of Simon Brown J (as he then was) in *Trust House Forte Ltd v Secretary of State* (1986) 53 P&CR 293, where he sought to summarise the effect of the cases:
>
> > "There has been a growing body of case law upon the question when it is *necessary or at least permissible* to have regard to the possibility of meeting a recognised need elsewhere than upon the appeal site.... These authorities in my judgment establish the following principles:

> (1) Land (irrespective of whether it is owned by the applicant for planning permission) may be developed in any way which is acceptable for planning purposes. The fact that other land exists (whether or not in the applicant's ownership) upon which the development would be yet more acceptable for planning purposes would not justify the refusal of planning permission upon the application site.
>
> (2) Where, however, there are clear planning objections to development upon a particular site then it may well be relevant and indeed necessary to consider whether there is a more appropriate alternative site elsewhere. This is particularly so when the development is bound to have significant adverse effects and where the major argument advanced in support of the application is that the need for the development outweighs the planning disadvantages inherent in it.
>
> (3) Instances of this type of case are developments, whether of national or regional importance, such as airports... coal mining, petro-chemical plants, nuclear power stations and gypsy encampments..... 'comparability is appropriate generally to cases having the following characteristics: first of all, the presence of a clear public convenience, or advantage, in the proposal under consideration; secondly, the existence of inevitable adverse effects or disadvantages to the public or to some section of the public in the proposal; thirdly, the existence of an alternative site for the same project which would not have those effects, or would not have them to the same extent; and fourthly, a situation in which there can only be one permission granted for such development or at least only a very limited number of permissions….'

17. I have highlighted the words "relevant or at least permissible" and "relevant and indeed necessary", because they signal an important distinction, insufficiently recognised in some of the submissions before me. It is one thing to say that consideration of a possible alternative site is a potentially relevant issue, so that a decision-maker does not err in law if he has regard to it. It is quite another to say that , it is *necessarily* relevant, so that he errs in law if he fails to have regard to it.

18. For the former category the underlying principles are obvious. It is trite and long-established law that the range of potentially relevant planning issues is very wide *(Stringer v Minister of Housing and Local Government* [1970] 1 WLR 1281); and that, absent irrationality or illegality, the weight to be given to such issues in any case is a matter for the decision-maker *(Tesco Stores Ltd* v *Secretary of State* [1995] 1 WLR 759, 780). On the other hand, to hold that a decision-maker has erred in law by *failing* to have regard to alternative sites, it is necessary to find some legal principle which compelled him (not merely empowered) him to do so."

45. From this it can be seen that it is very much a matter for the decision-maker to decide in what way, and to what extent the question of alternative sites is relevant for the application before it. There is certainly nothing in the judgment of Carnwath LJ (or that part of the judgment of Simon Brown J cited) to suggest that if an applicant wants to suggest that alternative sites were relevant it could only make them so by contending that the site in question was the only suitable site as opposed to being the most preferable or some lesser criterion. Much will depend on the circumstances of the individual case. But equally the mere existence of a site elsewhere which would be more appropriate from a planning point of view would not ordinarily be sufficient to entail refusal.

46. In the light of that I cannot see that the claimed unfairness here is somehow met by saying that in truth all that the Inspector was doing in his paragraph 49 was saying that the decision he had already reached could not be reversed by an argument on the part of Dudgeon that this was the only possible site because he was not in a position to reach that view. That assumes that the only argument open to Dudgeon was a narrow version of the Category 3 point when in truth a discussion about alternative sites could have been more nuanced and open. What the Secretaries of State are here attempting to do is to place the points which Dudgeon might have wished to make into an artificial straightjacket. Nor do I accept that on the face of the IR the Inspector's consideration of alternative sites should be seen as arising at only this conceptual

final stage as opposed to forming part of the "classic balancing exercise" which the Secretaries of State contend he was undertaking in his consideration of the desirability of facilitating renewable energy projects on the one hand, and avoiding undesirable environmental outcomes on the other. On the face of his paragraph 49 the Inspector took the possibility of an alternative site into account as a reason for refusing permission.

47. The Secretaries of State further rely upon the Inspector's recent witness statement. In paragraph 5 he said that there had been some general discussion about the existence or otherwise of alternative sites from which he concluded that a large number of other sites had been considered and that the substation did not in fact have to be sited alongside overhead transmission lines (the latter not being referred to in the IR at all) – but that these points had no direct bearing on his main considerations. Then, in paragraphs 6-8 he seeks to explain or clarify the reasoning expressed in the IR about the possibility of alternative sites. In particular he elaborates on his thinking about why some of the other sites had been eliminated and the background or evidence not suggesting that the site was uniquely suitable. All of this was to suggest the very limited exercise which the Secretaries of State contend the Inspector was in fact involved in when discussing alternative sites.

48. For the reasons given in cases such as *R v. Westminster City Council ex p. Ermakov* [1996] 2 All ER 302 and *Rumsey v Secretary of State for the Environment, Transport and the Regions* [2001] 81 P&CR 465, I should be very slow indeed to accept such evidence and I decline to do so here. Its primary purpose is not to explain what actually happened at the hearing (as paragraph 4 had done) but to clarify or supplement the reasoning shown in the IR. In any event, even if admitted, in my view, the points made above still remain. Had the matter been opened for discussion it may not have been as narrow as the Inspector now suggests and on any view he took the availability of other sites into account in reaching his decision. So these parts of his witness statement do not assist the Secretaries of State. Moreover none of that evidence can assist on the reasoning deployed in the DL by the Secretaries of State.

49. Mr Maurici then made a further point concerned with remedy. He argued that if in truth all that would have been available to Dudgeon was a Category 3 point to the effect that this was the only site, even if there had been some unfairness in not permitting Dudgeon to make submissions about it, this would go nowhere because Dudgeon could not make, or at rate has not on this appeal made, a case that in the absence of that unfairness this <u>was</u> the only site. Dudgeon is required to show this by reason of the need for it to establish "substantial unfairness" pursuant to s288 (5) (b) of the 1990 Act. I do not accept this for the reasons set out below.

50. First, the case which Dudgeon might have made is not necessarily as constrained as the Secretaries of State suggest for the reasons already given.

51. Second, I do not accept Mr Maurici's characterisation of this point within the s288 appeal. Section 288 (1) permits an appeal where, among other things, a person wishes to question the validity of an order on the grounds that (i) the order is not within the powers of this Act, or (ii) any of the relevant requirements have not been complied with in relation to that order. Section 288 (5) (b) then provides that the Court:

> "if satisfied that the order or action in question is not within the powers of this Act, or that the interests of the applicant have been substantially prejudiced by a failure to comply with any of the relevant requirements in relation to it, may quash that order or action."

52. The substantial unfairness requirement applies only to limb (ii), a failure to comply with relevant requirements. But a failure to comply with natural justice may also be seen properly as a limb (i) case since the decision maker has no power to act outside natural justice. See the commentary at P288.13 in the *Encyclopaedia of Planning Law.* In any event, it seems to me that where a party has been deprived of the opportunity to make representations on a matter which the decision-maker has gone on to take into account, that is itself amounts to a substantial prejudice unless the breach is purely technical or could not possibly have made a difference. It is not necessary for the aggrieved party to show that he would have succeeded on the point or even that, *prima facie,* he would have done so. And to the extent that it is at least incumbent on such an aggrieved party to identify the kind of material he would rely upon, Dudgeon has done so here, because of the analysis contained in the ES, the adequacy of which was accepted in the IR and DL. Indeed it is noteworthy that the Secretaries of State at least saw that there might be a tension of sorts between that material and the Inspector's finding in his paragraph 49 when they referred in paragraph 22 of the DL to "notwithstanding their conclusion" as to the ES.

53. Finally, at one stage Mr Maurici submitted that had the Inspector made no reference to alternative sites at all in the IR (and thus had the DL done the same) his conclusion could not have been impeached. That may be, but (a) he did make those references, in a significant way, and (b) I cannot possibly conclude that his decision would inevitably have been the same without them. That is especially where the decision concerned is a balancing exercise with a presumption in favour of, or at least significant weight to be given to, permitting a renewable energy facility such as this, and where, at least as far as the Secretaries of State were concerned an additional factor against permission, being noise concerns, was now to be disregarded.

54. In truth, the Secretaries of State's claimed analysis of the alternative sites issue and its impact is over-sophisticated and fails to dislodge the essential point. The decision-makers took into account a matter on which Dudgeon was not given the opportunity to be heard. For that reason Ground 1 succeeds and the Secretaries of State's decision must be quashed.

GROUNDS 2 -5 – THE DEVELOPMENT PLAN POINT

Introduction

55. My finding on Ground 1 makes it strictly unnecessary to consider the remaining grounds. But in deference to the arguments made and lest this matter goes further, I shall deal with them briefly.

56. It is common ground that the decision maker must have regard to the Development Plan and any other material considerations – see s70 (2) of the 1990 Act. And in such a case, s38 (6) of the 2004 Act (previously s54A of the 1990 Act) requires the determination to be made in accordance with the development plan unless material considerations indicate otherwise. Paragraph 8 of the DL referred expressly to that requirement.

57. It is also common ground for the purposes of this case that:

    (1) The Development Plan includes, so far as is relevant, the (regional) East of England Plan and the Core Strategy;

(2) Policies relevant to the Development Plan included ENG 2, CP11, CP12 and DC 15;

(3) Neither the IR nor the DL made any express reference to ENG 2 or CP12.

Relationship between the policies

58. As noted above ENG 2 imposes regional targets in respect of renewable energy. That plan, and those targets, are referred to expressly in DC15 at paragraph 4.83. CP12 refers to them also. The thrust of CP12 is replicated in the "headline" section of DC15 and in its Reasoned Justification especially paragraph 48.4. It was not suggested, nor could it be, that either ENG 2 or CP12 says anything materially divergent from, or additional to, the detailed wording of DC15.

59. Indeed, DC15 could be said to represent the essence of the Development Plan insofar as it applied to this application. Both Dudgeon and the Secretaries of State agreed on what that was. As Mr Maurici accepted, it was, effectively, a presumption in favour of a development to facilitate renewable energy (as this one is) but one which could be rebutted if there were significant environmental impacts sufficient to outweigh it. In practical terms, therefore, an application such as this had a "head-start" – the decision-maker is not simply taking the renewable energy and the landscape considerations as factors of equal weight to be addressed in a simple balancing exercise. In my judgment that is amply borne out by the language of DC15 referring as it does to "support in principle" and the grant of permission "unless".

60. Against that background I consider the individual challenges under this head.

Grounds 2 and 3

61. These allege that both the Inspector and the Secretaries of State failed to mention and thus to consider, ENG 2 and CP12 respectively. It is true that they were not mentioned, although they formed part of Dudgeon's appeal statement. But their import was contained in DC15. It is very hard to see what express mention or consideration of them would add. If the content of a particular policy itself not mentioned appears in another policy which is, the Court may properly take the view that there is no material error. See the observations of Hoffman LJ in *South Somerset DC v Secretary of State for the Environment* [1993] 1 PLR 80 where he rejected (at p86) the suggestion that the Inspector had not taken into account a regional policy when it was for all practical purposes the same as the local plan which had been considered. I do not consider that this approach has less force in the present context simply because *South Somerset* was dealing with a s70 failure as opposed to a s38 (6) (or s54A) failure. The decision-makers clearly had in mind DC15 and were aware of its contents. If so, they were aware of the regional "weight" that lay behind it. In this context, I note also the decision of Sir Michael Harrison in *Bath Estates v Secretary of State for Communities and Local Government* [2008] EWHC 204 (Admin), following *South Somerset* who said that a failure to mention a specific policy will not be fatal if its underlying principles have been taken into account. He went on to uphold the Inspector's decision despite his "surprising" failure to refer to one particular policy.

62. Broadly, all of the points made in the preceding paragraph can be made in favour of the Secretaries of State's decision in the DL which, again, focused on DC15.

63. I accept that, as Lord Clyde put it in the House of Lords case of *City of Edinburgh v Secretary of State for Scotland* [1997] 1 WLR 1447, a decision will be open to challenge if the decision-

maker failed to have regard to a policy in the development plan which is relevant or fails properly to interpret it. But where the policy is reproduced in another one, to which regard is had, the basis for challenge falls away. I also accept that, as Ouseley J put it in *R (Cummins) v London Borough of Camden* [2001] EWHC 1116 at paragraph 164:

> "It may be necessary for a Council in a case where policies pull in different directions to decide which is the dominant policy: whether one policy compared to another is directly as opposed to tangentially relevant, or should be seen as the one to which the greater weight is required to be given."

But in truth, this is not one of those cases because the development plan as a whole can be conveniently drawn essentially from DC15. Finally, I accept that where the decision maker has failed to refer to a policy which is relevant and not covered by some other equivalent policy which has been considered, his decision will be open to challenge even where neither side referred him to that policy – see *St James v Secretary of State for the Environment* [2001] EWHC 30 (Admin). But once more, that is not this case.

64. Accordingly, I cannot see that there was any material error in the failure here to refer to ENG 2 or CP12.

Ground 4

65. The essential allegation here is that there was no or no proper identification of the Development Plan and no clear finding as to the respects in which the proposed development was in breach of it. I have already set out in paragraph 59 above what it was. I consider the position with regard both to the IR and the DL.

Identifying the Development Plan

66. In paragraph 8 of the IR the Inspector did not, but should have, noted that the East of England Plan formed part of the Development Plan. But that, of itself does not mean that he did not understand what it was. In my judgment, the Inspector was aware of the "presumptive" status of projects such as this. See his recitation in his paragraph 13 of the "substantial support" invoked by Dudgeon, his reference to support in principle subject to "the proviso" in his paragraph 32 and the need for such a substation in paragraph 33. There is further reference to "support in principle" in paragraph 47 and the significant weight in favour of renewable energy projects in his paragraphs 48 and 49. Read fairly as a whole and not "as an examination paper on current and draft development plans" and looking at the "general thrust" of the reasoning in his report (see Hoffman LJ in *South Somerset* p82) it seems to me that the Inspector did have on board the essence of the Development Plan. That remains the case notwithstanding the references to "balance" in, for example, paragraph 47. There is still a weighing or balancing exercise to be done, albeit that the starting point is in favour of a development such as this.

67. It would have been better if the Inspector had articulated expressly what he perceived the Development Plan to be. But it is not necessarily fatal if he does not, provided that the context reveals, as it does here, that he knew what it was and was applying it. See for example, the decision of David Keene QC (as he then was) in *Spelthorne BC v Secretary of State for the Environment* (1994) 68 P&CR 211 at pp214-215.

68. Moreover the way in which the matter was put in the DL has to be considered. At paragraph 9 the Secretaries of State correctly state the basic elements of the Development Plan. While they went on to say that the most relevant policies were DC1, DC15 and CP11, for the reasons already given I do not consider that the failure to refer to ENG 2 and CP12 itself amounted to a material error.

69. In paragraph 14 full account was taken of the wider benefits of the proposal which had to be accorded "significant weight". That is repeated in paragraph 25. Otherwise, the Secretaries of State adopted the reasoning of the Inspector. In those circumstances it is not more possible to say that the Secretaries of State did not understand the essence of the Development Plan, than the Inspector.

Identifying the failure to accord with the Development Plan

70. The Inspector's finding at paragraph 32 of the IR is phrased in terms of compliance or otherwise with DC15 as opposed to the Development Plan as such. But I cannot see that this makes a difference where that policy states what the thrust of the plan is, for present purposes. I accept that he also says that there is a conflict with CP11. But I do not think that this has skewed the analysis. After all CP11 is part of the Development Plan – but unlike CP12 it is not reproduced in the same way in DC15.

71. In the DL the Secretaries of State refer to the Development Plan expressly and what they say are its most relevant policies. In paragraphs 17 and 25 they point to a failure to comply with DC15 and at paragraph 26 refer to the conflicts with the development plan.

72. In truth given the nature of the Development Plan itself the character of the non-conformity is obvious, namely the "outweighing" environmental factors such that the "proviso" to the presumptive support for a development such as this is found to have operated.

Case-law

73. I was referred to the decision of Sullivan J (as he then was) in *Milne v Rochdale Metropolitan Borough Council* [2000] Env LR 22. Here he referred to the problem of where different plan policies pull in different directions and where there may be no clear cut answer to the question whether the development in question conforms to the development plan. He went on to say in paragraph 49 that it was accordingly untenable to say that a breach of any one policy within the Development Plan meant that the proposal was not in accordance with the plan as a whole. I do not see this as being of any particular relevance to the case before me.

74. I was also referred to *Secretary of State for Communities and Local Government v Calderdale* [2010] EWCA Civ 1268. Here the Court of Appeal dismissed an appeal from the judge who quashed the Inspector's decision. This was on the basis that the Inspector had made a clear legal error in interpreting s38 (6) as requiring him simply to "have regard to" the development plan, as opposed to following it unless material considerations indicate otherwise. It is hardly surprising that his decision was quashed in such circumstances. But there is no equivalent error here. Indeed, the Secretaries of State referred expressly to the words of s38 (6).

75. Finally, I was referred to the decision of Nicola Davies J in *Resource Recovery Solutions v Secretary of State for Communities and Local Government* [2011] EWHC 1726 (Admin). Here the key point was that the Inspector failed to have regard to a reinstated regional policy which was different in content and targets to the local plan which was addressed. An important part of the development plan has thus not been articulated or addressed. There is no equivalent defect in the decision here. A second ground for quashing the decision was that the Inspector there had reached no conclusion as to whether the proposal accorded with the development plan as a whole, having identified and properly interpreted its provisions. But I do no think that the same can in substance be said of the decision here.

76. Accordingly I find nothing in the case-law to suggest upholding this ground.

Conclusion

77. There can be no doubt that more explicit references to the nature of the Development Plan and its breach would have been desirable here. But on the facts of this decision, I do not consider that any material error was made.

Ground 5

78. This was to the effect that what the Inspector and the Secretaries of State actually did was to treat the support for renewable energy projects such as this and no more than simple factors in the balance, along with environmental and other concerns, as opposed to giving them "presumptive" status. But for the reasons already given I do not accept that this is what happened, either in the IR or in the DL. Mr Kimblin points to the fact of the impression created that this was a simple application for development of an industrial character in a rural setting and hence, looked at that way, was almost bound to fail. But this is to ignore the references in the IR and DL to the weight to be given to such projects. And in a sense one is bound in a case of this kind to find more words devoted to the character of the particular development proposed and its impact on the landscape and other environmental matters, than to support for renewable energy. That is because the former is wholly fact-sensitive requiring an analysis of the evidence of such matters in the instant case, whereas once one has articulated and noted the strong policy support for projects of this kind there is not a great deal more to say unless other fact-sensitive issues such as alternative sites are brought into play.

79. To the extent that any of the case-law referred to above could be said to relate to this as well as the previous grounds, I do not consider that it affords Dudgeon any support for Ground 5 either, and overall I would not have upheld this ground.

Conclusions on the Development Plan Issue

80. Accordingly, for the reasons given above, had it been necessary to decide Grounds 2-5 I would have rejected them. But as it is the entire exercise has been infected by the procedural unfairness which is the basis of Ground 1. In any reconsideration regard will no doubt be had to the desirability of referring to all the applicable policies and a more explicit articulation of the Development Plan.

Outcome

81. It follows that the decision in question, being that of the Secretaries of State set out in the DL dated 20 September 2011, must be quashed. I am most grateful to Counsel for their excellent written and oral submissions.