Neutral Citation Number: [2017] EWCA Civ 2102

Case No: C1/2016/2699

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT
QUEEN'S BENCH DIVISION (PLANNING COURT)
THE HON MR JUSTICE DOVE
[2016] EWHC 1349 (Admin)

Cardiff Civil and Family Justice Centre
2 Park Street, Cardiff, CF10 1ET

Date: 14/12/17

Before :

LORD JUSTICE McFARLANE

LORD JUSTICE DAVIS
and
LORD JUSTICE HICKINBOTTOM

- -

Between :

(1) FOREST OF DEAN DISTRICT COUNCIL
(2) RESILIENT ENERGY SERVERNDALE LIMITED

Appellants

- and -

THE QUEEN ON THE APPLICATION OF PETER WRIGHT

Respondent

- -
- -

Paul Cairnes QC and **James Corbet Burcher** (instructed by **Helen Blundell, Solicitor Forest of Dean District Council**) for the **First Appellant**
Martin Kingston QC and **Jenny Wigley** (instructed by **Burges Salmon LLP**) for the **Second Appellant**
Neil Cameron QC and **Zack Simons** (instructed by **Harrison Grant Solicitors**) for the **Respondent**

Hearing date: 8 November 2017

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Approved Judgment

Lord Justice Hickinbottom:

Introduction

1. These appeals raise the single issue of whether, on an application for development proposed to be undertaken by a community benefit society, a proposed donation to the community of a proportion of the turnover derived from the development is a material consideration.

2. The issue arises in the context of an application to the First Appellant local planning authority ("the Council") by the Second Appellant ("Resilient Severndale") for change of use of agricultural land to wind turbine, and the installation of a single, community-scale 500kW wind turbine at Severndale Farm, Tidenham, Gloucestershire ("the proposed development"). It was proposed that the turbine would be erected and run by a community benefit society, and the application included a promise that an annual donation would be made to a local community fund based on 4% of turnover from the operation of the turbine over its projected life of 25 years, to be achieved by way of a condition that the development be undertaken by such a society with the donation as part of the scheme.

3. The Council granted full planning permission for the proposed development, with such a condition. In doing so, in favour of the proposed development, they expressly took into account the donation. The Respondent ("Mr Wright"), a local resident, sought judicial review of the decision, on the basis that the promised donation was not a material planning consideration, and the Council had acted unlawfully in taking it into account. In his judgment of 9 June 2016, Dove J agreed with that proposition, and quashed the grant of planning permission. In these appeals, the Council and Resilient Severndale contend he was wrong to do so.

4. Before us, Paul Cairnes QC and James Corbet Burcher of Counsel appeared for the Council, Martin Kingston QC and Jenny Wigley of Counsel for Resilient Severndale, and Neil Cameron QC and Zack Simons of Counsel for Mr Wright.

The Policy Background

5. The Government wish to encourage renewable energy projects, and consider local communities have a part to play. In October 2014, the Department of Energy and Climate Change published a document entitled "Community Benefits from Onshore Wind Developments: Best Practice Guidance for England" ("the DECC Guidance"), in which the Ministerial Foreword said:

> "Communities hosting renewable energy play a vital role in meeting our national need for secure, clean energy and it is absolutely right that they should be recognised and rewarded for their contribution."

The introduction goes on to state that:

> "Communities have a unique and exciting opportunity to share in the benefits that their local wind energy resources can bring

> through effective partnerships with those developing wind energy."

6. The document describes community benefits, in this context, in the following terms:

> "Community benefits can bring tangible rewards to communities which host wind projects, over and above the wider economic, energy security and environmental benefits that arise from those developments. They are an important way of sharing the value that wind energy can bring with the local community.
>
> Community benefits include:
>
> 1. Community benefit funds – voluntary monetary payments from an onshore wind developer to the community, usually provided via an annual cash sum, and
>
> 2. Benefits in-kind – other voluntary benefits which the developer provides to the community, such as in-kind works, direct funding of projects, one-off funding, local energy discount scheme or any other non-necessary site-specific benefits.
>
> In addition to the above, there can also be:
>
> 3. Community investment (Shared ownership) – this is where a community has a financial stake, or investment in a scheme. This can include co-operative schemes and online investment platforms.
>
> 4. Socio-economic community benefits – job creation, skills training, apprenticeships, opportunities for educational visits and raising awareness of climate change.
>
> 5. Material benefits – derived from actions taken directly related to the development such as improved infrastructure.
>
> This document contains guidance on community benefit funds and benefits in-kind (points 1 and 2). The provision of these community benefits is an entirely voluntary undertaking by wind farm developers. They are not compensation payments.
>
> Material and socio-economic benefits will be considered as part of any planning application for the development and will be determined by local planning authorities. They are not covered by this guidance…".

7. Prior to the DECC Guidance, many onshore wind developers already provided voluntary contributions in various forms over the lifetime of the project. The document goes on to say:

> "The wind industry through RenewableUK has consolidated this voluntary approach by coming together to produce a protocol which commits developers of onshore wind projects above 5MW (megawatts) in England to provide a community

> benefit package to the value of at least £5,000 per MW of installed capacity per year, index-linked for the operational lifetime of the project.
>
> Community benefits offer a rare opportunity for the local community to access resources, including long-term, reliable and flexible funding to directly enhance their local economy, society and environment….
>
> The best outcomes tend to be achieved when benefits are tailored to the needs of the local community…".

The DECC Guidance refers to a number of case studies where community benefit funds have been set up by wind farm developers, e.g. by West Coast RWE Innogy UK in respect of the Farr Wind Farm in Scotland (£3.5m over the lifetime of the wind farm).

8. However, the DECC Guidance makes clear the relationship between the guidance it gives in the context of renewable energy policy, and the planning regime. Under the heading "Planning phase guidance; background to community benefits", it states

> "This document contains guidance on community benefit funds and benefits-in kind. The provision of these community benefits are entirely voluntary undertakings by wind farm developers and should be related to the needs of the local community.
>
> These community benefits are separate from the planning process and are not relevant to the decision as to whether the planning application for a wind farm should be approved or not – i.e. they are not 'material' to the planning process. This means they should not generally be taken into account by local planning authorities when deciding the outcome of a planning application for a wind farm development.
>
> Currently the only situation in which financial arrangements are considered material to planning is under the Localism Act as amended (2011), which allows a local planning authority to take into account financial benefits where there is a direct connection between the intended use of the funds and the development.
>
> And Planning Practice Guidance [see paragraph 10 below] states, 'Local planning authorities may wish to establish policies which give positive weight to renewable and low carbon energy initiatives which have clear evidence of local community involvement and leadership.
>
> Socio-economic and material benefits from onshore wind developments are types of benefit that can be taken into

> consideration when a planning application is determined by the local planning authority and are not covered by this Guidance."

9. In addition, paragraph 97 of the National Planning Policy Framework ("the NPPF") states:

> "To help increase the supply of renewable and low carbon energy, local planning authorities should recognise the responsibility on all communities to contribute to energy generation from renewable or low carbon sources. They should:
>
> - Have a positive strategy to promote energy from renewable and low carbon sources;
> - Design their policies to maximise renewable and low carbon energy development while ensuring that adverse impacts are addressed satisfactorily, including cumulative landscape and visual impacts;
> - Consider identifying suitable areas for renewable and low carbon energy sources, and supporting infrastructure, where this would help secure the development of such sources;
> - Support community-led initiatives for renewable and low carbon energy, including developments outside such areas being taken forward through neighbourhood planning…".

10. Planning Practice Guidance: Renewable and low carbon energy (ID: 5-004-20140306) contains guidance in relation to the approach to be taken to community-led renewable energy, which builds on paragraph 97 of the NPPF. Under the heading "What is the role for community led renewable energy initiatives?", it states:

> "Community initiatives are likely to play an increasingly important role and should be encouraged as a way of providing positive local benefit from renewable energy development. Further information for communities interested in developing their own initiatives is provided by the Department of Energy and Climate Change. Local planning authorities may wish to establish policies which give positive weight to renewable and low carbon energy initiatives which have clear evidence of local community involvement and leadership."

The Factual Background

11. The Resilience Centre Limited ("the Resilience Centre") was established in 2009 by Andrew Clarke and his wife. The rationale for the company is set out in Mr Clarke's statement dated 2 December 2015. It focuses on social investment, i.e. "the provision and use of capital to generate social as well as financial returns", with the aim "to help build resilience in society in the context of climate change, and natural resource limitations and with a view to improving local economies" (paragraph 4).

12. The Resilience Centre has sought to pursue that aim, and in particular overcome the problems of up-front community energy project costs, which are at risk if the project does not ultimately proceed, by developing "the Resilient Energy Community Model". This involves the Resilience Centre and the landowner obtaining planning permission, but with a commitment to open up the project to individual investors from the community once planning consent has been obtained. Since the Cooperative and Community Benefits Act 2014 came into force on 1 August 2014, their legal structure of choice has been a community benefit society registered under that Act, which, as I understand it, has various tax advantages. By section 2(2)(a)(ii) of that Act, it is a condition of registration that "it has been shown to the satisfaction of the [Financial Conduct Authority]… that the business of the society is being, or is intended to be, conducted for the benefit of the community".

13. The Resilient Energy Community Model is focused upon the community, the socio-economic benefits of the model being said to include the following.

    i) The wind turbine is of "community scale", i.e. it meets or helps to meet local energy needs, but does not seek to maximise output or exceed those needs.

    ii) Through back-to-back power purchase arrangements, it both reduces the costs of energy locally and retains a greater proportion of money paid in power bills within the local economy.

    iii) It retains business rates within the district.

    iv) It creates local jobs directly and indirectly.

    v) It provides a local educational resource.

14. It also gives more direct financial benefit to the local community, in two ways. First, individuals in the community are invited to invest through a share issue in the relevant community benefit society, with the value of the contribution of the Resilience Centre and landowner being independently valued and reflected in their share in the project. Expected returns for investors is in the region of 7% per annum. Second, once the wind turbine is operational, a percentage of operating turnover is donated to the local community "to aid in building community resilience by helping the community to address current needs and future challenges" (paragraph 5 of Mr Clarke's statement). These funds are allocated to community causes by a panel of local people.

15. This model has been used by the Resilience Centre, through single project limited companies and community benefit societies, for 500kW community wind power projects at Alvington (which is in the Council's area) and St Briavels (which is just outside) which are operative, and two further projects at Kingswood, Stroud have obtained planning consent.

The Application

16. Resilient Severndale, through the Resilience Centre as its agent, applied to the Council for planning permission for the proposed development on 29 January 2015. The application was accompanied by, amongst other things, a Planning Statement and an Environmental Report, and was supplemented by further letters from the

Resilience Centre dated 10 and 15 July 2017. The application focused on both the benefits of renewable wind energy and the new policy emphasis on the engagement of local people in the energy process. The application documents therefore emphasised the community-focused nature of the development, paragraph 5.9.1 of the Environmental Report setting out the various benefits to the community which I have already outlined (see paragraph 12 above).

17. One benefit was said to be:

> "Sustainable Community Benefits over life of turbine averaging £40,000/MW installed capacity = 8X latest Government recommendations."

That needs a little explanation. As I have described, the DECC Guidance refers to a protocol which commits developers of wind farms with a capacity of more than 5MW to provide a community benefit package of £5,000 per MW of installed capacity each year (see paragraph 7 above). A commitment was proposed here, where the proposed development was for only 0.5MW, of a donation to a community benefit fund of 4% of turnover or approximately £20,000 per year, equivalent to £40,000 per MW (i.e. eight times the protocol level).

18. The Officer's Report dated 7 July 2015 ("the First Officer's Report") advised the Council's Planning Committee ("the Committee") that the community benefit fund was not a material consideration that could be taken into account when considering the planning application, because (i) there were no clear controls and/or enforcement measures that could ensure the benefit was delivered, and in any event, (ii) the fund could be used to finance projects that were unconnected to low carbon energy generation.

19. Resilient Severndale submitted further observations to the Council, which resulted in consideration of the application being deferred. Further submissions were then made, to the effect that the project would commit up to £1.1m in direct community benefits (i.e. 4% of turnover, together with £600,000 that it was estimated would be earned by the turbine over and above the community benefit society's commitments which, under the terms of the society, would also be dedicated to the community), and relying upon a successful appeal to an inspector in relation to Alvington Wind Farm. Further Officer's Reports were then produced, the final report dated 11 August 2015 concluding that the community benefit fund *was* a material consideration in favour of the development.

20. That day (11 August 2015), the Committee approved the application, the minutes expressly recording that, in doing so, "members had included the local community donation fund as a material contribution in favour of the proposals as part and parcel of the basket of socio-economic benefits which were relied upon by [Resilient Severndale]".

21. On 30 September 2015, the planning application was granted subject to a number of conditions, including condition 28 (a pre-commencement condition) which provided as follows:

> "The development is to be undertaken via a Community Benefit Society set up for the benefit of the community and registered with the Financial Conduct Authority under the Co-Operative and Community Benefit Societies Act 2014. Details of the Society number to be provided to the local planning authority prior to commencement of construction.
>
> Reason: to ensure the project delivers social, environmental and economic benefits for the communities of Tidenham and the broader Forest of Dean."

That was the vehicle for ensuring that the promised community benefit fund would be delivered.

22. The fund, once set up, will be allocated by a panel of local individuals established for that task; and the objects of the fund will include any community project. There was evidence before the judge that the St Briavels Wind Turbine Community Fund had been distributed for (amongst other things) the creation of a village handyman service, the maintenance of publicly accessible defibrillators in the village, the purchase of waterproof clothing to enable young members of the community to participate in scheduled outdoor activities in inclement weather, and to provide a meal at a local public house for the members of the St Briavels Lunch Club (a lunch club for older people) and club volunteers.

The Claim

23. Mr Wright challenged the decision to grant planning permission by way of judicial review, on the basis that the community benefit fund donation was not a material consideration. He submitted that it did not serve a planning purpose, it was not related to land use, and it had no real connection to the proposed development. In his judgment of 9 June 2016, Dove J accepted those submissions.

24. Before this court, Mr Cairnes for the Council and Mr Kingston for Resilient Severndale submit that Dove J erred in law in his approach to the donation and his conclusion that it was not a material consideration in the planning decision-making process. They submit that, properly considered, the community benefit fund donation serves a planning purpose, and there is a real connection between it and the proposed development. Furthermore, they submit, the judge's conclusion that the donation is, as a matter of law, immaterial to the planning decision-making process is in contradiction to national policy and guidance which identifies renewable energy development as a positive material consideration. Mr Kingston submits that the community fund donation is an inherent feature of the community involvement in the proposed development; and the result of the judgment, he submits, is to render that aspect of Government policy unlawful.

The Law

25. The only issue that arises in these appeals is whether the proposed community benefit fund donation of a proportion of the turnover derived from the development was properly taken into account as a material consideration by the Council when it considered and approved the planning application for the proposed development.

26. Section 70(2) of the Town and Country Planning Act 1990 ("the 1990 Act") provides that, in dealing with an application for planning permission, a planning authority must have regard to all "material considerations", including "any local finance consideration" defined in section 70(4) (added from 15 January 2012, by section 143(4) of the Localism Act 2011) as "(a) a grant or other financial assistance that has been, or will or could be, provided to a relevant authority by a Minister of the Crown, or (b) sums that a relevant authority has received, or will receive, in payment of Community Infrastructure Levy".

27. What amounts to a material consideration has been considered in a series of cases to which we were referred, including Newbury District Council v Secretary of State for the Environment [1981] AC 578 ("Newbury"), Westminster City Council v Great Portland Estates PLC [1985] 1 AC 661, R v Plymouth City Council ex parte Plymouth and South Devon Cooperative Society Limited [1994] 67 P&CR 78, Tesco Stores Limited v Secretary of State for the Environment [1995] 1 WLR 759, R (Sainsbury's Supermarkets Limited) v Wolverhampton City Council [2010] UKSC 20; [2011] 1 AC 437 and Aberdeen City and Shire Strategic Development Planning Authority v Elsick Development Company Limited [2017] UKSC 66 ("Aberdeen"). In his judgment at [20] and following, Dove J comprehensively and helpfully reviewed these cases (save for Aberdeen, which post-dated his judgment). I can be relatively brief. The relevant law is uncontroversial. Indeed, all parties rely upon the same well-established propositions.

28. So far as relevant to these appeals, the following propositions can be drawn from the cases.

    i) A planning decision-maker has a statutory duty to have regard to all material considerations; and to have no regard to considerations which are not material. Whilst the weight to be given to a material consideration is a matter for the decision-maker, what amounts to a material consideration is a question of law for the court to determine.

    ii) The fact that a matter may be regarded as desirable (for example, as being of benefit to the local community or wider public) does not in itself make that matter a material consideration for planning purposes. For a consideration to be material, it must have a planning purpose (i.e. it must relate to the character or the use of land, and not be solely for some other purpose no matter how well-intentioned and desirable that purpose may be); and it must fairly and reasonably relate to the permitted development (i.e. there must be a real – as opposed to a fanciful, remote, trivial or *de minimis* – connection with the development). These criteria of materiality, oft-cited since, are derived from the speech of Viscount Dilhorne in Newbury at page 599H, and known as "the Newbury criteria". They were very recently confirmed by the Supreme Court in Aberdeen (at [29] per Lord Hodge JSC, giving the judgment of the court).

    iii) For a benefit to be material, it does not have to be necessary to make the development acceptable in planning terms; although, by section 106 of the Town and Country Planning Act 1990 and regulation 122 of the Community Infrastructure Levy Regulations 2010 (SI 2010 No 948), a planning obligation may only be taken into account in the determination of any planning application if it is so necessary. Although paragraph 206 of the NPPF

provides that "planning conditions should only be imposed where they are necessary…", the statutory requirement for necessity does not apply to the attachment of a condition to the grant of planning permission.

iv) Financial considerations may be relevant to a planning decision. For example, financial dependency of one part of a composite development on another part may be material, as may financial viability if it relates to the development. However, something which is funded from the development or otherwise offered by the developer will not, by virtue of that fact alone, be sufficiently related to, or connected with, the development to be a material consideration.

v) Off-site benefits are not necessarily immaterial. An off-site benefit may be material if it satisfies the Newbury criteria.

The Appellant's Case

29. Mr Cairnes and Mr Kingston accepted that the donation to a community benefit fund was an off-site benefit, and accepted that therefore, in order to be material, it must have a planning purpose and have a real connection with the proposed development. However, they submitted that Dove J erred in concluding that the proposed donation "is an untargeted contribution of off-site benefits which is not designed to address a planning purpose" (at [55] of his judgment); and that there was "no real connection between the development of the wind turbine and the gift of monies to be used for any purpose which appointed members of the community consider their community would derive benefit" (at [56]). He erred, it is said, both in restricting the scope of the concept of "serving a planning purpose" and thus finding that the community benefit fund donation did not satisfy that criterion; and in finding that it did not relate to the development.

30. Their submissions were wide-ranging, but three broad strands are apparent.

31. First, in respect of a planning purpose, Mr Cairnes submitted that the community benefit fund donation is capable of providing – and will in fact provide – a "positive socio-economic impact within a confirmed community-led structure, reasonably proximate to the development itself". Those benefits, and the "community resilience" that will arise as a result, directly engage with the way in which the land is used and communities are built. The community benefit fund is not only sourced from the proposed development as a percentage of turnover (so, as Mr Kingston vividly put it, "the community benefits from every turn of the turbine blades"), but through a community-focused and community-led structure in the form of the community benefit society. The fund therefore serves a planning purpose.

32. Mr Kingston accepted that the community involvement through the community benefit fund does not relate to land use "in the strict sense"; but, he submitted, it fulfils a planning purpose in improving sustainability of communities, and is not less related to land use than (e.g.) the planning policy in relation to affordable housing, i.e. the policy encouragement to limit the occupancy of some housing to those with limited financial needs, which is recognised as a material consideration in planning applications.

33. Second, Mr Kingston submitted that the community benefit fund donation falls within the scope of planning purpose, because it has a positive effect of a "constraint on the operation of the development" for the benefit of the community: it is the beneficial financial result of constraining the development to operate only for the benefit of the community. In this regard, the fact that the developer would be a community benefit society, rather than a strictly commercial enterprise, is vital. The community benefit fund is not a gift or a bribe to obtain planning permission: it is an inextricable part of the scheme, and an inherent consequence of the development being community-led. It would be inappropriate and wrong to disaggregate the community benefit fund, as a financial consequence of the scheme, from the other aspects of the scheme. He submitted that the DECC Guidance, properly construed, draws an important distinction between community benefit funds that are sourced from a commercial venture, and those sourced from a community project. Every payment from the fund would evidence continuing community involvement in the operation of the scheme, from which the fund would be derived. There can be confidence that the relevant fund will be only used for local community purposes because, not only will it be distributed by a committee of local people, but the statutory provisions under which the community benefit society will be set up requires it to be conducted for the benefit of the community. The Financial Conduct Authority has to be satisfied that that requirement is met. Mr Cairnes went so far as to refer to "the unique nature of the financial contribution in the instant case".

34. Third, both Mr Cairnes and Mr Kingston submitted that the judge was wrong to consider that the classes of material considerations are closed; and, in particular, he failed to take into account the recent evolution in policy, which should be mirrored by a change in approach to material considerations. What amounts to a material consideration for planning purposes is flexible and dynamic, and responsive to evolving planning policy. The DECC Guidance, NPPF and the PPG positively support both renewable energy, and specifically community involvement and leadership in local renewable energy projects. There is thus strong policy support for treating developments such as this, on a planning application, more benevolently than a commercially-operated wind turbine. In any event, the conclusion of Dove J requires a planning authority to ignore these relevant policy factors, and thus creates a "policy contradiction". Mr Kingston submitted that the judgment effectively renders unlawful the Government policy encouraging positive consideration of community involvement in renewable energy; and whether it is unlawful or not is, he submits, the central issue in this appeal.

Discussion

35. Skilfully as those submissions were made, I am unpersuaded by them.

36. Both Mr Cairnes and Mr Kingston – in my view, rightly – accepted that, on a planning application, it would be unlawful for a planning authority to take into consideration a donation to a community benefit fund by a commercial wind farm developer, because such a donation would not be a material consideration. For similar reasons, they accepted that an authority could not require such a donation as a planning obligation, whoever the developer might be. However, they each submitted that the circumstances of this case, notably the voluntary donation derived from a community-led project and made to benefit the community, were materially different; but that submission faced the difficulty that, as I have indicated (see paragraph 28(ii)

and (iv) above), neither the source of the funds nor the fact that a matter is regarded as beneficial to the public make a matter a material consideration for planning purposes (a matter to which I return below: see paragraph 51 and following).

37. That led to Mr Kingston, in particular, submitting that the community benefits of this development have to be looked at as a whole, because the donation for the community benefit fund cannot be disaggregated from the other community socio-economic benefits that will derive from the development, some of which (it is common ground) are material in a planning context. However, it was not suggested that the 4% of turnover donation was "necessary" for the purposes of the grant of planning permission; nor could any explanation be given as to why the figure of 4% (rather than 3% or 5% or some other figure) was offered. Nor was that donation "inherent" in the project, any more than an offer of a similar donation by a commercial wind farm developer would be "inherent" in his development. In any event, an immaterial consideration cannot be made material by simply aggregating it with other considerations, some of which are or may be material.

38. Nor was I impressed by Mr Kingston's submission that the DECC Guidance distinguished between donations to the community made by a commercial developer and those made by a community developer, for two primary reasons.

39. First, I am unconvinced that the nature of the proposed development scheme here is essentially different from what Mr Kingston described as a "commercial" scheme. I accept that there are differences in emphasis between the type of project Mr Kingston described: a commercial scheme may be more concerned with maximising profit, whereas in the proposed development the community would have more of an interest in the scheme at the expense of some profit. Just as a commercial wind farm may not be entirely concerned with profit – as I have described, developers of such a wind farm are expected to make a voluntary donation into a community benefit fund – the proposed scheme here is not entirely altruistic. The Resilience Centre is committed to local renewable energy; but, as Mr Clarke's statement makes clear – and entirely understandably – it focuses upon the use of capital to generate financial, as well as social, returns (see paragraph 11 above). It intends making a profit on this project, as a return for the at risk investment it has made. Similarly, the landowner intends making a profit from his investment, his stake in the project being based on the value of his land with the benefit of planning permission. If the project is opened up to individual investors, although they will be local, not all local people will be able to afford to invest and the number of such investors are likely to be relatively few – we were told that about one hundred, out of a community of about 4,500, have expressed an interest. Those who invest will expect an estimated 7% per annum return. Therefore, in each scheme, although I accept the emphasis and the distribution of income might be different, there are usually elements of both profit and voluntary contributions to the community.

40. Second, in relying upon the DECC Guidance, Mr Kingston faced the difficulty of the document itself stating that community benefits are "separate from the planning process and are not relevant to the decision as to whether the planning application for a wind farm should be approved or not – i.e. they are not 'material' to the planning process" (see paragraph 8 above). He sought to address this difficulty by reference to the introduction to the DECC Guidance, which states that "material and socio-economic benefits will be considered as part of any planning application for the

development and will be determined by local planning authorities. They are not covered by this guidance." Mr Kingston submitted that the DECC Guidance draws a distinction between a community venture and a commercial venture with community benefits. He submitted that, on a proper construction of the Guidance, community benefit funds and benefits in kind as the terms are used in the DECC Guidance introduction are restricted to such benefits as might be provided by otherwise commercial wind farm developers; whilst community investment, socio-economic community benefits and material benefits, as those terms are used, are restricted to community-led and -focused projects such as this. On this analysis, the community benefit fund in this proposed development is an essential part of a bundle of socio-economic benefits which, it is submitted, the Guidance acknowledges are material planning considerations.

41. There are in my view a number of difficulties with that analysis.

42. First, a basic defect in the analysis is that, in my view, on a true reading the DECC Guidance simply does not draw the distinction between commercial and community wind developments which Mr Kingston seeks to rely upon. The community benefit fund in this case – the 4% of turnover year-on-year – falls firmly within the definition of "community benefit fund" given in the DECC Guidance, i.e. "voluntary payments from an onshore wind developer to the community, usually provided via an annual cash sum". It does not fall within the definition of "socio-economic community benefits", i.e. "job creation, skills training, apprenticeships, opportunities for educational visits and arranging awareness if climate change". Nor does it fall within "community investment", because it is clear that this category involves shared ownership, i.e. "where a community has a financial stake, or investment in the scheme", which is not the case in a community benefit fund in which the community share in a benefit not ownership. There is nothing in the Guidance to suggest that a donation which falls within "community benefit funds" is restricted to a donation from so-called "commercial" developers.

43. That the community benefit fund in this case is distinct from the other socio-economic benefits (some of which *are* material planning considerations) was recognised by Resilient Severndale in its Summary Grounds of Opposition to Mr Wright's judicial review, where it was said:

> "12. By letter of 15 July, [Resilient Severndale] confirmed:
>
> - The project would be brought forward by a community benefit society.
>
> - Separately to this, £500,000 would be donated to the local community over a period of 20 years.
>
> [Resilient Severndale] confirmed on 7 August 2015 that it would accept a condition securing the first of the above. Only this matter, not the community fund, is covered by condition 28 which the Committee elected to impose. In this letter [Resilient Severndale]… challenged the approach of the officers to date in failing to refer properly to the social and economic benefits of the project.

> 13. It is important to be aware that throughout the application process there was a clear distinction made between:
>
> (a) the establishment of a community investment scheme; and
>
> (b) the annual community donation.
>
> 14. In this way the Committee were being directed to clear and demonstrable social and economic impacts on the local community (in this case beneficial) on the understanding that they, the Committee members, were entitled to take these benefits into account."

44. Therefore, from its letters of 15 July and 7 August 2015, and from its pleading in the judicial review, Resilient Severndale's offer was clear, i.e. a community benefit fund donation distinct from the other benefits of the development. In my view, that correctly recognised the reality that the donation to the community benefit fund was outside the "socio-economic benefits" of the project and was, as the DECC Guidance confirmed, outside the scope of material planning considerations. Given the nature of the offer, it is unsurprising that the First Officer's Report advised the Committee that the community benefit fund was not a material consideration (see paragraph 18 above).

45. I add for the sake of completeness, that neither does the fund fall within section 70(4) of the 1990 Act (see paragraph 26 above). That sub-section was added by the Localism Act 2011, as part of a suite of planning provisions which included the NPPF. It set out "local finance considerations" which are to be treated as material considerations for planning purposes. Of course, notwithstanding a failure of such consideration to comply with the Newbury criteria, Parliament through statute, unlike the executive through policy, could do that. It is notable, however, that Parliament has not amended those provisions to include a community benefit fund donation, by whomever made, as such a material consideration.

46. Second, at a higher level, although the DECC Guidance is not planning policy, even planning policy cannot convert something immaterial into a material consideration for planning purposes. Mr Kingston submitted that changing policy in relation to affordable housing resulted in a change of approach of the courts to accept affordable housing needs as a material consideration in, notably, Mitchell v Secretary of State for the Environment (1994) 69 P&CR 60. However, that was a very different case from this. As Saville LJ (with whom Balcombe LJ and Sir Roger Parker agreed) indicated (at page 62), it was uncontroversial that the need for housing in a particular area was a material consideration for planning purposes: Mitchell merely confirmed that there was no difference in principle between the need for housing generally, and the need for particular types of housing. Contrary to Mr Kingston's submission, I do not consider that Balcombe LJ's short judgment suggests otherwise. The issue was raised in the context of a challenge to an affordable housing policy, and whether that policy offended the Newbury criteria. Balcombe LJ, like Saville LJ (with whom he agreed, and said that his observations did no more than elaborate Saville LJ's leading judgment), merely confirmed that the need for affordable housing was a matter properly relating to the character and/or use of the land. That is one of the Newbury

criteria. In my view, Mitchell is firmly based on conventional principles concerning the character and use of land, and did not affect the approach to material considerations.

47. Mr Kingston frankly accepted that his reliance on a review of the affordable housing cases "maybe goes too far" (paragraph 19 of his skeleton argument). In my view, the affordable housing cases do not assist Mr Kingston's cause: and, certainly, they do not support the proposition that, in considering whether a matter which does not satisfy the Newbury criteria can be treated as a material consideration, the court can consider how such a matter is treated by the executive government in its policy documents.

48. In any event, whilst it is true that both paragraph 97 of the NPPF and the PPG encourage the use of renewable energy, and particularly community-led initiatives in that regard, neither encourage unrestricted gifts of money to the community; and, as Dove J said at [54] of his judgment, neither suggests that, where a proposed development is community-led, it is unnecessary to examine contributions associated with it to assess whether they satisfy the legal requirements of being a material consideration in the planning decision, i.e. the Newbury criteria.

49. Both Mr Cairnes and Mr Kingston referred to the "policy contradiction" inherent in Dove J's judgment, which (it is submitted) requires a planning decision-maker to ignore relevant Government policy encouraging renewable energy and, particularly, renewable energy projects which are community-focused and community-led. However, in my view, there is no such contradiction or problem. The DECC Guidance is not part of the planning regime; nor is the Sustainable Communities Act 2007 or the Infrastructure Act 2015, which Mr Kingston also relied upon in support of the contention that the community involvement in projects is generally encouraged. In any event, the planning regime is used to considering, in the same decision-making process, various material policies that may pull in different directions. In respect of any proposed development, the adverse impact on one policy may have to be balanced against the policy benefits elsewhere in the regime. There is no doubt that a policy that encourages community involvement in wind farm development may be a material consideration; but it is only material if and insofar as it complies with the Newbury criteria. Where it does, then it is for the planning decision-maker to give it the weight that it considers appropriate.

50. Turning to those criteria, where a financial contribution that is not a material consideration is put forward as part of an application for proposed development, it is sometimes said that that is an attempt to "buy" planning permission. In my view, that terminology (or even more pejorative terms such as "bribe") is generally unhelpful. In respect of materiality, the proper focus is upon the Newbury criteria. No matter how well-intentioned the proposed donor might be (and I accept that, here, Resilient Severndale is well-intentioned), and no matter how publicly desirable such a donation might be (and I accept that, here, the proposed community benefit fund would benefit the community), such a donation will not be material for planning purposes unless it satisfies those criteria.

51. As I have indicated (paragraph 28(ii) above), a planning purpose is one which relates to the character or use of the land. It is proposed that the donation by the developer here will be put into a community benefit fund, administered by local people for the

benefit of the community, but without any other restriction, e.g. a restriction to use it for a planning purpose. I have set out some of the beneficiaries of the similar fund set up in respect of the St Briavels Wind Farm (see paragraph 22 above). I accept that all these are worthy community causes, but the provision of waterproofs for young people, and lunch for older people, do not seem to address any obvious planning purpose. As Dove J found (at [48] of his judgment), "beyond being of some benefit to the local community, as recognised or defined by the local people administering the fund, there is no limitation on how the money might be used".

52. Nevertheless, Mr Cairnes and Mr Kingston submitted that "materiality" is a broad concept, the categories of which are never closed. This fund would benefit the community as identified by those responsible for its distribution – and, in that limited sense, contribute to the robustness or "sustainability" of that community.

53. However, although the concept of materiality may be broad, it is not without limit; and the "categories" of materiality as set out in Dove J's judgment, to which Mr Cairnes and Mr Kingston referred (e.g. matters which "ameliorate or address some impact on social or physical infrastructure" or "address some adverse land use consequences of the grant of permission", or an "off-site contribution related to a planning impact") are, in reality, merely different applications of the Newbury criteria.

54. Mr Kingston, relying upon R (Welcome Break Group Limited and Others) v Stroud District Council [2012] EWHC 140 (Admin) ("Welcome Break") and Richard Verdin trading as the Darnhall Estate v Secretary of State for Communities and Local Government [2017] EWHC 2079 (Admin) ("Verdin"), submitted that the community benefit fund donation is for a planning purpose because it is "the positive effect of a constraint on the operation of the development". It is "simply the beneficial financial result of constraining the development to operate only for the benefit of the community" (paragraph 10 of his skeleton argument). It is therefore, he submits, similar to Welcome Break, where the development was constrained to operate in a way that benefited local employment and the sale of locally sourced food; and to Verdin, where conditions constrained the construction of the development by requiring the use of small local building firms and using local procurement initiatives.

55. However, in my view, Welcome Break and Verdin are of no assistance to Mr Kingston, each being very different from this case on their facts. The planning obligation relating to local food resourcing and local employment in Welcome Break was clearly, as found by Bean J (as he then was), directly related to the use of the land and the development; as was the condition relating to the use of local building firms in Verdin. In this case, as I have described, it is envisaged that the donation will or may fund community causes which have no possible planning purpose or relation to the proposed development.

56. Nor is R (Copeland) v London Borough of Tower Hamlets [2010] EWHC 1845 (Admin) or R (Working Title Films Limited) v Westminster City Council [2016] EWHC 1855 (Admin), upon which Mr Kingston also relied, of any more help to his cause. Mr Kingston relied upon these cases to show that social factors can be material in the planning context: the former concerned the relationship between a fast-food take-away and a school, and the latter the provision of a community hall as part of a large development in which planning permission was granted on the basis that "the

level of social and community uses and public parking significantly enhances the development". However, as I have described, community and social benefits may, in their proper place, be in favour of the grant of planning permission. But neither case suggests that the Newbury criteria do not apply to such benefits.

57. Finally, Mr Kingston submitted that the fact that the operation of a community wind turbine, for the financial benefit of the community through a community benefit fund, is in itself sufficient for that benefit to be a material consideration, because, in addition to his other arguments (which I have dealt with above), it fulfils the clear planning purpose of improving the sustainability of communities, and/or, for the community generally, it ameliorates the adverse (visual and aural) impact of the wind turbine on the community. However, this is merely a recasting of the argument that any matter which benefits the community is a material consideration for planning purposes; and it would apply equally to a community benefit fund donation offered by a "commercial" wind farm developer as much as a "community" developer. I have already dealt with the substance of that argument.

58. In my view, for the reasons I have given, Dove J, who referred to and applied the relevant authorities, was right to proceed on the basis that the nature of the community benefit fund donation, and the vehicle it was proposed would provide it, were not such as to preclude examination of the contributions associated with it to see whether they satisfied the legal requirements of being a material consideration in the planning decision. He was entitled to conclude that "the community donation is an untargeted contribution of off-site community benefits which is not designed to address a planning purpose" (see [55] of his judgment). He was also entitled to conclude that there is "no real connection between the development of a wind turbine and the gift of monies to be used for any purpose which appointed members of the community consider their community would derive benefit" (see [56]). Indeed, he was in my view, undoubtedly right to draw such conclusions: and to conclude that, consequently, the Council was not entitled to take into account as a material consideration the offer of the community benefit fund donation made as part of Resilient Severndale's proposal, as it did.

Conclusion

59. Although, out of deference to the arguments put before this court, I have set out my own reasons for upholding the judge below, in my view Dove J's conclusions were correct, essentially for the reasons he gave.

60. I would dismiss the appeals.

Lord Justice Davis :

61. In my view, Mr Cameron QC put his finger on the real point when he said that the question here is not whether the proffered benefits in question were *desirable*: it is whether (in planning terms) they were *material*.

62. The Appellants were not, for example, really able to explain why a 4% figure by way of community donation was chosen to be put forward. Presumably it was, at least in part, calculated that such a figure would be attractive to the planning authority. But the implication is that a corresponding application offering, say, 5% would have been

still more likely to prevail; whereas a planning application making no such offer at all possibly might have failed. These points of themselves seem to me to cast grave doubt on whether such a proposal was in truth integral to the planning application, as the Appellants sought to say, and on whether the proposal was material in a planning sense.

63. Nor can I see any principled basis for departing from a proper application of the Newbury approach in a case such as the present. The fact that desirable objects (renewable and sustainable energy) and worthy causes (benefits to the community) are involved cannot of themselves mandate a departure from usual principles with regard to material considerations. In any event, in the present case this ultimately in substance was to be a commercial development.

64. I do not propose to say more. I agree that the appeals should be dismissed for the comprehensive reasons given by Hickinbottom LJ in his judgment. I also agree with the judgment of Dove J in the court below.

Lord Justice McFarlane :

65. I also agree.