Renewable energy developers must tighten up on planning obligations (Good Energy Generation Ltd v Secretary of State for Communities and Local Government and another)

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Planning analysis: Following the judgment in Good Energy Generation Ltd, Stephen Whale, a barrister at Landmark Chambers, says developers will have to pay more attention to the precise nature and drafting of their proposed community benefit planning obligations if they are to be taken into account and afforded weight in the decision-making process.

Good Energy Generation Ltd v Secretary of State for Communities and Local Government and another [2018] EWHC 1270

What are the practical implications of this case?

Developers, especially wind farm and other renewable energy developers, will in future have to provide community benefit section 106 planning obligations that are more certain, more closely connected to the proposed development and related to genuine community-led initiatives If the obligations are to stand a better chance of meeting the three tests in regulation 122 of the Community Infrastructure Levy Regulations 2010, SI 2010/948 (CIL Regulations) or of being taken into account as material considerations.

Decision-makers (be they local planning authorities, inspectors or the Secretary of State) are likely to afford no weight to such planning obligations if they are entirely discretionary, nebulous and remote from the proposed development in the sense of lacking connection with it or which have not been explained to the local community.

Faced with the judgment in this case, and the parallel judgment in *Forest of Dean District Council and another v R (on the application of Wright)* [2017] EWCA Civ 2102, developers will have to pay more attention to the precise nature and drafting of their proposed community benefit planning obligations if they are to be taken into account and afforded weight in the decision-making process. Paradoxically, some developers may instead elect to abandon certain proposed planning obligations and take the risk that they can obtain planning permission without them.

What was the background?

The developer applied to Cornwall Council (the council) for planning permission for a wind farm development comprising up to 11 wind turbines on land south of Bude, close to the Cornwall Area of Outstanding Natural Beauty and the Heritage Coast. The council refused the application, resulting in the developer appealing and the Secretary of State recovering the appeal for his own determination. The developer provided a unilateral undertaking under section 106 of the Town and Country Planning Act 1990, which provided for financial contributions to a community benefit fund, a community investment scheme and a local tariff. The Secretary of State, like the inspector before him, concluded that these three planning obligations did not meet the three tests in regulation 122 of the CIL Regulations and that, moreover, they were immaterial considerations. He afforded them no weight, and dismissed the appeal. The High Court challenge to the Secretary of State's decision focused on his approach to the three planning obligations. In the course of the proceedings, the Court of Appeal in *Wright* concluded that a community benefit fund in another wind turbine case was an immaterial consideration. The developer in the *Good Energy* case abandoned its reliance upon that particular planning obligation in consequence, leaving the argument as to the community investment scheme and the local tariff.

What did the court decide?

The court decided that the inspector and the Secretary of State were entitled to conclude that no weight could be attached to the obligations relating to the community investment scheme or the local tariff in that they were not material considerations which complied with regulation 122 of the CIL Regulations. The community investment scheme was not available from the outset of the development, in that it was to be established within six months of the exporting of electricity to the National Grid on a commercial basis. None of the details of the community investment scheme had been disclosed and that would happen only when the details were eventually published.

As an investment opportunity, it could have been made available to institutional investors. The lack of specific details, combined with uncertainty about the scheme's commencement and long-term future, meant that the connection between it and the development was 'remote and uncertain' rather than real. It could not properly be described as community ownership or a community-led initiative. Rather, it was merely a potential investment opportunity. The local tariff (a

scheme whereby eligible persons would receive at least a 20% reduction in electricity bills) was entirely discretionary and, even if it was introduced, it could be withdrawn at any stage. The figures chosen by the developer in terms of reductions in bills were not explained or justified by reference to the development. It was a 'nebulous proposal,' with no evidence that it was a community-led initiative. It was 'essentially an inducement to make the proposal more attractive to local residents and to the local planning authority.'

The court also rejected a second ground of challenge, which amounted to the contention that the Secretary of State had failed properly to take into account aspects of a development plan policy and a supplementary planning document. Permission to appeal was refused.

Just before judgment was handed down in the *Good Energy* case, the Supreme Court granted permission to appeal in *Wright*. It follows that the Supreme Court will revisit the issue as to whether or not the proposed community benefit fund in that case is a material consideration. No doubt it will discuss material considerations in a planning context more generally.

Stephen has an extensive practice in all aspects of planning and environment law, local government law, highway law, licensing law and public law. He regularly advises and represents developers, local authorities, interest groups, government agencies and the Secretary of State. Stephen has a great deal of experience at planning inquiries and hearings, as well as development consent order examinations, together with all court levels from the magistrates' court up to the Supreme Court. He has many reported cases to his name and has been highly ranked in the leading directories for both planning and licensing over many years. In Good Energy, Stephen represented the first defendant.

Interviewed by Kate Beaumont.

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