Neutral Citation Number: [2013] EWHC 751 (Admin)

Case No: CO/10866/2012

**IN THE HIGH COURT OF JUSTICE**
**QUEEN'S BENCH DIVISION**
**ADMINISTRATIVE COURT**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15/04/2013

**Before :**

**JOHN HOWELL QC**
Sitting as a Deputy High Court Judge

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**Between :**

**The Queen**
**On the application of**

| | |
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| **RWE Npower Renewables Limited** | **Claimant** |
| **- and -** | |
| **Milton Keynes Borough Council** | **Defendant** |
| **-and-** | |
| **Ecotricity (Next Generation) Limited** | **Interested party** |

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**Mr Gordon Nardell QC and Mr James Burton** (instructed by **Eversheds LLP**) for the **Claimant**
**Mr Richard Harwood QC** (instructed by **Richard Buxton**) for the **Defendant**

Hearing dates: 28 February 2013

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# Approved Judgment

**John Howell QC :**

Introduction

1. Wind turbines generate passionate argument as well as energy. For some they are an indispensable means of obtaining energy from a renewable source to meet this country's requirements in a sustainable way. For others they provide only an intermittent supply of energy at too great a cost. Some object to what they perceive to be, or fear will be, the incongruous intrusion of wind farms in the landscape; others anticipate that such development will be, or find that it is, attractive or at least an acceptable additional element in the countryside. The local impact which large wind turbines have on residential amenity may also be perceived differently: some find them, or fear that they will be, visually overbearing or intrusively noisy; others may not. Such differences of opinion inevitably generate disputes about whether or not planning permission should be granted for their construction.

2. This claim for judicial review seeks to impugn the "Wind Turbines Supplementary Planning Document and Emerging Policy"(**"the Wind SPD"**) that was adopted by Milton Keynes Borough Council on July 24th 2012. The SPD contains an "Emerging Policy" that planning permission will be granted for proposals to develop wind turbine renewable energy sources unless, *inter alia*, any turbine generator over 25m in height is not separated from residential premises by at least a certain minimum distance which varies according to its height. Planning permission will still be granted even if the relevant minimum distance is not observed if the owners and occupiers of all the residential premises within it agree to the wind turbine's construction. The "Emerging Policy" does not provide, however, that planning permission will be refused if such conditions are not met. The "Emerging Policy" also prescribes certain minimum distances to be observed between a turbine generator and bridleways, public footpaths and high pressure fuel lines. If the "Emerging Policy" in the Wind SPD is valid, it would rank as a material consideration in determining any application for planning permission for a wind turbine in the Borough.

3. This claim for judicial review is brought by RWE Npower Renewables Limited. That company develops and operates wind energy schemes. It has two proposals for wind farms in the Borough. It is concerned about the application of the separation distances in the "Emerging Policy" to its current proposals. But it is also concerned about the wider significance of the emergence of policies, such as this, which identify minimum separation distances from other places for wind turbines regardless of their actual impact in any particular case on them. It considers that, if the "Emerging Policy" is valid, other local planning authorities in England may adopt similar policies that will, in practice, put any proposal at risk of rejection on arbitrary grounds and nullify national guidance which encourages the development of renewable energy. In the Claimant's opinion there was no objective justification for the minimum separation distances proposed in the "Emerging Policy" and the "evidence base" relied on by the Council in support of its policy is highly contentious. But, as Mr Gordon Nardell QC, who appeared on behalf of the Claimant, made plain, those are not matters which the Claimant was inviting this court to consider.

4. The Claimant seeks to impugn the Wind SPD on the basis that it could not have been, and was not, lawfully adopted by the Council on four main grounds.

    i) The Wind SPD was adopted as a "supplementary planning document". The Claimant contends that the Council had no power to do so. The Wind SPD had to be treated, so the Claimant submits, as a "development plan document". Such a document could only have been adopted by the Council if it had survived a more rigorous examination than that to which a "supplementary planning document" has to be exposed before it may be adopted. The Wind SPD was not subjected to that more rigorous examination.

    ii) Secondly, if the Wind SPD might otherwise have been adopted lawfully as a "supplementary planning document", the Claimant nonetheless contends that it could not lawfully have been adopted by the Council given that, so the Claimant submits, the "Emerging Policy" in it conflicts with the adopted development plan for Milton Keynes.

    iii) Thirdly, the Claimant contends in any event that, when preparing the Wind SPD, the Council failed to have regard to national policies and advice applicable to wind turbine development which is contained in guidance issued by the Secretary of State as it was required to do.

    iv) Finally, even if the Wind SPD might have been lawfully adopted as a "supplementary planning document" notwithstanding these other objections, the Claimant contends that in all the circumstances the Council was obliged to have exercised its discretion to treat it instead as a "development plan document", rather than as a "supplementary planning document", or failed to have regard to the Secretary of State's guidance which indicated that it should have done.

5. I emphasise at the outset, therefore, that this case is not about the merits or demerits of the development of wind turbines. Nor is it about whether in this case the Council has discharged the requirement that a "supplementary planning document" must contain a reasoned justification for the policies it contains. Indeed Mr Nardell disclaimed any challenge to the rationality of the reasoned justification for the "Emerging Policy" contained in the Wind SPD and did not contend that it was a policy no reasonable authority could have adopted in the circumstances. This claim for judicial review is thus concerned only with the legality, not with the merits, of the Wind SPD.

6. In this judgment I shall deal with matters in the following order:

| | *Paras* |
|---|---|
| The legal background | |
| (i) the development plan and "local development documents" | [8]-[15] |

(ii) the manner in which "local development documents" are prepared and may be adopted or approved [16]-[20]

(iii) which documents are "development plan documents" and which are "supplementary planning documents" [21]-[28]

(iv) obtaining coherent guidance from "local development documents" [29]-[35]

Policies for wind turbines in the adopted local plan and the "Emerging Policy" in the Wind SPD [36]-[47]

Whether the Wind SPD was a "development plan document", a "supplementary planning document" or some other type of "local development document"

(i) submissions [48]-[49]

(ii) the general function of a "supplementary planning document" and its definition in the 2012 Regulations [50]-[61]

(iii) the requirements for a document to be a "supplementary planning document" [62]-[64]

(iv) whether the Wind SPD was a document of a description falling within regulation 5(1)(a)(i) of the 2012 Regulations [65]-[70]

(v) whether the Wind SPD contains a development management policy falling within regulation 5(1)(a)(iv) of the 2012 Regulations [71]-[77]

(vi) whether the Wind SPD is a document of a description falling within regulation 5(1)(a)(iii) of the 2012 Regulations [78]-[82]

(vii) conclusion [82]

The alleged conflict with the adopted development plan

(i) submissions [84]-[95]

(ii) this Court's function [96]-[106]

(iii) the proper construction of Policy D5 in the adopted development plan [107]-122]

(iv) whether the "Emerging Policy" was in conflict with the adopted development plan [123]-[151]

Whether the Council failed to have regard to national policies and advice contained in guidance issued by the Secretary of State

(i) introduction [152]-[153]

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(iii) consideration [160]-[189]

Whether the Council was obliged to exercise a discretion to treat the Wind SPD as a "development plan document" and whether it failed to take into account the Secretary of State's guidance in not doing so

(i) submissions [190]-[192]

(ii) whether a local planning authority has a discretion to treat a "local development document" as a "development plan document" when it is not required to do so [193]-[197]

(iii) whether any discretion the Council had to treat the Wind SPD as a "development plan document" was unlawfully exercised [198]-[202]

A summary of my conclusions [203]-[218]

Annex: relevant guidance issued by the Secretary of State


## THE LEGAL BACKGROUND

7. As will already be apparent from my summary, the Claimant's case depends in part on understanding what documents are, or may be treated as being, "development plan documents" or "supplementary planning documents" and what requirements such documents have to satisfy before they can be adopted by a local planning authority. To obtain such an understanding requires an exploration of some of more obscure parts of the labyrinthine scheme governing planning in England. I propose initially simply to outline the main relevant features of this scheme by way of background to facilitate that understanding, exploring some of the more obscure aspects only when dealing with the contentions of the parties on the issues which this claim for judicial review raises.

### *(i) the development plan and "local development documents"*

8. As is well known, applications for planning permission in England fall to be determined in accordance with the "development plan" unless material considerations indicate otherwise: see section 70 of the Town and Country Planning

Act 1990; section 38(6) of the Planning and Compulsory Purchase Act 2004 ("**the 2004 Act**").

9. The "development plan" has been a central feature of the system of development control since the Town and Country Planning Act 1947. The 2004 Act introduced a new regime for the adoption of development plans. But it also provided, for the first time, a framework for the adoption of other, local planning documents. Before the 2004 Act, local planning authorities had in practice adopted various forms of supplementary planning guidance to assist in the determination of planning applications. The 2004 Act provided for the first time a procedure for the adoption by local planning authorities of such other planning guidance. This regime governs what are referred to, collectively, as "local development documents". (These are sometimes referred to as "LDDs".)

10. The 2004 Act has been subsequently modified by, among other enactments, the Planning Act 2008, the Local Democracy, Economic Development and Construction Act 2009 and the Localism Act 2011 and it is supplemented by regulations made by the Secretary of State under it.

11. The local planning authority's "local development documents" must (taken as a whole) set out the authority's policies (however expressed) relating to the development and use of land in their area[1].

12. It is important to note, however, that "local development documents" fall into one of two categories in the 2004 Act: those which are, and those which are not, "development plan documents" (sometimes referred to as "DPDs"). Only "development plan documents" will form part of "the development plan" in accordance with which planning applications are to be determined unless material considerations indicate otherwise. Other "local development documents" can only constitute a material consideration when considering planning applications.

13. Thus, under the 2004 Act, "the development plan" in England, in areas outside Greater London, includes (i) any relevant "regional strategy" that the Secretary of State has; (ii) the local planning authority's "development plan documents" (taken as a whole) which have been adopted or approved in relation to that area, and (iii) any "neighbourhood development plan" made by that authority: see section 38(3) of the 2004 Act.

14. The 2004 Act also provided that the existing development plan adopted under the previous regime was to remain part of the development plan for a transitional period of three years. However the Secretary of State was given power to specify in a direction policies in that existing development plan that would continue to form part of the "development plan" until, for example, a new policy contained in a "development plan document" was adopted or approved: see paragraph 1 of Schedule 8 to the 2004 Act. In many areas, therefore, of which Milton Keynes is one, the "development plan" still includes policies from the old, adopted development plan.

[1] see section 17(3) of the 2004 Act.

15. Regional strategies, which were only introduced as part of the "development plan" by the Local Democracy, Economic Development and Construction Act 2009, are now being phased out under section 109 of the Localism Act 2011. Subject to the temporary retention of policies in an old, adopted development plan as part of it, therefore, the "development plan" will then comprise the local authority's "development plan documents" and any neighbourhood plan it has made.

***(ii) the manner in which "local development documents" are prepared and may be adopted or approved***

16. There are significant differences in the procedures governing the adoption of "development plan documents" and those governing other "local development documents", reflecting the different status they have in the determination of planning applications once adopted.

17. Every "development plan document" has to be submitted by the local planning authority to the Secretary of State for independent examination by a person appointed by him. Opportunities must be given to those seeking to change such documents to appear before, and to be heard by, the person carrying out that examination. That person is required to determine whether such a document complies with certain specified requirements and "is sound". He must then make recommendations to the local planning authority in the light of that examination[2]. The local planning authority may only adopt a "development plan document" following that examination and, broadly speaking, it can only adopt it in accordance with the recommendations of the person who has conducted that examination and with such modifications as do not materially alter the policies in the document recommended[3].

18. By contrast a local authority has much greater flexibility with respect to the adoption of other "local development documents". It may adopt a "local development document" (other than a "development plan document") either as originally prepared or as modified so as to take account of any representations made in relation to the document or any other matter which it thinks relevant[4].

19. The Town and Country Planning (Local Planning) (England) Regulations 2012 ("**the 2012 Regulations**") make provision governing the preparation and adoption of "supplementary planning documents". This is a category of "local development document" that is the creation of the Regulations. It is not one created by the primary legislation. It is a category which does not include any "development plan document". But it is not a category that includes all "local development documents" that are not "development plan documents". For example, such "supplementary planning documents" do not include the statement of community involvement, describing the authority's policy for the involvement of the public in decisions in development control and on "local development documents", that the authority must prepare under section 18 of the 2004 Act (which is deemed by that section to be "a local development document")[5].

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[2] see section 20 of the 2004 Act.
[3] see section 23(2)-(4) of the 2004 Act.
[4] see section 23(1) of the 2004 Act.
[5] see section 18(3) of the 2004 Act.

20. Before adopting any "supplementary planning document", the local planning authority must prepare a statement setting out the persons whom it consulted when preparing that document and how the main issues which those persons raised have been addressed in it. The authority must then give the public an opportunity for at least four weeks to make representations on the "supplementary planning document" in the light of that statement[6]. As soon as reasonably practicable after a "supplementary planning document" has been adopted, the local planning authority must make available that document and an "adoption statement" that specifies *inter alia* any modifications to the document which it has made to take account of any representations made to it or any other matter it thought relevant[7].

***(iii) which documents are "development plan documents" and which are "supplementary planning documents"***

21. The Secretary of State has prescribed documents which "*are to be prepared*" as "local development documents" in regulation 5(1) of the 2012 Regulations. They are:

> **"(a) any document prepared by a local planning authority individually or in cooperation with one or more other local planning authorities, which contains statements regarding one or more of the following -**
>
> **(i) the development and use of land which the local planning authority wish to encourage during any specified period;**
>
> **(ii) the allocation of sites for a particular type of development or use;**
>
> **(iii) any environmental, social, design and economic objectives which are relevant to the attainment of the development and use of land mentioned in paragraph (i); and**
>
> **(iv) development management and site allocation policies, which are intended to guide the determination of applications for planning permission;**
>
> **(b) where a document mentioned in sub-paragraph (a) contains policies applying to sites or areas by reference to an Ordnance Survey map, any map which accompanies that document and which shows how the adopted policies map would be amended by the document, if it were adopted."**

22. The documents which, "*if prepared, are to be prepared*" as "local development documents" are likewise specified in regulation 5(2). They are:

> **"(a) any document which-**
>
> **(i) relates only to part of the area of the local planning authority;**
>
> **(ii) identifies that area as an area of significant change or special conservation; and**

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[6] see regulations 12 and 13 of the 2012 Regulations.

[7] see regulations 11 and 14 of the 2012 Regulations and section 23(1) of the 2004 Act.

**(iii) contains the local planning authority's policies in relation to the area; and**

**(b) any other document which includes a site allocation policy."**

23. On behalf of the Council, Mr Richard Harwood QC submitted that regulation 5 of the 2012 Regulations does not define exhaustively those documents, in addition to a statement of community involvement, which a local planning authority may prepare and adopt as "local development documents". That is an issue to which I shall return. For the reasons given in paragraphs [56] to [60], I accept Mr Harwood's submission.

24. The Secretary of State also has power to prescribe "which descriptions of local development documents *are* development plan documents"[8]. He has exercised this power to prescribe as "development plan documents" any document of the description referred to in regulation 5(1)(a)(i), (ii) or (iv) or 5(2)(a) or (b) of the 2012 Regulations[9].

25. The fourth of the Claimant's main grounds (which I have set out in paragraph [4] above) depends on this prescription not being exhaustive so that a local planning authority has a discretion whether or not to treat other "local development documents" as "development plan documents". That is a further question to which I shall return. But, for the reasons given in paragraphs [193] to [197], a local planning authority has no such discretion once the Secretary of State exercised this power.

26. For present purposes it is also important to note that it is the documents specified as "development plan documents" by the Secretary of State in the 2012 Regulations which comprise what is referred to in those Regulations as the "local plan"[10]. It was decided to refer to them as the "local plan" apparently on the basis that "this term is more readily understood" than the term, "development plan documents", which is used in the primary legislation[11].

27. Regulation 2(1) provides, for the purpose of 2012 Regulations, that:

**""supplementary planning document" means <u>any document of a description referred to in regulation 5</u> (except an adopted policies map or a statement of community involvement) <u>which is not a local plan</u>".** (emphasis added)

28. There are two important points to be noted about this definition.

i) To be a "supplementary planning document" the document must be "of a description referred to in regulation 5" of the 2012 Regulations. A document that is not a document of a description referred to in regulation 5 cannot be a "supplementary planning document" for the purpose of the 2012 Regulations.

ii) Since any document of the description referred to in regulation 5(1)(a)(i), (ii) or (iv) or 5(2)(a) or (b) is a "local plan", it follows that the only document of a

[8] see section 17(7)(a) of the 2004 Act.
[9] see regulation 2(1) of the 2012 Regulations (in the definition of "local plan").
[10] see regulations 2(1) and 6 of the 2012 Regulations.
[11] see paragraphs [4.3] and [8.3] of the Explanatory Memorandum to the 2012 Regulations.

description referred to in that regulation (other than an adopted policies map or a statement of community involvement) that can be a "supplementary planning document" is a document of a description referred to in either regulation 5(1)(a)(iii) or regulation 5(1)(b).

***(iv) obtaining coherent guidance from "local development documents"***

29. The legislative scheme seeks to ensure that the various "local development documents" provide coherent guidance for those determining planning applications.

30. Thus, the "local development documents" "must be in general conformity with" any relevant regional strategy[12]. Further, when preparing "local development documents" (other than a statement of community involvement) a local planning authority "must have regard to" various matters[13]. These include (by virtue of section 19(2)(a) of the 2004 Act) "national policies and advice contained in guidance issued by the Secretary of State".

31. The Secretary of State has significant powers of intervention in relation to "local development documents" if he disagrees with the judgments of the local planning authority, in particular if they do not give sufficient weight to his guidance.

32. He may direct the local planning authority to modify such a document in accordance with his direction at any time before it adopts it and the authority cannot then adopt it until he gives notice that he is satisfied that it has complied with his direction[14]. (In the case of a "supplementary planning document", he can also direct the local planning authority to send it to him and not to adopt it until he has decided whether or not to intervene[15]). The Secretary of State may also direct the local planning authority to prepare a revision of a "local development document" in accordance with such timetable as he directs[16].

33. But the Secretary of State has further powers of intervention in the case of "development plan documents". If he considers that a local planning authority is failing or omitting to do anything which it is necessary for it to do in connection with the preparation, revision or adoption of a "development plan document", he can in effect do it himself, requiring any expenditure which he incurs to be reimbursed by the authority[17]. He may also direct the authority to submit such a document (or any part of it) to him for his approval and, in that event, the document (or the relevant part of it) has no effect unless it is approved by him (with or without modifications). He can also direct the local planning authority to withdraw such a document at any time after it has been submitted for independent examination and before it has been adopted[18].

34. Further, under regulation 8 of the 2012 Regulations:

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[12] see section 24(1) of the 2004 Act.
[13] see section 18(3) and 19 of the 2004 Act and regulation 10 of the 2012 Regulations.
[14] see section 21(1) and (2) of the 2004 Act.
[15] see regulation 16 of the 2012 Regulations.
[16] see section 26 of the 2004 Act.
[17] see section 27 of the 2004 Act.
[18] see section 21(4)-(9A).

> **"(2) A local plan or a supplementary planning document must contain a reasoned justification of the policies contained in it.**
>
> **(3) Any policies contained in a supplementary planning document must not conflict with the adopted development plan.**
>
> **(4) Subject to paragraph (5), the policies contained in a local plan must be consistent with the adopted development plan.**
>
> **(5) Where a local plan contains a policy that is intended to supersede another policy in the adopted development plan, it must state that fact and identify the superseded policy."**

35. The 2004 Act makes provision for the resolution of some conflicts if nonetheless they occur. Thus section 38(5) provides that:

> **"If to any extent a policy contained in a development plan for an area conflicts with another policy in the development plan the conflict must be resolved in favour of the policy which is contained in the last document to be adopted, approved or published (as the case may be)."**

Section 17(5) provides that:

> **"If to any extent a policy set out in a local development document conflicts with any other statement or information in the document the conflict must be resolved in favour of the policy."**

## POLICIES FOR WIND TURBINES IN THE ADOPTED LOCAL PLAN AND THE "EMERGING POLICY" IN THE WIND SPD

36. The local development plan for Milton Keynes adopted under the regime that prevailed before the 2004 Act was the Milton Keynes Local Plan 2001-2011. That plan was adopted by the Council in December 2005.

37. On October 24th 2008 the Secretary of State gave a direction under paragraph 1 of Schedule 8 to the 2004 Act listing the policies in that plan which would remain part of the "development plan" for the Borough until a new policy, which expressly replaces it, is published adopted or approved. The adopted local plan contained two policies, which were thus preserved for this period, specifically mentioning renewable energy including wind turbines.

38. Policy D4 provided that all new development exceeding 5 dwellings (in the case of residential development), or which incorporated gross floorspace in excess of 1,000m$^2$ (in the case of other development), would be "required to include...renewable energy production eg external solar collections, wind turbines or photovoltaic devices". The intention was that the renewable energy element should provide at least 10% of building energy use.

39. Policy D5 was a more general policy dealing with proposals to develop renewable energy. It provided that:

"Planning Permission will be granted for proposals to develop r enewable energy resources unless there would be:

i) significant harm to the amenity of residential areas, due to noise, traffic, pollution or odour;

ii) significant harm to a wildlife species or habitat;

iii) unacceptable visual impact on the landscape.

Wind turbines should, in addition, avoid unacceptable shadow flicker and electromagnetic interference and be sited at least 350m from any dwellings."

40. As counsel agreed, proposals for a wind turbine as a component part of a residential development exceeding 5 dwellings could not have been expected to meet any requirement to be sited at least 350m from any dwelling. Policy D5 did not apply, therefore, to such proposals.

41. A policy containing the provisions in Policy D5 first emerged in the second deposit version of the local plan in October 2002. As the Inspector who considered the draft local plan observed in his report on it in November 2004, wind turbines were then thought to be unlikely to be of very wide or general application in Milton Keynes and the Borough would possibly be unattractive for widespread commercial exploitation given moderate local mean wind speeds. The Plan stated that possible locations for wind turbines under Policy D5 included sites within the city (such as industrial premises distant from housing) or in rural areas with high wind speeds. In a witness statement filed on behalf of the Council, its Assistant Director of Planning Economy and Development, Mr Nicholas Paul Fenwick, states that when Policy D5 was formulated and adopted a typical onshore wind turbine would have been in the order of 50m in height to the tip of the blade.

42. Wind turbines have subsequently increased in height. This enables them to exploit the higher wind speeds that occur at a greater height. Moreover the larger the rotor diameter (and thus the larger the area swept by the blades) the more energy will be generated. A typical onshore turbine in a new wind farm is now in the order of 120m in height to the tip of the blade and that height is increasing.

43. The Wind SPD states that additional guidance was considered necessary given the increase in the number of submitted and anticipated wind farm applications, as well as the increase in the scale of wind turbines, since Policy D5 was written. It also states that there was evidence that updated guidance was required in relation to noise from wind farms. It concludes by stating that "having assessed the evidence for this SPD, it is considered appropriate to add the following emerging policy for wind turbines in the Borough".

44. The "Emerging Wind Turbine Policy" in the Wind SPD is in the following terms:

"1. Planning permission will be granted for proposals to develop wind turbine renewable energy sources, including wind turbines that act as a component of a more extensive development unless there would be:

(a) significant harm to the amenity of residential areas, due to noise, traffic, pollution or odour;

(b) significant harm to a wildlife species or habitat;

(c) unacceptable visual impact on the landscape;

(d) unacceptable shadow flicker and electro-magnetic interference; or

(e) a failure of the application to meet the minimum distance requirement under Section 2, subject to the exception in Section 3.

2. Requirements for Minimum Distance from Residential Dwellings

(a) The "minimum distance requirement" means the necessary minimum distance between the wind turbine generator and residential premises, as set out in sub-section (d).

(b) "Residential premises" means any premises the main purpose of which his to provide residential accommodation, including farmhouses.

(c) If a number of wind turbine generators are being built as part of the same project the minimum distance requirement applies to each wind turbine generator individually.

(d) If the height of the wind turbine generator is:

(i) 25m, the minimum distance requirement is 350m;

(ii) 100m, the minimum distance requirement is 1000m;

(iii) between 25m and 100m, the minimum distance requirement is pro-rata between (i) and (ii) above, according to its height; or

(iv) greater than 100m, the minimum distance requirement is projected between (i) and (ii) above, according to its height.

(e) The height of the wind turbine generator is measured from the ground to the end of the blade tip at its highest point.

(f) There is no minimum distance requirement if the height of the wind turbine generator does not exceed 25m.

(g) If planning permission is granted on the condition that the proposed wind turbine generator meets the minimum distance requirement under sub-section 2(d), the actual height of the wind turbine generator must not exceed the maximum height in relation to that minimum distance.

3. Exception

(a) The Local Authority may grant planning permission for the construction of a wind turbine generator which does not meet the minimum distance requirement under section 2(d) if the condition under sub-section (b) is met.

(b) The condition is that the owners and occupants of all residential premises which fall within the minimum distance requirement for the proposed wind turbine generator must agree in writing to the construction of the wind turbine generator.

(c) It is the duty of the authority to ensure that no written agreement is elicited by unlawful means and that all necessary written agreements have been received before planning permission is granted.

4. Requirements for Minimum Distance from Bridleways

That, as a starting point when assessing a site and its potential layout, a separation distance of four times the overall height should be the target for National Trails and Ride UK routes, or 200 metres, whichever is the greater. The negotiation process recommended in the Companion Guide to PPS 22 should indicate whether, in the particular circumstances of each site, these guidelines can be relaxed or need strengthening to minimise or eliminate any perceived potential difficulties.

5. Requirements for Minimum Distance from Public Footpaths

The minimum distance requirement is the fall-over distance (i.e. height of the wind turbine as defined in 2(e) above, plus 25%.

6. Safety requirements

Wind turbines must be shut down:

• when they have become iced. They must only restart when ice has been cleared as laid out in the recommendation in the Technical Annex of Planning Policy 22 and/or

• upon the request of any of the Emergency services, to allow access to the site(s) in the event of an accident or incident.

A separation distance of 1.5 times the height of the turbine from high pressure fuel lines shall apply."

45. The policy in section 1(a), (b), (c) merely reproduced in effect for proposals to develop wind turbine renewable energy sources what was in Policy D5 (i) (ii) and (iii) with respect to proposals to develop renewable energy sources generally. Section 1(d) reflected part of the last sentence of Policy D5 which was directed at wind turbines in particular.

46. There were two things which were new in section 1 of this policy when compared with Policy D5:

i) the inclusion of proposals to develop wind turbines that act as a component of a more extensive development that were dealt with under Policy D4; and

ii) section 1(e). Instead of providing that wind turbines should be sited at least 350m from any dwelling, section 1(e) introduced the minimum separation distances from residential premises for those turbine generators (whose height was 25m or more) varying according to the height of the generator set out in section 2 (subject to the exception in section 3).

47. In addition, in sections 4 to 6, the "Emerging Policy" specified new minimum distance requirements separating wind turbines from public footpaths and high pressure fuel lines and set out a new minimum distance target or guideline in respect of bridleways.

## WHETHER THE WIND SPD WAS A "DEVELOPMENT PLAN DOCUMENT", A "SUPPLEMENTARY PLANING DOCUMENT" OR SOME OTHER TYPE OF "LOCAL DEVELOPMENT DOCUMENT"?

### *(i) submissions*

48. On behalf of the Claimant, Mr Nardell QC submitted that the Wind SPD does not contain statements (falling within regulation 5(1)(a)(i) of the 2012 Regulations) regarding the development and use of land which the local planning authority wish to encourage during any specified period. It is, so he contended, a policy which is designed to discourage wind turbine development, effectively prohibiting its commercial development in the Borough. But, so Mr Nardell submitted, the Wind SPD was nonetheless a "development plan document". It was a document which contained statements (falling within regulation 5(1)(a)(iv) of the 2012 Regulations) regarding development management policies which are intended to guide the determination of applications for planning permission. He submitted that the "and" (in the phrase "development management and site allocation policies" in that subparagraph) should be read disjunctively; that a "development management policy" is policy in respect of the exercise of development control under Part III of the Town and Country Planning Act which is intended to guide the determination of applications for planning permission; and that that is precisely what the "Emerging Policy" is intended to be. It was thus a "development plan document" and could not be adopted as a "supplementary planning document".

49. On behalf of the Council, Mr Richard Harwood QC submitted that the Wind SPD was a document of a description falling within regulation 5(1)(a)(iii). As section 17(3) of the 2004 Act made plain, "local development documents" set out the authority's policies relating to the development and use of land in their area. "Supplementary planning documents" could contain policies (as regulation 8(3) of the 2012 Regulations referred to in paragraph [34] above demonstrated) provided they did not conflict with the adopted development plan. Indeed, as regulation 8(2) of the 2012 Regulations provided, "a supplementary planning document must contain a reasoned justification of the policies contained in it". It was thus no bar to the Wind SPD being a "supplementary planning document" that it contained policies. The policies it contained, so he submitted, were ones that set or reflected the environmental objectives which were relevant to the attainment of the development of land to provide wind turbines that the Council wished to encourage. Alternatively Mr Harwood submitted that the Wind SPD did not have to be treated as a "development plan document". The Wind SPD was not a document of a description falling within the other sub-paragraphs of regulation 5(1) or regulation

5(2) and regulation 5 did not exhaustively set out all the types of "local development document" there can be. The Wind SPD, so he submitted, provided a classic example of supplementary planning guidance to policies such as D4 and D5 in the Local Plan elaborating on what minimum distances there should be from residential dwellings and other places to a wind turbine depending on its size.

***(ii) the general function of a "supplementary planning document" and its definition in the 2012 Regulations***

50. The general function since the 2004 Act which the Secretary of State envisages a supplementary planning document serving is clear. The Secretary of State has seen such documents as normally adding further detail to policies in the development plan. He has thus seen them as providing further guidance on specific sites (as in master plans or in development briefs) or on specific issues (such as design)[19]. Specifically with respect to Renewable Energy, the Secretary of State considered that "under the new planning system, supplementary planning documents are intended to elaborate on the policies and proposals in the development plan documents"[20]. It appears that the Secretary of State still considers that this is the function of a "supplementary planning document" under the 2012 Regulations. As the Explanatory Memorandum to the 2012 Regulations put it (at [4.3]), "supplementary planning documents are a category of planning documents, not referred to in the 2004 Act, which supplement the policies in a local plan". It is on such statements that Mr Harwood relied for his contention that the Wind SPD performs the function which a "supplementary planning document" is intended to serve.

51. In my judgment the general function that a "supplementary planning document" may well be intended to serve does not provide much assistance in determining whether any document falls to be treated as such. It is of course true that a "supplementary planning document" cannot be one that constitutes a "development plan document". In that sense it can only supplement what may be contained in such a document; it cannot be a substitute for it. Nor can any policy it contains conflict with the adopted development plan given regulation 8(3) of the 2012 Regulations[21]. But that does not reveal whether a document should be classified as a "development plan document" nor whether, if it is not such a document, it can be adopted as a "supplementary planning document".

52. The 2012 Regulations introduced changes of some significance to the regulatory regime for "supplementary planning documents" that need to be borne in mind when considering earlier statements about their general function and what documents may now be adopted as such.

53. First, under the relevant previous regulations, the Town and Country Planning (Local Development)(England) Regulations 2004 ("**the 2004 Regulations**"), a document of a description falling within regulation 5(1)(a)(iii) of 2012 Regulations (which may now be a "supplementary planning document") was previously part of

[19] see eg PPS12 (2004) at [6.1]; the section on Supplementary Planning Documents in the Plan Making Manual (2004); and the definition of a Supplementary Planning Document in the Glossary to the National Planning Policy Framework (March 2012).

[20] see Planning for Renewable Energy A Companion Guide to PPS22 (2004) at [4.19].

[21] see paragraph [34] above.

the local authority's "core strategy". It was thus a "development plan document", not a "supplementary planning document", for the purpose of those Regulations[22]. Accordingly a document which previously could not have been a "supplementary planning document" may now be.

54. Secondly, under the 2004 Regulations, any "local development document" which was not a "development plan document", other than a statement of community involvement, was defined to be a "supplementary planning document" for the purpose of the 2004 Regulations[23]. Accordingly any "local development document" had to contain a title which indicated whether the document was a "development plan document" or a "supplementary planning document"[24]. These two categories of document together with the statement of community involvement, therefore, comprised all the "local development documents" a local planning authority could prepare and adopt. But, as noted in paragraph [28(1)] above, a document that is not a document of a description referred to in regulation 5 of the 2012 Regulations cannot now be a "supplementary planning document" for the purpose of the 2012 Regulations, even if it might otherwise be a "local development document". Mr Harwood's contention is thus that not every "local development document", which is not a "development plan document" or a statement of community involvement, must be a "supplementary planning document" for the purpose of the 2012 Regulations. In my judgment, for reasons given below, that contention is correct. It follows that, with the exception of a document of a description falling with regulation 5(1)(b) of the 2012 Regulations, a document which might previously have been treated as a "supplementary planning document" for the purpose of the 2004 Regulations cannot now be classified as such a document for the purpose of the 2012 Regulations.

55. These two changes mean that the only document which may now be a "supplementary planning document" is one that previously would have been a "development plan document" and those that could have been a "supplementary planning document" cannot be. While this does not necessarily make the statements about the general function which such a document is intended to serve wrong, it does indicate that simply considering whether a document serves that general function will not itself answer the question whether or not it is a "supplementary planning document".

56. As I have indicated, in my judgment Mr Harwood was right in his submission that not every "local development document", which is not a statement of community involvement or a "development plan document", must be a "supplementary planning document" for the purpose of the 2012 Regulations.

57. The documents which may be "local development documents" are defined in the primary legislation. In addition to any statement of community involvement (which is deemed to be a "local development document" by section 18(3) of the 2004 Act), the term "local development documents" is to be construed in accordance with section 17 of the 2004 Act: see section 37(2) of the 2004 Act. This is a somewhat

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[22] see regulations 7(a), 6(3) and 6(1)(a)(iii), and 2(1) (definition of supplementary planning documents) of the 2004 Regulations (as amended).
[23] see regulation 2(1) of the 2004 Regulations.
[24] see regulation 13(3) of the 2004 Regulations.

oblique method of definition since section 17 does not now contain a definition of a "local development document" as such. Section 17(8) merely provides that:

> **"A document is a local development document only in so far as it or any part of it –**
>
> **(a) is adopted by resolution of the local planning authority as a local development document;**
>
> **(b) is approved by the Secretary of State under section 21 or 27."**

This enables the local planning authority to make a document a "local development document" by adopting it as such. There is no requirement that it can only be a document that is also prescribed by the Secretary of State as being such a document.

58. As originally enacted, however, section 17(1) and (2), when taken with section 15(2)(a), of the 2004 Act, effectively provided that a "local development document" was one specified in the relevant authority's local development scheme as such; that the documents which had to be specified as such included (in addition to the statement of community involvement) any document that was of a description prescribed by the Secretary of State; but that such documents might also include such other documents as the authority thought appropriate. Section 17(1) and (2) of the 2004 Act were repealed, and section 15 was amended, by section 180 of the Planning Act 2008, in order to relieve a local planning authority of the obligation to list its "local development documents" in its local development scheme. Instead Section 180 of the 2008 Act also amended section 17(7) of the 2004 Act to give the Secretary of State power (under paragraph (za)) to prescribe

> **"which descriptions of documents are, or if prepared are, to be prepared as local development documents".**

This enabled the Secretary of State (a) to require certain documents to be prepared as local development documents (thus providing a minimum set of documents for the local development framework) and (b) to require other documents (if the authority decided to prepare them) to be prepared as "local development documents" that would have to comply with the requirements imposed with respect to such documents by the 2004 Act (thus restricting a local planning authority's discretion to adopt documents without such compliance). But section 17 of the 2004 Act as amended does not give the Secretary of State a power to prescribe which descriptions of documents <u>are</u> "local development documents" (as he has under section 17(7)(a) to specify which "local development documents" <u>are</u> "development plan documents"). Nor does it provide that a local planning authority may not prepare documents as "local development documents" other than those which the Secretary of State has prescribed under section 17(7)(za) and then adopt them (under section 23(1) of the 2004 Act). The amendments made in the 2008 Act do not appear to have been intended to deprive a local planning authority of the power which it had hitherto had to adopt such other documents as they thought appropriate as "local development documents" in addition to those which the Secretary of State required to be prepared as such.

59. In my judgment, therefore, provided a document fulfils a function which a local development document is intended to serve (as defined in section 17(3) of the 2004 Act), which is to set out the authority's policies relating to the development and use of land in its area, and provided it is adopted by the authority (as required by section 17(8)), it is a "local development document" for the purpose of section 17 of the 2004 Act. It need not be a document of a description prescribed by the Secretary of State which has to be prepared as a "local development document".

60. If a local authority prepares any document as a "local development document" that does not fall within the descriptions of documents referred to in regulation 5 of the 2012 Regulations, however, it cannot be a "supplementary planning document" for the purposes of those Regulations, since such a document has to be document of a description referred to in regulation 5[25]. This gives rise to consequences that may be regarded as surprising if the intention was merely to consolidate the 2004 Regulations as amended with respect to "supplementary planning documents" with minor amendments to improve clarity (as the Explanatory Memorandum to the Regulations appears to suggest). If a local planning authority decides to adopt such a document as a "local development document", it need not meet the requirements for public participation, and the substantive requirements, that a "supplementary planning document" set out in the 2012 Regulations has to comply with, for example that any policy it contains must not conflict with the adopted development plan. On the other hand the two changes made in the definition of a "supplementary planning document" referred to above (if deliberate and not a mistake) might be thought to give local planning authorities greater freedom to adopt certain "local development documents", something that might be regarded as consistent with the general changes introduced by the Localism Act 2011.

61. The fact that a document which is not referred to in regulation 5 of the 2012 may be adopted as a "local development document", however, does not assist the Council's case. As Mr Nardell submitted, the Council plainly intended to adopt the Wind SPD as a "supplementary planning document" under the 2012 Regulations. Accordingly it published an "adoption statement" under regulation 14 of those Regulations, as it was required to do for such a document. It did not adopt the Wind SPD merely as a "local development document" of some other description.

***(iii) the requirements for a document to be a "supplementary planning document"***

62. As explained in paragraphs [28] above, whether the Wind SPD could have been adopted as a "supplementary planning document" depends on whether the document is of a description referred to in regulation 5 (1)(a)(iii) of the 2012 Regulations (given that it plainly is not a document of a description referred to in regulation 5(1)(b)).

63. But, even if it is a document of that description, that is not necessarily sufficient for it to be classified as a "supplementary planning document". As regulation 5(1)(a) makes plain any document may contain statements regarding one of more of the matters referred to in sub-paragraphs (i), (ii), (iii) and (iv). If it contains a statement regarding one of the matters referred to in sub-paragraphs (i), (ii) or (iv), those matters form part of the "local plan" and accordingly the document must be treated

[25] see paragraphs [27]-[28] above.

as a "development plan document", even if it also contains statements regarding the matters referred to in sub-paragraph (iii).

64. Accordingly in my judgment, for the Wind SPD to be classified as a "supplementary planning document", it must contain a statement regarding the matters mentioned in subparagraph (iii) and no statement regarding the matters mentioned in the other sub-paragraphs of regulation 5(1). It must also not be a document of a description referred to in regulation 5(2), since such a document is also a "development plan document".

***(iv) whether the Wind SPD is a document of a description falling within regulation 5(1)(a)(i) of the 2012 Regulations***

65. Prima facie at least, the "Emerging Policy" in the Wind SPD is a document containing statements falling within sub-paragraph (i) of article 5(1)(a) regarding the development of land the Council wishes to encourage during the period for which the adopted local plan with respect to renewable remains in force. It contains a statement that "planning permission will be granted for proposals to develop wind turbine renewable energy sources" unless certain conditions are met.

66. In my judgement, however, the Wind SPD is not a document of a description referred in regulation 5(1)(a).

67. As Mr Harwood rightly pointed out, what all "local development documents", including "supplementary planning documents", contain are "policies" relating to the use and development of land. What regulation 5(1)(a) is thus concerned with are statements that contain policies, which are described in sub-paragraphs (i) to (iv). But in my judgment regulation 5(1) is not concerned with documents containing statements that merely repeat the policies already contained in the adopted local plan or in another "local development document" by way of background or for the sake of clarity. Those will already have been prepared and adopted. It is concerned with the preparation of policy statements that are not already contained in such documents. It is thus documents containing statements of such new policies which article 5(1)(a) requires to be prepared as "local development documents" in accordance with the 2012 Regulations.

68. True it is that regulation 5(1)(a) requires consideration of whether any document "contains statements regarding one or more of" the matters mentioned in the following sub-paragraphs. But, if this included statements regarding such matters which provide the background to, or justification for, the matters mentioned in those sub-paragraphs, the result would be absurd. For example, documents containing statements regarding any environmental, social, design and economic objectives (which fall within sub-paragraph (iii)) cannot avoid mentioning the development and use of land mentioned in sub-paragraph (i), since, if they did not do so, they could not describe how the objectives which they must refer to are relevant to the attainment of the development and use of land mentioned in sub-paragraph (i). If such a statement regarding the matters mentioned in sub-paragraph (i) brought the document within that particular sub-paragraph, that document would always have to be regarded as a "development plan document". If so, there could never be a "supplementary planning document", a result wholly inconsistent with the 2012 Regulations which regulate how such a document may be adopted.

69. Accordingly in my judgment it is irrelevant, when considering whether the "Emerging Policy" in the Wind SPD contains statements that provide encouragement for the development of land, that it effectively repeats whatever may already be in the adopted local plan in Policies D4 and D5. What is relevant is what in substance is new in the "Emerging Policy" (which I have described in paragraphs [46] and [47] above). Thus, section 1 of the "Emerging Policy", for example, does not provide any new statement regarding the development of land which the Council wishes to encourage. It is concerned with more detailed specification of the conditions which are relevant in the Council's view to the attainment of wind turbine development that is already encouraged in the adopted local plan during the period for which the relevant policies subsist.

70. Mr Nardell submitted, however, that the Wind Turbine SPD did not fall within regulation 5(1)(a)(i) for a different reason. That reason has nothing to do with whether or not the "Emerging Policy" in the Wind SPD was a "document of the description referred to in regulation 5(1)(a)(i)[26]. It concerned the effect of the specification of the conditions subject to which planning permission is to be granted. That, so Mr Nardell submitted, transformed a policy of encouragement of wind turbine development in the adopted local plan into one which in practice discourages it. If correct, that might be relevant to whether the "Emerging Policy" was in conflict with the adopted local plan and whether the Council had failed to have regard to guidance issued by the Secretary of State. But in my judgment it is irrelevant to whether the Wind SPD is a document of a particular description. That depends on what type of statements a document contains (as regulation 5(1)(a) makes plain), not on what the effect of such statements may be in practice[27].

***(v) whether the Wind SPD contains a development management policy falling within regulation 5(1)(a)(iv) of the 2012 Regulations***

71. Regulation 5(1)(a)(iv) of the 2012 Regulations is concerned with "development management and site allocation policies which are intended to guide the determination of applications for planning permission".

72. It was common ground that the "and" in this sub-paragraph must be read disjunctively. It would be sufficient, therefore, that a document contains development management policies which are intended to guide the determination of applications for planning permission. It need not contain any site allocation policies. I agree. Were it otherwise a document containing a simple development control policy, such as "development that harms the character and appearance of a conservation area will not normally be permitted", could not form part of the local plan for the purpose of the 2012 Regulations and become part of the development plan.

73. Mr Nardell submitted that in this context "development management" was simply another, and a perhaps less apparently negative, way of referring to development control. He submitted that, whatever else the "Emerging Policy" was, it was a

[26] see the definition of a "local plan" in regulations 2(1) and 6 of the 2012 Regulations.
[27] If it did depend on that effect, Mr Nardell's contention about the alleged effect of the "Emerging Policy" would in any event fail for the reasons given in paragraphs [197]-[201].

development control policy which was intended to guide the determination of applications for planning permission for wind turbines.

74. The difficulty with Mr Nardell's approach is that any policy which is intended to guide the determination of applications for planning permission is such a development control policy. If any such policy is a development control policy falling within regulation 5(1)(a)(iv), then so equally is any statement in a "local development document" regarding the matters referred to in regulation 5(a)(i), (ii) or (iii). Thus any statement regarding the development and use of land which the local planning authority wish to encourage, any statement regarding any environmental, social, design and economic objectives relevant to the attainment of such development and use of land, and any statement regarding the allocation of sites for a particular type of development or use might all be regarded as statements of development management policy which are intended to guide the determination of applications for planning permission. That result would mean that sub-paragraphs (i) and (ii) of article 5(1)(a) were otiose. This might not of itself be a particularly strong objection to Mr Nardell's submission, since it is plain that there are overlaps between various sub-paragraphs in regulation 5(1). For example a statement regarding the allocation of sites for a particular type of development or use (falling within regulation 5(1)(a)(ii)) might also be a statement regarding the development and use of land which the local planning authority wish to encourage during a specified period (falling with regulation 5(1)(a)(i)). Indeed it is hard to see why it would not be. But, if Mr Nardell's contention is correct, there could also never be a "supplementary planning document". That would be a result contrary to the manifest intention of the 2012 Regulations. Any "local development document" containing a statement of policy regarding the objectives mentioned in sub-paragraph (iii) of regulation 5(1)(a), that was relevant to the attainment of the development and use of land which the local planning authority wish to encourage, would inevitably be a development control policy intended to guide the determination of applications for planning permission regarding such development and use of land. It would thus fall within regulation 5(1)(iv) and be a "development plan document". It could never be a "supplementary planning document".

75. In my judgment the difference, between (a) documents containing statements regarding matters referred to in sub-paragraphs (i) to (iii) of regulation 5(1)(a) of the 2012 Regulations and (b) a document containing statements regarding a development management policy which is intended to guide the determination of applications for planning permission, is that the former are all connected with particular developments or uses of land which a local planning authority is promoting whereas the latter is concerned with regulating the development or use of land generally.

76. In this case the new parts of the "Emerging Policy" in the Wind SPD are all connected with a particular development that it is the Council's policy in its adopted local plan to encourage by granting planning permission, namely proposals to develop wind turbines. They are not concerned with regulating the development or use of land generally.

77. For those reasons in my judgment the new parts of the Emerging Policy in the Wind SPD do not constitute a document of a description referred to in regulation 5(1)(a)(iv).

***(vi) whether the Wind SPD is a document of a description falling within regulation 5(1)(a)(iii) of the 2012 Regulations***

78. Regulation 5(1)(a)(iii) applies to documents that contain statements regarding

> **"any environmental, social, design and economic objectives which are relevant to the attainment of the development and use of land" [which the local planning authority wish to encourage during any specified period].**

79. As I have explained, what is new in the "Emerging Policy" in the Wind SPD is a more detailed specification of the conditions which are relevant in the Council's view to the attainment of the development of wind turbines that is already encouraged in policies D4 and D5 whilst those policies remain part of the development plan. In my judgment the conditions are ones relating to environmental, social or design objectives. Without satisfaction of the conditions, the policy to grant planning permission for such development will not apply.

80. In my judgment the question is whether a statement regarding such conditions is a statement regarding such "objectives" relevant to the attainment of the development of land for wind turbines.

81. An objective is normally an end at which to aim, a goal. It might be said, therefore, that its nature is less prescriptive than that of a condition to be complied with. But in this context that would in my judgment place too narrow a construction to place on this sub-paragraph of regulation 5(1)(a). An objective that is relevant to the attainment of the development of land that a planning authority wishes to encourage may be one that the authority wants to be satisfied if it is to encourage that development. That approach would be consistent with it constituting a "policy" which is something a "supplementary planning document" may contain (as the 2012 Regulations recognise[28]). Moreover it would make little sense to require a "local development document" containing statements regarding relevant "objectives" in a narrower sense to be the subject of the more stringent requirements of the 2012 Regulations before it can be adopted but not to require one containing statements regarding relevant "objectives" in a more prescriptive sense to be before it is adopted.

82. Accordingly in my judgment the Wind SPD is a document containing statements regarding the matters mentioned in regulation 5(1)(a)(iii) which can be a "supplementary planning document".

***(vii) conclusion***

83. In my judgment, therefore, the Wind SPD was not a "development plan document" falling within regulation 5(1)(a)(i) or (iv) of the 2012 Regulations. It was a "supplementary planning document" falling within regulation 5(1)(a)(iii).

**THE ALLEGED CONFLICT WITH THE ADOPTED DEVELOPMENT PLAN**

***(i) submissions***

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[28] see regulations 8(2) and (3) of the 2012 Regulations cited in paragraph [34] above.

84. As mentioned in paragraph [34] above, regulation 8(3) of the 2012 Regulations provides that

> **"Any policies in a supplementary planning document must not conflict with the adopted development plan."**

85. The Claimant contends that the "Emerging Policy" in the Wind SPD fell foul of that prohibition and that, accordingly, its adoption was unlawful.

86. On its behalf, Mr Nardell QC submitted that it was not sufficient for the policies in any SPD to be "in general conformity with" any adopted development plan: they must not conflict with it. The existence of any such conflict had to be assessed, not by reference to the adopted development plan as a whole, but rather, so he submitted, by reference to those parts of the adopted development plan that bear on the issues that a supplementary planning document addresses. He submitted that it was for the court to interpret any relevant policies to determine what they mean, and then, having interpreted the relevant policies, the court's task is to determine for itself whether they are in conflict. The court's task was not to consider whether the local planning authority's view was not one a reasonable planning authority could have held: see ***R (Wakil) v Hammersmith and Fulham LBC*** [2012] EWHC 1411 (QB), [2013] 1 P&CR 13; ***R (TW Logistics) v Tendering DC*** [2013] EWCA Civ 9.

87. Mr Nardell submitted that in this case the relevant parts of the adopted development plan to consider are those concerned with wind energy and that the policy directly in point is Policy D5. He submitted that the conflict between Policy D5 and the residential separation distances in the Wind SPD was stark and self-evident. The effect of Policy D5 was that wind energy development will be permitted provided any adverse impacts can be satisfactorily addressed. The concluding paragraph of that policy had to be read in that context. It merely indicated what should normally be the case if the general condition protecting residential amenity was to be satisfied. At most it was a desideratum: it did not create any requirements that had to be satisfied if a proposal was to benefit from the policy that planning permission should be granted. By contrast, so he submitted, the minimum separation distances from dwellings in the "Emerging Policy" apply whether or not there will in fact be any adverse impact and whether or not it can be satisfactorily addressed.

88. Alternatively, Mr Nardell contended that, even if the last paragraph of Policy D5 did create criteria that had to be satisfied, the Wind SPD was still plainly in conflict with it. In his submission a clear conflict emerges from the fact that the prescribed distances are all above the minimum 350m distance mentioned in that policy and the fact that there is no minimum distance requirement if the height of the wind turbine generator does not exceed 25m when Policy D5 has such a requirement on this basis in all cases.

89. Mr Nardell further submitted that policies would be in conflict, even if they appeared on their face to be consistent, if in practice they would be in conflict. The practical effect of the Wind SPD, so he contended, is to preclude wind energy development on a commercial scale in the Borough. He drew attention to the fact that the Council's own mapping of the effects of various separation distances led to a conclusion that introducing a separation distance of 1km across the Borough "would be overly restrictive to large wind turbines". That distance, he submitted,

was effectively incapable of being met anywhere in the Borough. Such a restrictive approach, he contended, was not redeemed by a more relaxed approach for smaller turbines. That result, so he submitted, put the "Emerging Policy" in clear conflict with Policy D5. It changed a fundamentally permissive policy into a fundamentally prohibitive one.

90. He further submitted that sections 4 to 6 of the "Emerging Policy" were likewise in conflict with the adopted development plan, as they would point to a refusal of planning permission for a development that complied with Policy D5.

91. On behalf of the Council, Mr Harwood QC submitted that the prohibition of policies in supplementary planning documents which conflict with the adopted development plan gives greater scope for policies to be contained in such documents than would a requirement for consistency or conformity with it. It only prohibits the adoption of policies which directly clash with the adopted development plan such that they cannot rationally both be applied together consistently in any circumstances. Only when the two documents cannot stand together would the prohibition in regulation 8(3) of the 2012 Regulations be breached. Mr Harwood also emphasised that any conflict has to be with the development plan as a whole and whether that would occur would often require a planning judgment that it was for the local planning authority to take, subject to review by this court if its decision was unreasonable.

92. In this case Mr Harwood submitted that, in addition to policies D4 and D5, consideration has to be given to all policies in the adopted development plan relevant to wind turbines, such as D1 (prohibiting unacceptable visual intrusion or pollution), D2 (buildings to relate well to the surrounding countryside), S10 (protection of the open countryside recognising that wind turbines may be an exception), T1 and T3 (meeting the needs of pedestrians and cyclists) and L6 (promotion of horse-related development).

93. Mr Harwood submitted that the adopted development plan already contains a policy (whose validity cannot be challenged) that wind turbines should be sited at least 350m from any dwelling which is to be applied in addition to the assessment of specific amenity impacts. Thus, so he submitted, all that the "Emerging Policy" does in Section 1, 2 and 3 is to provide more detail on minimum separation distances from residential dwellings for different size of turbines, subject always to the consent of local residents. Sections 2 and 3 of the Emerging Policy are merely a more detailed application of the requirement for a separation distance of at least 350m from any dwelling in Policy D5 to a range of turbine sizes, having regard to policies D1 and D2. It is similar to the more detailed elaboration of the minimum amount of social housing required in residential developments contained in a supplementary planning document found to be lawful in ***R (Pye (Oxford) Ltd) v Oxford City Council*** [2002] EWCA Civ 1116, [2003] JPL 45 .

94. Mr Harwood submitted that sections 4, 5 and 6 of the Emerging Policy reflected the priorities in policies D1, T1, T3 and L6 as well as D5. Separation distances between bridleways, public rights of way and fuel separation lines are (so he argued) encouraged by national guidance and those chosen were not in conflict with the adopted development plan.

95. Mr Harwood submitted that an assessment of conflict between policy documents has to rest primarily on the terms of the documents themselves. However, he submitted that, although further opportunities for extremely tall wind turbines in Milton Keynes will be limited under the "Emerging Policy" unless the written agreement of owners and occupiers of residential properties is obtained, they will not be eliminated and that, in any event, they do not represent the totality of commercial schemes. Accordingly the effect of the policy is not to preclude commercial wind farm development, much less any wind turbine development.

***(ii) this Court's function***

96. It is now well established that planning policy statements, for example, in a development plan, have to be interpreted objectively in accordance with the language used read in its proper context. That task of interpretation (as distinct from any judgement involved in the application of any such policy) is a matter for the court itself: see ***Tesco Stores Ltd v Dundee City Council*** [2012] UKSC 13, [2012] PTSR 983 see eg per Lord Reed at [18]-[19].

97. In ***R (Wakil) v Hammersmith and Fulham LBC*** *supra*, Wilkie J had to consider whether a document had been wrongly characterised as a "supplementary planning document" (rather than a "development plan document") under the 2004 Regulations. That depended on whether the document "identifies an area as an area of significant change". In that case Wilkie J stated that:

> "81. In my judgment, and by way of analogy with the *Tesco* case where, as here, the question is whether a document satisfies or does not satisfy all of the conditions identified in a statutory document, that is an application of fact to legal requirements and, as such, is a matter where the Court has to make the judgment. It is not limited to reviewing a decision made by the local planning authority, subject only to intervention only on Wednesbury grounds.
>
> 82. I accept that in making that judgment, the Court must bear in mind that a local planning authority has, as I find, in good faith, characterised the document as not satisfying those three conditions. I have, therefore, to be cautious in concluding that the local planning authority has got that judgment wrong. That, however, is not the same as saying that I can only come to a different view only if I think that it was perverse for the Defendant to have come to a different view. What I have to do is to consider the document as a whole and then conclude whether, in my judgment, it satisfies each of the three conditions [set out in the 2004 Regulations]."

98. Mr Nardell submitted that the approach that Wilkie J adopted to the Court's function when considering the classification of a document for the purpose of those Regulations should apply equally to the Court's function when considering whether a document complies with a requirement applicable to it in the 2012 Regulations and that, accordingly, the court should itself determine whether or not any policy in a supplementary planning document is in conflict with an adopted development plan.

99. I disagree. The question whether a policy is in conflict with an adopted development plan is not a question of construction or one analogous to it. It involves a planning

judgment that it is for the relevant planning authority to make provided that it does not act unreasonably. This Court's function is to review the rationality of that planning judgment.

100. In ***R (TW Logistics) v Tendering DC*** *supra*, on which Mr Nardell also relied, it was common ground that the question whether a policy was consistent with the development plan was a question of the interpretation of the plan or policy in question and accordingly that it was one for the court itself to determine. The Court of Appeal simply followed the approach which was common ground between the parties in that case: see at [3(vii)] and [4]. However the question whether a document satisfies some relationship of consistency or conformity with another is not one of interpretation of the two documents: once both have been properly interpreted, answering that question involves a judgment comparing the content of each document. That comparison involves the making of a judgment about, not an interpretation of, the content of both document, as the Court of Appeal held in ***Persimmon Homes (Thames Valley) Ltd and others v Stevenage BC*** [2005] EWCA Civ 1365, [2006] 1 WLR 334. In that case the Court of Appeal had to consider whether a local plan complied with the statutory requirement that any local plan had to be "in general conformity" with the structure plan for the area. As Laws LJ put it at [29],

> "Let this or that interpretation of "general conformity" be accepted (and the interpretation of the relevant structure and local plans likewise). Those processes exhaust the role of statutory construction. But after our books on construction are put away, there must remain on various sets of facts a question still unanswered: is this local plan in general conformity with the structure plan or not? The proper construction of the general conformity requirement, and of the relevant plans, is a necessary step along the way to the question's answer. But it is not the final step. If it were, the exercise of interpretation or construction would give the answer. But plainly it does not; at least it may not....the question whether the local plan is in general conformity with the structure plan is likely to admit of more than one reasonable answer, all of them consistent with the proper construction of the statute and of the relevant documents. In those circumstances the answer at length arrived at will be a matter of planning judgment and not of legal reasoning."

101. Of course the nature of the judgment involved in making any comparison and the scope for reasonable differences of view about the answer will depend on the nature of the comparison which the relevant statutory provision calls for. In this case it is not sufficient that a policy in a supplementary planning document is "in general conformity with" the adopted development plan (as it has to be any relevant regional strategy: see section 24(1) of the 2004 Act[29].) That relationship between the policies in two documents can be satisfied, even if there is a conflict between them: see ***Persimmon Homes (Thames Valley) Ltd and others v Stevenage BC*** *supra* per Laws LJ at [26]. But that does not mean that the question whether a policy in a supplementary planning document is "in conflict with" the adopted development plan does not involve the making of any judgment or one about which reasonable persons may disagree.

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[29] see paragraph [30] above.

102. Of course, if the question whether the two policies are in conflict turned only on whether they are logically or literally inconsistent on their face, then it should make no difference whether this court's task is to determine that question for itself or whether it is to review whether the local planning authority's view on that question was one no reasonable person could hold. There should only be one right or reasonable answer in such a case: either the policies are, or are not, inconsistent on their face. But the object of the requirement in regulation 8(3) is not merely to avoid literal inconsistency. It is to produce consistent guidance when the relevant policies are applied in practice when determining planning applications for specific developments.

103. Given their nature, planning policies are general statements and they may produce results which are in conflict when applied in practice, even if, at least ostensibly, they are not inconsistent, as Mr Nardell recognised (and indeed contended was so in this case) and as Mr Harwood accepted in principle. Whether or not two generally expressed planning policies are in conflict and whether they may produce conflicting results when applied in practice may well involve questions of planning judgment. Such a planning judgment will often be involved in any event when considering whether any policy in a supplementary planning document complies with the requirement imposed by regulation 8(3) of the 2012 Regulations. That requires a comparison of such a policy, not merely with one other policy, but rather with the adopted development plan as a whole, which will often contain a number of policies of relevance. Indeed, as Lord Reed pointed out in ***Tesco Stores Ltd v Dundee City Council*** *supra* at [19], "development plans are full of broad statements of policy, many of which may be mutually irreconcilable". Thus it is now well established that, in considering whether a planning authority has complied with the statutory requirement to determine a planning application "in accordance with the development plan" unless material considerations indicate otherwise, for example, the court has to review whether the authority's "overall conclusion" that an application is, or is not, "in accordance with the development plan" is one no reasonable authority could have reached or was one otherwise flawed on well known *Wednesbury* grounds. The court does not determine for itself whether or not the application is in accordance with the development plan: see ***City of Edinburgh Council v Secretary of State for Scotland*** [1997] 1 WLR 1447 per Lord Clyde at p1459, ***Tesco Stores Ltd v Dundee City Council*** *supra* per Lord Reed at [17].

104. In my judgment the court should adopt the same approach when considering whether the requirement, that a policy in a supplementary planning document is, or is not, "in conflict with" an adopted development plan, has been complied with. There is no material difference in nature of the judgment involved in deciding whether or not an application for planning permission or a policy is "in accordance with" or "in conflict with" the adopted development plan. Something that is in accordance with a development plan cannot be inconsistent or in conflict with it. Something that is in conflict or inconsistent with a development plan cannot be in accordance with it. If anything there may be more scope for different, reasonable views when considering the consistency with the adopted development plan of a policy (which is capable of multiple applications to various developments) than when considering the consistency of a specific application for a particular development with that plan.

105. In ***R (Wakil) v Hammersmith and Fulham LBC*** *supra*, Wilkie J appears to have taken the view at [82] that, in all cases, it is for the court to determine for itself whether the content of a document satisfies a statutory requirement. In my judgment, however, the fact that a judgment is involved in determining whether something, such as the content of a document, satisfies a statutory requirement does not of itself necessarily determine what the court's function is when considering whether that requirement has been complied with. In some cases the judgment under the relevant statutory scheme will be one for the court to make. However, as Lord Hoffmann put it in ***Tesco Stores Ltd v the Secretary of State for the Environment*** [1995] 1 WLR 759 at p780, "if there is one principle of planning law more firmly settled than any other, it is that matters of planning judgment are within the exclusive province of the local planning authority or the Secretary of State." The relevant planning legislation has no doubt been enacted in the light of that principle. In my judgment, therefore, the planning judgment whether a policy in a supplementary planning document is in conflict with the development plan is one for the local planning authority subject to review by the court on public law rationality grounds. Any other approach would be inconsistent with authority. In ***Persimmon Homes (Thames Valley) Ltd and others v Stevenage BC*** *supra*, for example, the Court of Appeal had to consider the task of the court on a statutory application to quash the local plan on the ground that it failed to comply with the statutory requirement that it had to be in general conformity with the structure plan. The Court of Appeal (Laws and Wall LLJ, Lloyd LJ dissenting) held that, having construed each document, the court's task was to review the authority's decision on that matter according to the conventional public law test of rationality, generally referred to as the *Wednesbury* principle, as the question involved the application of judgment, or expert or mature opinion, to the circumstances of the case: see per Laws LJ at [21]-[23], [29]-[30]. In my judgment there is no relevant difference in this court's function on a statutory application to quash (as in that case) and on a claim for judicial review (as in this case) when the allegation is that a planning document does not meet a statutory requirement. In each case this court's function is to consider the rationality of the planning authority's judgment about general conformity or conflict with the development plan when reviewing the legality of what it has done.

106. Accordingly in my judgment my task is to review whether the Council's view that the "Emerging Policy" in the Wind SPD was not in conflict with the adopted development plan was one which it was rationally entitled to hold.

***(iii) the proper construction of Policy D5 in the adopted development plan***

107. Before considering whether the Wind SPD was in conflict with the Milton Keynes Local Plan, it is necessary to construe Policy D5 and in particular its last sentence. That policy provides that:

> "Planning Permission will be granted for proposals to develop renewable energy resources unless there would be:
>
> i) significant harm to the amenity of residential areas, due to noise, traffic, pollution or odour;
>
> ii) significant harm to a wildlife species or habitat;

iii) unacceptable visual impact on the landscape.

Wind turbines should, in addition, avoid unacceptable shadow flicker and electromagnetic interference and be sited at least 350m from any dwellings."

108. There are two material questions involving the interpretation of that policy: (i) the first concerns the general effect of the last sentence in that policy; (ii) the second concerns the particular effect of requirement that wind turbines should be sited at least 350m from any dwelling.

109. Mr Nardell submitted that the last sentence of Policy D5 does not create any further criteria which a proposal to develop wind turbines had to satisfy to be in accord with this policy. The requirements are merely things such a proposal "should" satisfy, not things it "must" satisfy, to benefit from the policy. All the last sentence of Policy D5 does, so he submitted, is to provide guidance about when the harm or impact mentioned in paragraphs (i) - (iii) of the policy might occur and that the substantive policy was simply that wind energy development (like other renewable energy development) should be permitted provided any adverse impacts can be addressed satisfactorily.

110. In my judgment the last sentence of Policy D5 does create additional requirements that a proposal for a wind turbine must satisfy if it is to benefit from the policy that planning permission will be granted for it.

111. Policy D5 does not simply provide that renewable energy development will be permitted provided any adverse impacts can be addressed satisfactorily. The structure of Policy D5 is to provide that planning permission for proposals to develop renewable energy sources (of which proposals for wind turbines are but one) will be granted unless certain conditions are met. These do not embrace all possible adverse impacts. They do not include, for example, any adverse effect on the character and appearance of any conservation area or on a listed building or its setting or on any other heritage feature. Moreover to displace the requirement to give permission it is only necessary to show a "significant" adverse effect in respect of the first two conditions, not an "unacceptable" one (as in the case of the third). Policy D5 does not require planning permission to be refused if there is such a "significant" adverse impact. The proposed development merely ceases to benefit from the policy that planning permission will be granted for it. Assuming that no other policies in the development plan are applicable, the question would then be whether the significant harm which the proposal would cause is outweighed by the benefits which the proposed development would be likely to secure. The fact that an application may have a significant, but a nonetheless acceptable, adverse impact might be said to show that the impact had been satisfactorily addressed. But that would not mean that the development should benefit from the policy, even if it would nonetheless be granted permission.

112. The effect of the last sentence is to specify conditions which proposals for wind turbines "should, in addition" satisfy if they are to benefit from this policy. Thus the policy would not require planning permission to be granted for wind turbines, for example, if they would cause unacceptable shadow flicker or electromagnetic interference. They should not cause such effects if proposals for them are to be benefit from the policy that planning permission will be granted for them.

113. These additional conditions do not simply duplicate those in the generally applicable part of the policy. A minimum separation distance from any residential dwelling may serve, for example, to protect the amenity of such a dwelling from any overbearing visual impact that a wind turbine situated close to it may have and from any adverse noise impact which the turbine may have on it. Such a visual impact on a particular dwelling is not covered by conditions (i) or (iii) in the more general part of the policy. Moreover, insofar as condition (i) is concerned with the adverse effect on residential amenity due to noise, it is concerned with such effects on "residential areas", not individual dwellings, a distinction that can be of significance when wind turbines are erected away from such areas.

114. In my judgment, therefore, the last sentence of Policy D5 sets out further requirements which proposals for wind turbines must meet, which are additional to those which all proposals to develop renewable energy sources should meet, if they are to benefit from the policy that planning permission will be granted for them. In this context "should" means "must".

115. The second question of interpretation concerns the particular effect of the requirement in the last sentence of Policy D5 that "wind turbines should...be sited at least 350m from any dwellings".

116. Mr Harwood submitted that the effect of this is to require wind turbines to be sited 350m or more from any dwelling. It does not mean that a turbine which is 350m away from a dwelling would be acceptable and it does not prevent the Council from elaborating on "at least 350m" in the context of greatly differing turbine sizes.

117. In my judgment Mr Harwood's submission confuses the question whether or not a proposed development is in accordance with the policy with the question whether or not it is acceptable. A proposed wind turbine situated 351m from the nearest residential dwelling is one situated at least 350m from that dwelling and the proposal for it is plainly in accordance with that requirement in Policy D5. That does not mean that it is necessarily acceptable. Other material considerations, such as the impact which it is likely to have on the amenity of that dwelling by virtue of its presence given its size or by virtue of the noise it may generate, may nonetheless indicate that planning permission should be refused notwithstanding that the proposal accords with Policy D5.

118. Mr Harwood relied in support of his submission, however, on the decision of the Court of Appeal in ***R (Pye (Oxford) Ltd) v Oxford City Council*** *supra*. He contended that the elaboration of minimum separation distances in the "Emerging Policy" was no different than the policy generally to seek 30% of new housing units as social housing on all suitable sites contained in the supplementary planning guidance which the Court of Appeal had found not to be inconsistent in that case with the statement in the local plan that the City Council would normally look for a minimum of 20% of housing units to be affordable.

119. In my judgment this case is not analogous to that. The requirements in the relevant local plans are materially different.

120. The relevant facts in the ***Pye*** case are set out more fully in the judgment the subject of the appeal which was given by Ouseley J: see [2001] EWHC Admin 870, [2002]

2 P&CR 35, at [18]-[22]. The relevant local plan policies in that case, HO5 and HO6, provided that the City Council would seek, or would require the inclusion, of "a significant element of social housing" on the sites to which those policies applied. The reasoned justification for these policies in the text of the local plan stated that targets for individual sites had to be realistic and that "experience suggests that in normal circumstances the Council can look for a minimum of 20% of the housing units being affordable". The Supplementary Planning Guidance impugned in that case stated that:

> "Policy HO6 states that the Council will seek a significant element of social housing. The interpretation of significant needs to be considered in terms of current housing needs information and relevant material considerations. The Council therefore thinks it is reasonable to seek generally 30% of a proposed development to be provided as social housing on all suitable sites."

As Ouseley J stated at [87],

> "In my judgment the SPG in that respect can reasonably be seen by the City Council as "supplementing" the specific HO5 and HO6 policies, giving guidance as to the scope of "a significant element". On the face of it, the SPG's reference to seeking "generally 30 per cent social housing" is consistent with the "minimum of 20 per cent" being sought in the Local Plan."

Pill LJ (giving a judgment with which Mummery LJ and Nelson J agreed) agreed with Ouseley J. As he put it at [29],

> "20% is stated to be the minimum which in normal circumstances the Council can look for. I do not consider a policy which seeks "generally" and on "all suitable sites" 30% of a proposed development for social housing to be inconsistent with the local plan policy. I agree with the judge's conclusion to that effect and would decide the case on that short point. To hold otherwise would be to take too inflexible a view of the policy in the local plan."

In that case, therefore, the relevant local plan policy merely stated that a "significant element" of social housing would be sought. The court considered that generally seeking 30% on all suitable sites as the "significant element" was not inconsistent with the minimum target in normal circumstances of 20% stated in the local plan.

121. In this case Policy D5 does not provide that wind turbines should be sited a "significant distance" from any residential dwelling and that such distance must be at least 350m. An application to develop a wind turbine more than 350m from such a dwelling would not necessarily satisfy such a policy: the question whether the turbine was in the circumstances a "significant distance" from that dwelling would still need to be considered. In this case by contrast the only relevant requirement imposed by Policy D5 is that the turbine be at least 350m from such a dwelling. Such a turbine unarguably satisfies that requirement of Policy D5.

122. In my judgment, therefore, any application for a wind turbine situated at least 350m from the nearest residential dwelling plainly meets the requirement in Policy D5 (properly construed) that it should be sited at least 350m from it.

***(iv) whether the "Emerging Policy" in the Wind SPD was in conflict with the adopted development plan***

123. Does it then follow that the minimum separation distances from residential dwellings set out in the Emerging Policy in the Wind SPD are in conflict with the adopted development plan?

124. If regard is had only to Policy D5, then in my judgment there can only be one rational answer to that question. Provided the proposal satisfies its other conditions, Policy D5 requires planning permission to be granted if a wind turbine is at least 350m from any residential dwelling. By contrast, in such circumstances the "Emerging Policy" in the Wind SPD does not if the height of the turbine exceeds 25m. It imposes more stringent requirements before planning permission will be granted in accordance with it. Such more stringent requirements are inconsistent, and in conflict, with the requirement that planning permission will be granted if the wind turbine is at least 350m from the nearest residential dwelling.

125. Mr Harwood submitted, however, that the minimum separation distances from dwellings in the "Emerging Policy" are a more detailed application of the "at least 350m" separation distance to a range of turbine sizes in Policy D5 having regard to Policies D1 and D2 in the Local Plan. So far as relevant these policies provide that:

> "D1. Planning permission will be refused for development that would be harmful for any of the following reasons:
>
> ... ......
>
> (iii) An unacceptable visual intrusion or loss of privacy, sunlight and daylight
>
> (iv) Unacceptable pollution by noise, smell, light or other emission to air, water or land.....
>
> D2. Development proposals for buildings will be refused unless they:
>
> i) Are in scale with other buildings in the immediate vicinity in terms of their height and massing, except where a greater scale is necessary to reflect the development's function and importance
>
> ii) Relate well to and enhance the surrounding environment...."

126. Mr Harwood's submission may well be an *ex post facto* attempt to show that the "Emerging Policy" in the Wind SPD is not in conflict with the adopted local plan. The Report to the Council's Cabinet on July 4th 2012 (which decided that the Wind SPD should be adopted) made clear that the SPD "supplements policy D5 of the Adopted Local Plan". The minutes record that the Cabinet "recognised" that the Wind SPD "would supplement Policy D5". There was no suggestion in the Report or Minutes that it was intended to supplement policies D1 or D2 or that those policies had any relevance in justifying the content of the "Emerging Policy". The Wind SPD itself concludes that the separation distance in Policy D5 should be

increased to protect residential amenity[30]. No mention is made in that document of Policies D1 or D2. Nor in that part of the witness statement of Mr Fenwick (who was the author of the Report to the Cabinet) in which he sought to explain the consistency of the Wind SPD with the adopted local plan is there any such mention, much less consideration, of Policies D1 and D2. Mr Fenwick merely states that, as the height of wind turbines had increased since the local plan was adopted, "as such" the Wind SPD is not in conflict with "the adopted local plan policy": "instead it performs the normal and well understood function of providing additional detail to the local plan policy requirement of locating turbines "at least 350m"from residential properties."

127. The apparent absence of any consideration of Policies D1 and D2 does not necessarily mean, however, that no consideration was given to policies in the adopted development plan other than D5 when formulating and adopting the "Emerging Policy" in the Wind SPD. It is plain, for example, that the "Emerging Policy" applies to wind turbine development as a component part of another development, something dealt with by Policy D4, as well as more general wind turbine development covered by Policy D5. But it does follow that there is no apparent contemporaneous explanation of how the "Emerging Policy" in the Wind SPD was not in conflict with Policy D5, even when regard is had to Policies D1 and D2, when it was prepared and adopted.

128. The assumption made appears to have been that, merely because the requirement in Policy D5 was for a wind turbine to be at least 350m from any residential dwelling if it was to benefit from that policy, there was no conflict with that Policy if the requirement was altered so that a turbine had to be further away from any residential dwelling if it was to benefit from any policy that planning permission would be granted for it. For the reasons I have already given that was not a view that in my judgment a reasonable authority could hold given the proper interpretation of that policy.

129. That does not necessarily mean of itself, however, that no reasonable person could have concluded that the minimum separation distances from any residential dwelling in the Wind SPD were not in conflict with the adopted development plan, having had regard to policies D1, D2 and D5, if consideration was given to that question. But in my judgment any reasonable person would have concluded nonetheless that they were. Any other answer would have been inconsistent with the inter-relationship and nature of the policies in question.

130. Policies D1 and D2 are both concerned with when planning permission will be refused, not with when planning permission will be granted (as Policy D5 and the "Emerging Policy" in the Wind SPD are). Policies D1 and D2 require planning permission to be refused when a particular development will produce a particular unacceptable result (in the case of D1) or when it will not achieve a prescribed result (in the case of D2) on the basis of the facts in any particular case. As Mr Nardell submitted, a wind turbine that is at least 350m from a residential dwelling may or may not produce an unacceptable effect on residential amenity on the facts of a particular case. Similarly it may or may not achieve a result prescribed by Policy D2 (assuming that policy applies to wind turbines). If a proposed

[30] see pages 2 and 13 of the Wind SPD.

development complied with Policy D5 but not with Policy D1 or D2, however, then the policies in the Local Plan would point in different directions: one policy would provide that permission will be granted, the other that it will be refused. Whether the development would then be in accordance with the development plan would require a planning judgment.

131. It may well be, if its impact is "unacceptable" and thus contrary to Policy D1, for example, that the local planning authority might regard the proposed development as not being in accordance with the development plan (since it would surprising if such a plan required planning permission to be granted notwithstanding such an impact). But that question does not need to be answered for present purposes.

132. The relevant question is whether the "Emerging Policy" that permission will be granted if the minimum separation distances which are in excess of 350m are satisfied is in conflict with the adopted development plan.

133. In my judgement it plainly is in the case of a wind turbine at least 350m from the nearest residential dwelling which does not meet the relevant minimum separation distance specified in the "Emerging Policy" when planning permission is not required to be refused under Policies D1 or D2. Other things being equal, D5 requires planning permission to be granted in such a case. That of itself is sufficient to invalidate the Wind SPD.

134. Equally in my judgment, however, the minimum separation distances from residential dwellings in the "Emerging Policy" must be regarded as being in conflict with the adopted development plan in the case of a wind turbine for which permission is to be refused in accordance with Policies D1 or D2.

i) If a proposal for a Wind Turbine is in accordance with the development plan if it complies with Policy D5 (even if it fails to comply with Policy D1 or D2), then the Wind SPD is in conflict with the development plan, since Policy D5 plainly requires planning permission to be granted for it even if it does not meet the minimum separation distance in the Wind SPD.

ii) On the other hand, if a proposal is only in accordance with the development plan if it also complies with Policies D1 and D2, then the requirement in the "Emerging Policy" for planning permission to be granted provided that the relevant minimum separation distance is observed is in conflict with the adopted development plan. Permission would be required to be granted in accordance with the "Emerging Policy" when the development plan requires that it must be refused.

135. In my judgment, therefore, the Council's view, that the minimum separation distances from any residential dwelling in excess of 350m specified in the "Emerging Policy" in the Wind SPD were not in conflict with the adopted development plan, was one no reasonable person could have adopted. Either the "Emerging Policy" failed to provide that planning permission would be granted when the adopted development plan required it to be granted (effectively amending the relevant distance requirement in Policy D5) or it provided that planning permission would be granted when the adopted development plan required that it

should be refused. In either case it was in conflict with the adopted development plan.

136. Mr Nardell also contended that the “Emerging Policy” in the Wind SPD failed to comply with regulation 8(3) of the 2012 Regulations on three other grounds.

137. First Mr Nardell submitted that the “Emerging Policy” was in conflict with the adopted development plan when it provided that planning permission will be granted for a wind turbine less than 25m in height, even if it was not at least 350m from the nearest residential dwelling, if the various other requirements of the Policy are satisfied.

138. Mr Nardell’s submission would have some force if the only wind turbines to which the “Emerging Policy” applies were those falling to be considered under Policy D5. But in my judgment they are not. They also include those which are a component part of a development which fall to be considered under Policy D4. There is no requirement under that Policy that a wind turbine be at least 350m from any residential dwelling, something that would almost certainly unachievable for the smaller turbines that may form part of the provision required under Policy D4 (for example) for a small residential development in excess of 5 dwellings. In my judgment a reasonable planning authority could regard wind turbines less than 25m in height as ones not likely to be governed by Policy D5 but more likely to be governed by Policy D4. Mr Nardell did not submit that the “Emerging Policy” was in conflict with Policy D4 itself. But in any event, what the minimum separation distance from a dwelling in Policy D5 does is to set a condition which must be satisfied for the policy to apply that planning permission will be granted for a proposal for a wind turbine. Given that Policy D5 does not provide that planning permission should be refused if such conditions are not satisfied, a policy to grant permission even if they are not satisfied is not in conflict with Policy D5. It is consistent with it. In those circumstances in my judgment Mr Nardell has not shown that no reasonable authority could have thought the “Emerging Policy” was not in conflict with the adopted development plan in this respect. Accordingly the Claimant’s challenge to the “Emerging Policy” fails on this ground.

139. Mr Nardell’s second, and main additional, ground for contending that the “Emerging Policy” in the Wind SPD was in conflict with the adopted development plan concerned the practical result which (so he submitted) the minimum separation distances from residential dwellings specified in it would have when compared with the practical result of the application of Policy D5. His contention was that in practice the specification of those distances changed what was fundamentally a permissive policy into a fundamentally prohibitive one.

140. I have already found that the minimum separation distances from dwellings specified in the “Emerging Policy” are not consistent with the separation requirement in Policy D5 on satisfaction of which planning permission will be granted (if the other relevant conditions are also satisfied). In substance the “Emerging Policy” effectively seeks to amend that requirement making it more severe and is thus in conflict with it. Mr Nardell’s contention only arises, therefore, if I am wrong on that matter. In considering it, therefore, I shall assume that I am.

141. What Mr Nardell's contention is concerned with is an alleged fundamental inconsistency in results that Policy D5 and the "Emerging Policy" will produce when applied.

142. Both policies state that planning permission will be granted if certain conditions are satisfied. In form at least, therefore, both policies encourage the grant of planning permission provided the conditions they specify are satisfied. The difference lies in the relative severity of those conditions. To give effect to the assumption I am making for this purpose and to examine the logic of Mr Nardell's submissions, I shall assume that the relevant separation requirement in Policy D5 had been that a wind turbine had to be not less than a satisfactory distance from the nearest residential dwelling and in any case not less than 350m. A policy which prescribed greater separation distances which were thought to be satisfactory in a supplementary planning document would not be in conflict with the development plan. The fact that its adoption would make it more difficult in practice to be granted planning permission in accordance with the policy would not mean it would be in conflict with it. Nor did I understand that Mr Nardell would necessarily submit that it was. His point is that the extent of the restrictions prescribed in the policy were such that the policy is itself transformed in nature from one encouraging development to one discouraging it: the policy may in form still have the same character, but in substance the supplementary guidance issued changes it and it is, therefore, in conflict with it.

143. There are two main difficulties with Mr Nardell's contention.

144. First, any policy that permission will be granted for a particular development if certain conditions are satisfied can be seen as a policy encouraging such development provided that those conditions are satisfied. The policy is one of conditional encouragement. Only if such development could never in practice occur if those conditions were satisfied would it in fact cease to be a conditional policy encouraging such development. Until that point it would simply be a policy that gave less encouragement in practice as the conditions become the more severe. In this case, although it is plain from the Council's own assessments, its reports and the Wind SPD itself, that the scope for any wind farm development would be very severely restricted in the Borough (if not entirely eliminated) if the minimum separation distances in the "Emerging Policy" are complied with, the evidence does not show that no construction of any wind turbine could be permitted in accordance with the "Emerging Policy" if those distances are observed. True it is that developers such as the Claimant might well find it extremely difficult (if not wholly impossible) to identify any land on which to construct more than a limited number of wind turbines of the size which they are interested in developing commercially. But it does not follow that no construction of any wind turbine of any description could occur if those distances are observed. As is stated in paragraph [6] of the Annex to the "Planning for Renewable Energy: A Companion Guide to PPS22" (2004),

> "Wind turbines are available in a wide range of sizes, from small battery charging units with rotor diameters of less than a metre to very large wind turbines with rotor diameters greater than 100 metres with a capacity of several megawatts. Wind turbines have increased in size and capacity over time and will continue to do so in the foreseeable future, although it should not automatically be assumed

that the largest turbines will feature in planning applications for onshore locations. The choice of turbine size depends on the site chosen and the scale of development required. Commercial wind farms that supply electricity to the electricity grid tend to use a smaller number of larger machines. However, farms and businesses using wind power might size their turbines according to the size of their own electricity demand."

145. The second difficulty that Mr Nardell's argument faces is the fact that the "Emerging Policy" allows for exceptions from the specified minimum separation distances from any dwelling when the owners and occupiers of dwellings within the relevant distance agree in writing. Mr Nardell quite understandably pointed out that in practice this could give such persons the ability to hold a developer or land owner "to ransom" if that person wanted to benefit from the "Emerging Policy". But Mr Nardell did not submit that the agreement of such persons was not capable of being a material planning consideration. Nor did he submit that an exception of this character to a planning policy was intrinsically unlawful as such. Further, as explained in paragraph [138] above, a policy to grant permission even if the minimum separation distance specified from a dwelling in Policy D5 is not met would not be in conflict with that Policy. Accordingly, whatever the severity of the restrictions the minimum separation distances from dwellings prescribed in the "Emerging Policy" might otherwise have been, it is capable of relaxation.

146. Accordingly it is not possible to conclude that the statement in the "Emerging Policy" in the Wind SPD that planning permission will be granted unless certain conditions are satisfied is effectively simply a sham and that satisfaction of those conditions means that no permission will ever be granted in accordance with the "Emerging Policy". For those reasons in my judgment, on the assumption I have made, both Policy D5 and the "Emerging Policy" in the Wind SPD are in character conditional policies to encourage the development of wind turbines.

147. The third and final additional ground on which the Claimant contends the "Emerging Policy" in the Wind SPD is in conflict with the adopted development plan concerns sections 4 to 6 of the "Emerging Policy". These were likewise said to be in conflict with the adopted plan as they would point to a refusal of planning permission for a development that complied with Policy D5.

148. The "Emerging Policy" in the Wind SPD (as stated in Section 1) is that planning permission will be granted unless the conditions in Section 1(a)-(e) occur. It does not make that policy conditional on the satisfaction of any of the minimum distance requirements for bridleways, public footpaths and safety to be found in sections 4, 5 and 6 of the "Emerging Policy". Section 1 to that extent follows the form of Policy D5 and does not add additional conditions that have to be satisfied before planning permission will be granted in accordance with it.

149. Policy D5 does not stand alone in the adopted development plan. Even if a proposal is to be granted planning permission in accordance with it, other policies may militate against that grant, as consideration of Policy D1 above itself illustrates. Other material considerations may also militate against such a grant. There is no reason in principle why further policy guidance may not be given in a supplementary planning document about the environmental, social, design or economic objectives contained in such other policies, or which would be material

considerations, relevant to the attainment of wind turbine development that the Council wishes to encourage. On behalf of the Council Mr Harwood referred to a number of other policies in the adopted local plan which, so he submitted, were of relevance to sections 4 to 6 of the "Emerging Policy". Mr Nardell made no attempt to show that the minimum separation distances from bridleways, public footpaths and safety to be found in sections 4, 5 and 6 of the "Emerging Policy" were in conflict with those policies or indeed any others in the adopted development plan which would fall to be taken into account, in addition to Policy D5, when determining a planning application for the construction of wind turbines.

150. In my judgment, therefore, the Claimant has not shown that sections 4 to 6 of the "Emerging Policy" in the Wind SPD are in conflict with the adopted development plan.

151. Nonetheless, for the reasons I have given, in my judgment no reasonable person could have concluded that the "Emerging Policy" was not in conflict with the development plan by reason of the minimum separation distances from dwellings it prescribed for turbines which are in excess of 25m in height and located more than 350m from any dwelling. The "Emerging Policy" in the Wind SPD was accordingly in breach of regulation 8(3) of the 2012 Regulations.

## WHETHER THE COUNCIL FAILED TO HAVE REGARD TO NATIONAL POLICIES AND ADVICE CONTAINED IN GUIDANCE ISSUED BY THE SECRETARY OF STATE

### *(i) introduction*

152. As mentioned in paragraph [30] above, when preparing any "local development document" the planning authority "must have regard to" (among other matters) "national policies and advice contained in guidance issued by the Secretary of State".

153. The Claimant's case, that the Council had failed to comply with this requirement, relied on guidance issued by the Secretary of State about renewable energy and also guidance issued by him about when the use of supplementary planning documents (rather than the use of "development plan documents") was appropriate. I will consider the latter in the next part of my judgment. In this part I shall only consider the Claimant's case based on the guidance issued in respect of renewable energy generally and on-shore wind in particular.

### *(ii) submissions*

154. The Claimant's case is based on the Secretary of State's guidance for renewable energy contained in the National Planning Policy Framework, the National Policy Statement for Renewable Energy Infrastructure (known as "**EN-3**") and "Planning for Renewable Energy: A Companion Guide to PPS22" ("**the Companion Guide**").

155. On its behalf Mr Nardell QC submitted that the overall effect of such guidance was (i) that local planning authorities should take a positive approach to on-shore wind energy encouraging its development and (ii) that whether such development would have any unacceptable adverse impact on residential amenity must be determined on

a case by case basis by reference to the specific impact that each specific development may have. Whether any noise generated was unacceptable, he submitted, falls to be determined in accordance with the Secretary of State's guidance by reference to the noise limits recommended in a document known as ETSU-R-97. The unacceptability of any particular development could not be determined in accordance with the Secretary of State's guidance by reference to the achievement of some generally applicable separation distance.

156. Mr Nardell submitted that the requirement to "have regard"to the Secretary of State's guidance can only be satisfied if the local planning authority first understands its meaning and effect correctly. In this case, he submitted, the Council did not follow the Secretary of State's guidance on wind energy. It departed from it without acknowledging or grappling with the fact that it was doing so and in the mistaken belief that it was complying with it. The "Emerging Policy", so he contended, discourages wind turbine development, effectively making it impossible for the Borough to make any significant contribution to its development contrary to the Secretary of State's guidance, and it seeks to apply generally applicable separation distances from residential dwellings, an approach which is inconsistent with his guidance to assess impacts on residential amenity on a case-by-case basis. Mr Nardell drew attention to the fact that it was stated in the Wind SPD that "in England the government has rejected the idea of a separation distance"; that other authorities had considered that it would be "in line with national policy" for each application to be assessed on a case by case basis, and that such authorities considered that any separation distances required were likely to be different for each development. He contended that they were right to do so. He submitted that the Council was required to identify, and to provide reasons for making, any departure from the Secretary of State's guidance. But, so he submitted, the Council had neither recognised that the "Emerging Policy" departed from his guidance. It had assumed that what it was doing was consistent with it. Nor had the Council explained why it was considered appropriate to depart from it (if it had indeed recognised that it was making such a departure).

157. On behalf of the Council Mr Harwood QC submitted that the Secretary of State's policy did not require encouragement of renewable energy generally, and on-shore wind in particular, regardless of all other considerations. The "Emerging Policy" in the Wind SPD encouraged wind turbine development subject to the conditions it contained. He pointed out that EN-3 says that "appropriate distances should be maintained between wind turbines and sensitive receptors to protect amenity". He submitted that the government supports the ability of local planning authorities to set separation distances locally. He referred to a statement by the Planning Minister to Parliament on December 12th 2012 that "we have not set minimum separation distances nationally, because to do so would cut across localism". He submitted that the Secretary of State's guidance permitted local planning authorities to work up appropriate locational criteria for renewable energy proposals, including those for wind energy. Policy NRM16 in the Secretary of State's Regional Strategy for the South East, for example, provided that "local development documents should include criteria-based policies". As that Strategy explained, "identification of criteria may aid decision-making when assessing proposals coming forward." There was nothing in the Secretary of State's guidance that precluded such criteria including separation distances.

158. Mr Harwood also cautioned me against reading EN-3 without regard to the fact that it is directed to decisions on applications for development consent which have to be determined in accordance with such guidance (rather than in accordance with any development plan) unless other considerations indicate otherwise: see section 104(3) of the Planning Act 2008. Local planning decisions are intended to be determined primarily by reference to the development plan and relevant local development documents, including supplementary planning documents.

159. In any event Mr Harwood submitted that there was nothing to show that the Council had misunderstood the Secretary of State's guidance. The Wind SPD clearly states that national planning policy makes it clear that local authorities must take a positive approach towards renewable and low-carbon energy developments, referring to the National Planning Policy Framework in terms, and it sets out the Secretary of State's advice in respect of ETSU R 97 in terms that the Claimant could not criticise. He submitted that the only obligation on a local planning authority is to have regard to national planning guidance when preparing a local development document. There is no requirement for such a document to be consistent with, or to follow, it or for the local authority to follow it unless there are good reasons to depart from, or make an exception to, it. Nor is there a duty on the local planning authority to give reasons for not following national guidance if it does not do so.

***(iii) consideration***

160. In considering this ground upon which the Wind SPD is impugned, I must again assume that all that the "Emerging Policy" in it did was to add detail to the minimum separation distance from residential dwellings of "at least 350m" found in Policy D5, rather than conflict with it (as in my judgment it does). Assuming again, therefore, that my conclusion on that matter is wrong, the issue on that assumption is whether the Council failed to have regard the national policies and advice in guidance issued by the Secretary of State.

161. Section 19(2)(a) of the 2004 Act does not require a local planning authority when preparing a local development document to follow such guidance nor does the relevant legislation require any supplementary planning document to be consistent, or not in conflict, with such guidance. It merely requires the local planning authority to "have regard" to it. It can give it no weight to such guidance or ignore it if it has rational planning grounds for doing so: see ***Tesco Stores Ltd v Secretary of State for the Environment*** *supra* per Lord Hoffmann at p784. But it cannot have regard to such guidance if it fails to understand it correctly: see eg ***Tesco Stores Ltd v Dundee City Council*** *supra* per Lord Reed at [17].

162. I have set out the relevant guidance issued by the Secretary of State in an Annex to this judgment. It establishes beyond argument (i) that local planning authorities are advised to take a positive approach to renewable energy development, including on shore wind, and (ii) that applications for such development should be approved if its impacts are (or can be made) acceptable unless material considerations indicate otherwise.

163. The substantive relevant question about the guidance concerns what policies local planning authorities may have which go beyond merely evincing positive approach to renewable energy development.

164. It is quite plain that a local planning authority may have such policies. The Companion Guide and the South East Plan both encourage local planning authorities to have criteria-based local policies. The National Planning Policy Framework also envisages that the local planning authority may have criteria for identifying suitable areas[31]. There appears to be nothing in that Framework to suggest that a local planning authority should not include such criteria in any local policies it may have in effect implicitly revoking the advice in the Companion Guide and the South East Plan. Indeed it envisages that, if suitable areas are identified, any criteria used to identify them will be known and relevant to the determination of applications outside such areas.

*a. whether a criterion in a local policy may be based on distance alone*

165. Such criteria may, of course, take different forms. For example the Claimant could not object, consistently with its own case, to the type of criteria mentioned in paragraphs (i) to (iii) in the general part of Local Plan Policy D5. What it claims to be inconsistent with the guidance issued by the Secretary of State is a criterion based simply on the distance between a renewable energy development, in this case an on-shore wind turbine, and a noise sensitive property, such as a dwelling. It contends that the unacceptability of the impact on the amenity of that property, whether visual or by reason of noise, cannot be determined by distance alone and that, accordingly, such a criterion in a local development document cannot be regarded as consistent with the guidance issued by the Secretary of State.

166. The Claimant's contention appears to me, however, to embody a mistaken deduction which is based on too narrow a conception of what local planning policies may do.

167. For present purposes I assume that distance of itself cannot necessarily determine whether the impact of a wind turbine on the amenity of any property, whether visual or by reason of noise, is unacceptable. But what does not necessarily follow from that is that a criterion in a local development document based simply on distance is inconsistent with the guidance issued by the Secretary of State. Planning policies do not necessarily simply say when planning permission should be refused. They may also say when it should be granted. A policy that planning permission should be granted if the relevant development is no less than a certain distance from a sensitive property is not a policy that assumes that the relevant development will necessarily have an unacceptable impact if it is nearer to that property and should, therefore, be refused planning permission. It is saying in effect that, if that distance from the sensitive property is complied with, its impact on it can be regarded as acceptable and that planning permission can accordingly be granted. Such a policy does not say that planning permission should be refused on the ground that its impact is unacceptable if the development is less than the specified distance from that property. It leaves that question to be determined by reference to any other local policy and all other material considerations. Policy D5 insofar as it provides that

[31] see paragraphs 98 and 99 and footnote 17 of that Framework.

planning permission will be granted if a wind turbine is at least 350m from a dwelling can be regarded as such a policy as could the "Emerging Policy" (if and insofar as it can be regarded as elaborating the detail of that minimum requirement).

168. The question raised by the Claimant's case is thus whether a policy that planning permission will be granted, but which does not require it to be refused, if a wind turbine is no less than a certain distance from a sensitive property (or certain distances depending on its height) is one about which the Secretary of State's guidance has anything to say and (if so) what.

169. The older advice contained in PPS22 and its Companion Guide would appear to support such a policy. It advised that, in framing appropriate criteria-based policies at local level, policies should make clear that the authority will support renewable energy proposals in locations where their impacts can be addressed satisfactorily; that, in considering the impact on amenity in relation to visual intrusion and noise that authorities, will need to consider the use of zones, cumulative effect and separation distance; and specifically in relation to noise, that plans may include criteria that set out minimum separation distances between different types of renewable energy projects and existing developments[32]. Policies that planning permission will be granted if the relevant development is no less than a certain distance from a sensitive property would appear consistent with such advice. They would not be inconsistent with the more detailed consideration of an application which failed to observe that distance to ascertain whether its impact was nonetheless acceptable, measured in the case of noise, for example, by reference to the standards recommended in ETSU-R-97, before any decision refusing planning permission for it was taken.

170. The South East Plan again encourages the inclusion of criteria-based policies in local development documents as they may aid decision making[33]. It states, however, that "it is essential that such criteria are phrased in a positive way"[34]. In my judgment a criterion that indicates when a proposal will be acceptable, as opposed to when it will be unacceptable, can reasonably be regarded as one phrased in a positive way.

171. The more recent guidance in the National Planning Policy Framework is less clear. It recognises that local planning authorities may have criteria for identifying suitable areas for renewable energy development. If such suitable areas are identified, applications outside them are expected to meet the criteria used in identifying them. The Framework says nothing, however, about the nature of such criteria in general, other than in the case of potential wind energy development.

172. In the case of wind energy development it advises local planning authorities to follow the approach in EN-3 (read with the relevant sections of the Overarching National Policy Statement for Energy Infrastructure) in identifying suitable locations. EN-3 recognises that "appropriate distances should be maintained between wind turbines and sensitive receptors to protect amenity. The two main

[32] see PPS22 at [22] and the Companion Guide at [2.18], and [4.11].
[33] see Policy NRM16 and paragraph [9.102].
[34] see paragraph [9.103].

impact issues that determine the acceptable separation distances are visual amenity and noise."

173. Precisely because EN-3 is a national policy for dealing with individual applications it is then concerned with how to assess whether the impact of a particular proposal of the size with which the IPC (now the Secretary of State) has to deal is unacceptable. Thus, in terms of visual impact, it recognises that "modern onshore wind turbines that are used in commercial wind farms are large structures and there will always be significant landscape and visual effects from their construction and operation for a number of kilometres around a site": see paragraph 2.7.48. The approach recommended to the IPC against that background in section 5.9.18 of EN-1 was that "the IPC will have to judge whether the visual effects on sensitive receptors, such as local residents, and other receptors, such as visitors to the local area, outweigh the benefits of the project". Similarly, when dealing with noise, it recommends that the IPC address the question whether a particular proposal does or does not comply with the standards recommended in ETSU-R-97. Such an approach would help in determining whether a particular proposal was unacceptable.

174. It would be consistent with that approach to have criteria in local planning documents, for example, that planning permission will be refused if (for example) the visual impacts of the particular project on sensitive receptors outweighed its benefits or if the noise from a particular proposal does not comply with ETSU-R-97. Such criteria apply, however, when assessing particular proposals. They do not provide criteria for identifying suitable areas for wind-turbine development (for example for allocation in a local plan) independently of any assessment of the impact of particular proposals. The criteria which the Secretary of State envisages in the National Planning Policy Framework that a local planning authority may have, however, are criteria which may identify such areas without the need for such an assessment. Such criteria could be ones that identify an area as being suitable for wind energy development because it is sufficiently far from a sensitive receptor that it can with predicted with reasonable confidence that the type of wind turbine to which the policy applies will not have an adverse visual or acoustic impact, having regard *inter alia* to the standards in ETSU-R-97.

175. In my judgment the guidance issued by the Secretary of State, including the older guidance, when taken as a whole does not advise local authorities not to have local policies that planning permission for a wind turbine will be <u>granted</u> if a minimum separation distance is met. What the guidance plainly indicates is that local authorities should not have a policy that planning permission for a wind turbine should be <u>refused</u> if a minimum separation distance is not met.

176. In reaching this conclusion I have paid no regard to the statement by the Planning Minister in the House of Commons on December 12th 2012 on which Mr Harwood relied. Section 19(2)(a) of the 2004 Act requires regard to be had to "national policies and advice contained in guidance issued by the Secretary of State". In my judgment that requires regard to be had to guidance in documents formally promulgated as guidance. Remarks by Ministers, whether made in Parliament or at public meetings, are not matters to which local planning authorities are required by that provision to have regard. Moreover there is no evidence that the Council had regard to it when preparing the Wind SPD.

*b. Whether the Council had regard to the Secretary of State's guidance when preparing the Emerging Policy"*

177. On that basis the question is then whether the Council failed to have regard to guidance issued by the Secretary of State in preparing the Wind SPD when providing (as I am assuming it did) more detailed guidance in the "Emerging Policy" on the minimum distance requirement to be satisfied to benefit from the policy that planning permission will be granted.

178. If I am wrong about the general effect of the Secretary of State's guidance insofar as it may relate to the use of minimum separation distances, however, that does not necessarily establish the Claimant's case on this matter. If its case on the effect of such guidance is correct, then the requirement that a wind turbine be at least 350m from the nearest dwelling that is contained in Policy D5 (which was adopted in 2005 after the publication of PPS22 and after the publication of the Companion Guide on which the Claimant relies) is itself inconsistent with the Secretary of State's guidance. Accordingly it might be thought that any guidance not to have such a policy would have been taken into account, but departed from, when Policy D5 was adopted. What the "Emerging Policy" in the Wind SPD did (as I am assuming for present purposes that it did) was to provide more detailed guidance on its application. That was something which the Secretary of State's guidance on supplementary planning documents permitted such documents to do. The question on these assumptions, therefore, is the same, namely whether the Council failed to have regard to the guidance issued by the Secretary of State in preparing the Wind SPD when providing more detailed guidance on the minimum distance requirement from the nearest dwelling that a wind turbine should satisfy in order to benefit from a policy that planning permission will be granted for it.

179. The Wind SPD indicated that the potential for Amplitude Modulation (AM) noise, sometimes referred to as the 'thump' or 'swish' noise made by the blades of the turbine, can be a particular cause for concern for many residents close to wind farms but that it is not fully understood and cannot be predicted. It stated that:

> "The Companion Guide to PPS 22 refers to the ETSU R 97 study under the heading "Low Frequency Noise (Infra Sound)". The NPPF includes a footnote to paragraph 97 which advises local planning authorities to follow the approach in the National Planning Policy Statement for Renewable Energy Infrastructure (July 2011) in determining applications and when identifying suitable areas. That document in turn refers to *The Assessment and Rating of Noise from Windfarms report* (1997), by ETSU for the Department of Trade and Industry, which should be used to assess and rate noise from wind energy development. Some commentaries argue this guidance has been overtaken by the speed with which the wind energy developments have been accelerated, (see evidence paper). Although the government has consistently defended the 1997 ETSU guidelines, the Department of Energy and Climate Change (DECC) commissioned study, *Analysis of How Noise Impacts are Considered in the Determination of Wind Farm Planning Applications* (April 2011) concluded that updated best practice guidance on noise was required. Specifically related to AM noise, the document states that "there is currently no requirement in ETSU-R-97 to include any correction or penalty for any modulation in the noise and this is reflected in the way this has been dealt with in the assessments studied. This position would need

to be re-stated, or otherwise addressed in any best practice guidance, in line with current research and guidance on this issue". The document also states "it would be appropriate for any best practice guidance to confirm an appropriate way of dealing with wind shear issues as this is fundamental to the assessment procedure". However, the DECC website states that "current methods used in practice to implement the ETSU-R-97 guidance continue to apply until supplementary best practice guidance is published". The National Planning Policy Statement for Renewable Energy Infrastructure includes a footnote to para 2.7.56 which states that the peer reviewed report published in June 2011 "concluded that the methodology in ETSU-R-97 was inconsistently applied and recommended better guidance on best practice for developers and planning authorities. Government is working with industry to draft better guidance".

Overall, given the speed of progress in wind energy technology and the age of local and national policy covering wind turbine developments, as well as evidence that updated guidance is required in relation to noise from wind farms, it is considered appropriate to introduce some additional, up to date, guidance relating to wind turbine proposals in Milton Keynes, in order to help protect residential amenity. The best way of protecting residential amenity is to review the separation distances between turbines and housing."

180. Mr Nardell did not criticise this as a description of national advice. It made plain that the National Planning Policy Framework advised local planning authorities in effect to use ETSU-R-97 in determining applications and when identifying suitable areas for wind turbine development. Any contention, therefore, that the Council failed to have any regard to that advice when preparing the "Emerging Policy" in the Wind SPD is unsustainable.

181. The Council plainly took the view, however, that there was evidence that updated guidance was required in relation to noise from wind farms to help protect residential amenity and that the best way of protecting that amenity was to review the separation distance between turbines and housing. Whether the separation distances proposed in that policy were justified by concerns about the adequacy of ETSU-R-97 and by any additional visual impact resulting from the increasing size of wind turbines since the local plan was adopted is not a matter for this court. Mr Nardell expressly eschewed any challenge to the rationality of the "Emerging Policy" in the Wind SPD and to the reasoned justification which that document was required to contain for that Policy.

182. The other main aspects of guidance issued by the Secretary of State is the advice it contains that local planning authorities should take a positive approach to renewable energy development, including on-shore wind.

183. The Wind SPD stated that:

"The government actively promotes and supports renewable energy developments... Renewable energy production from wind turbines will play an important role in contributing towards achieving..targets [which the United Kingdom has endorsed]. National planning policy on renewable energy development takes a very positive stance and also makes clear that local

authorities must take the same positive approach towards renewable and low-carbon energy developments.

Planning policy in the National Planning Policy Framework (March 2012) states "Planning plays a key role in....supporting the delivery of renewable and low carbon energy and associated infrastructure. This is central to the economic, social and environmental dimensions of sustainable development." (para 93). It goes onto state "To help increase the use and 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." (para 97).

The NPPF also states that: "Local planning authorities 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 impacts;

• consider identifying suitable areas for renewable and low carbon energy sources (para 97)"

184. Mr Nardell did not criticise this as a reasonable summary of the advice issued by the Secretary of State. His contention was that the "Emerging Policy" did not embody a positive approach to wind energy development: it discouraged it. Accordingly, so he submitted, the Council must have misconstrued the Secretary of State's advice since it thought (so he asserted) that the "Emerging Policy" was consistent with it. On that basis, so he submitted, the Council had had no regard to it. Further he particularly criticised the statement in the Wind SPD that, while a separation distance of 1km across the Borough would be "overly restrictive", the SPD accorded with national policy by a more relaxed approach for smaller turbines. That, he submitted, also demonstrated the Council's failure to construe the Secretary of State's guidance correctly.

185. In my judgment Mr Nardell's main submission on this aspect of the Claimant's case does not take sufficient account of two matters. The first is that the "Emerging Policy" is a policy governing when planning permission will be granted, not when it will be refused. In that respect the Wind SPD specifically says that "the revised separation distance [for wind turbines in the context of Policy D5] is set out in an emerging policy at the end of the document. However such proposals should continue to be considered on their merits." Thus, like Policy D5, it does not provide that a development that does not observe any minimum separation distance from a dwelling specified in the "Emerging Policy" will be refused planning permission. The second matter of which Mr Nardell's submission does not take sufficient account is that any policy encouraging renewable energy development, including wind turbines, will inevitably be tempered by the need for environmental protection which national policies also recognise. That is why Policy NRM16 in the South East Plan, for example, states that "local authorities should in principle support the development of renewable energy". There will almost invariably be other factors to

consider. How the balance between the general desirability of such development and such other factors is struck will inevitably involve a planning judgment. Whether the encouragement provided by any policy that planning permission will be granted if certain conditions are met to protect residential amenity represents a sufficiently positive approach given local circumstances to accord with national guidance is a matter itself of planning judgment. There may be little scope, for example, for wind farms to be constructed in a built-up area given potential opportunities and environmental constraints. A policy that planning permission would nonetheless be granted if those constraints were met could still be a positive policy insofar as such constraints allowed even if, given them, it would result in little or no wind farm development in the period to which the policy applied.

186. A planning judgment is thus required in order to determine whether a local development document provides a sufficiently positive approach to renewable energy development to accord with the Secretary of State's policy given local opportunities and existing constraints. If the Secretary of State disagrees with the local planning authority's judgment, he has power to intervene (as explained above[35]). Unless no reasonable person could have thought that the "Emerging Policy" displayed a sufficiently positive approach to when planning permission should be granted given the need to protect local circumstances, however, in my judgment it was open to the Council to regard the Emerging Policy as consistent with a positive approach to wind turbine development in its area.

187. Mr Nardell did not advance a case that no reasonable person could have reached such a conclusion. The mere fact as he contended that the resulting opportunities for any commercial wind farm development in the Borough are extremely limited or possibly wholly extinguished by the policy if planning permission is not granted otherwise than in accordance with it is not of itself sufficient. The "Emerging Policy" does not require the refusal of permission in such circumstances. Moreover any such challenge must inevitably involve a challenge to the rationality of any justification offered in the light of current knowledge and local circumstances for the minimum separation distances from dwellings specified in the "Emerging Policy", a challenge that Mr Nardell expressly eschewed.

188. Mr Nardell's particular criticism of the statement in the Wind SPD to which I have referred faces the same difficulties. It recognises that a separation distance of 1km across the Borough would be "overly restrictive". The Emerging Policy does not provide a requirement in all cases for one. It suggests that the SPD accords with national policy by having a more relaxed approach for smaller turbines. Whether or not that is so raises the same questions.

189. In my judgment, therefore, the Claimant's case that the Council failed to have any regard to guidance issued by the Secretary of State must be rejected.

**WHETHER THE COUNCIL WAS OBLIGED TO EXERCISE A DISCRETION TO TREAT THE WIND SPD AS A "DEVELOPMENT PLAN DOCUMENT" AND WHETHER IT FAILED TO TAKE INTO ACCOUNT THE SECRETARY OF STATE'S GUIDANCE IN NOT DOING SO**

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[35] see paragraphs [31] - [33] above.

*(i) submissions*

190. On behalf of the Claimant, Mr Nardell QC submitted that, even if the Wind SPD was not required to be treated as a "development plan document", the Council had a discretion to treat it as such a document which it had unlawfully failed to exercise. He contended that the adoption of the Wind SPD improperly circumvented the process for the preparation of "development plan documents", in particular the process of public examination by an independent person. It was apparent, so he submitted, that the "Emerging Policy" raised serious, controversial issues about its consistency with national and adopted local policies on wind turbine development, about whether its "evidence base" was sufficient to justify it and about whether its specific terms were appropriate. In those circumstances, so he submitted, having regard to the Secretary of State's guidance, the "Emerging Policy" could only have been prepared and adopted lawfully as a "development plan document". Mr Nardell relied on parts of the Plan Making Manual issued by the Department for Communities and Local Government (a document that has apparently survived the revocation of PPS12) that quoted PPS 12, which had provided that "supplementary planning documents should not be prepared with the aim of avoiding the need for examination of policy which should be examined", and that stated that "supplementary planning documents must not circumvent independent examination of development plan documents". He submitted that the object of the relevant guidance is that policy proposals that do not fall squarely within the "limited canvass" of supplementing or elaborating development plan policies should be treated as "development plan documents" subject to independent examination of its soundness and relationship to other plans and policies. Accordingly any policy proposed for inclusion within a "supplementary planning document" that gives rise to serious questions about its consistency with other plans and policies and about its soundness cannot be said to fall within that "canvass".

191. On behalf of the Council, Mr Harwood QC contended that the "Emerging Policy" in the Wind SPD is consistent with the National Planning Policy Framework's approach that a supplementary planning document should provide "further detail to the policies in the Local Plan". He submitted that a local planning authority may adopt a supplementary planning document, whether or not it is contentious. Either it meets the requirements for such a document or it does not. He also submitted that, if the Council had a discretion, it had proper reasons for adopting the "Emerging Policy" as a "supplementary planning document". It did not adopt it as such to circumvent its independent examination (although in his submission the Plan Making Manual should be regarded as being of no weight).

192. It will be apparent from these submissions that this ground for impugning the adoption of the Wind SPD arises only if (i) the Claimant's case, that the Wind SPD had to be treated as a "development plan documents", is not correct (as I have found); (ii) the Council's case, that the "Emerging Policy" in the Wind SPD is not in conflict with the adopted local plan and merely provides further detail to supplement what is in that plan, is correct (contrary to my judgment), and (iii) a local planning authority has a discretion enabling it to treat a "local development document" as a "development plan document" when it is not required to do so.

***(ii) whether a local planning authority has a discretion enabling it to treat a "local development document "as a "development plan document" when it is not required to do so***

193. A "development plan document" is a "local development document" which is specified as a "development plan document" in the local development scheme which the local planning authority must maintain: see section 37(3) of the 2004 Act. That scheme must specify the "local development documents" which are to be development plan documents: see section 15(2)(aa) of the 2004 Act. These provisions in the 2004 Act regarded in isolation would appear to give a local planning authority a discretion to choose which "local development documents" are to be "development plan documents".

194. However the Secretary of State has also been given power, under section 17(7)(a) of the 2004 Act to prescribe "which descriptions of local development documents *are* development plan documents". The question is what difference the exercise of that power may have. It might be said that what the Secretary of State has not been given power in terms to prescribe which "local development documents" are not "development plan documents". But in my judgment that is implicit in the power to prescribe which are "development plan documents". Those which the Secretary of State does not prescribe are not "development plan documents".

195. That conclusion is reinforced by the provisions of section 20 of the 2004 Act. One of the purposes of the independent examination of any development plan document (in accordance with section 20(5)(a) of the 2004 Act) is "to determine...whether it satisfies the requirements of...regulations under section 17(7)" of that Act[36]. A document which is not a document prescribed as being a "development plan document" will not satisfy the requirement that it is a "development plan document" as prescribed by the Secretary of State in regulations under section 17(7)(a). Accordingly the person carrying out the independent examination of such a document can never recommend it for adoption, and a local planning can accordingly never adopt it under section 23 of the 2004 Act, as it does not satisfy one of the requirements mentioned in section 20(5)(a)[37]. Thus, even if a local planning authority might decide to prepare a document as a "development plan document" which the Secretary of State has not prescribed to be one, it may never adopt it as such.

196. The 2012 Regulations have also been drafted on the assumption that a local planning authority has no such discretion to treat any "local development document" as a "development plan document" which the Secretary of State has not prescribed as being one. Thus it is only the documents specified as "development plan documents" by the Secretary of State which comprise what is referred to in the 2012 Regulations as the "local plan"[38]. This is significant as Part 6 of the 2012 Regulations, which regulates how "development plan documents" are to be examined and adopted applies, only to the "local plan" as so defined. Parts 8 and 9

[36] In my judgment the words at the end of this paragraph "relating to the preparation of development plan documents" only apply to "any regulations under section 36". The requirement in section 24(1) is concerned not with the mere process of preparing such documents. Like section 17(7)(a) and 17(b) it is concerned with the substantive nature of such documents.

[37] see section 20(7), (7A), (7C)(a) and section 23(2)-(4) of the 2004 Act.

[38] see regulation 2(1) of the 2012 Regulations.

that deal with monitoring and the availability of documents likewise only apply (in addition to "supplementary planning documents" and a statement of community involvement) to such "development plan documents" as form part of a "local plan".

197. In my judgment, therefore, a local planning authority may not treat any document as being a "development plan document" which the Secretary of State has not prescribed as being one. This ground for challenging the adoption of the Wind SPD must be dismissed on this basis alone.

***(iii) whether any discretion the Council had to treat the Wind SPD as a "development plan document" was unlawfully exercised***

198. Assuming, however, that that conclusion is wrong, the issue is whether the Council unlawfully exercised any discretion it had in deciding not to treat the Wind SPD as a "development plan document". In my judgment it did not do so.

199. There is no requirement that the only documents which may be adopted as "supplementary planning documents" are those which do not raise serious questions about their consistency with other plans and policies or about the evidence supporting them. If a document may be adopted as a "supplementary planning document", a local planning authority is entitled to exercise its own judgment in answering such questions. It is not obliged to have an independent person answer them instead. That is one of the important distinctions between a "development plan document" and other types of "local development documents".

200. In ***R (JA Pye (Oxford) Ltd v Oxford City Council*** *supra*, the Court of Appeal found (albeit obiter) that, once a document could be lawfully adopted as a supplementary planning document under the statutory regime then applicable, a local authority was not obliged to consider alternative ways of proceeding: see at [20] and [35]. In fact in this case the Council did consider alternatives. But Mr Nardell has not shown that the reasons it apparently had for adopting the Wind SPD as a supplementary planning document were unlawful or that it did so with some "improper" aim of circumventing any independent examination.

201. At its meeting on July 4th 2012 the Council's Cabinet considered a report that identified preparing the policy as part of a "development plan document" subject to independent examination as one of the options open to it. It was informed that the process would take at least two years and that the document would not be available for use in determination of the planning applications which the Council had already received. The minutes of the Cabinet's meeting record that it considered this option and recognised that, if adopted as a "Supplementary Planning Document", the Wind SPD would be a material consideration in the determination of wind turbine applications. As the Wind SPD noted, the increased number of submitted and anticipated applications for wind turbine development was one reason why, together with the increasing scale of wind turbines since Policy D5 was written, additional guidance was considered necessary. The Minutes also record that the Cabinet considered the possibility of adopting the Wind SPD as a "supplementary planning document" and also agreeing to prepare a formal policy as part of a "development plan document". The minutes record that the Cabinet considered that any work on such a "development plan document" would be better considered in the light of the outcome of the examination in public of the Council's Core Strategy (which was

intended to be part of its development plan). That examination was to be held in July 2012. These reasons may or may not be persuasive. But in my judgment they cannot be regarded as demonstrating that the Council was exercising its power to adopt a "supplementary planning document" for an improper purpose or simply with some "improper" aim of circumventing any independent examination of it. The fact that the consequence of the decision to adopt the Wind SPD as a "supplementary planning document" was that it was not the subject of such examination cannot show any such aim: it is the inevitable consequence of adopting any such document.

202. Accordingly, if the Council had a discretion to treat the Wind SPD as a "development plan document", in my judgment that discretion was not exercised unlawfully.

## SUMMARY OF CONCLUSIONS

203. The first of the four main grounds on which the Claimant relies (described in paragraph [4(1)] above) raises the questions whether the Council was obliged to treat the Wind SPD as a "development plan document" and whether it was entitled to treat it as a "supplementary planning document".

204. Under the current legislative scheme, the "local development documents" that a local planning authority may have are either "development plan documents" or they are not. Those which are not comprise (i) a statement of community involvement; (ii) "supplementary planning documents"; and (iii) any other "local development documents" that a local planning authority may adopt. These other "local development documents" that a local planning authority may adopt do not have to comply with the requirements under the 2012 Regulations, such as the requirement that any policy they contain must not be in conflict with the adopted local plan and for public participation in its preparation. But the existence of this category of "local development document" does not assist the Council in this case. It adopted the Wind SPD as a "supplementary planning document", a document with does have to comply with those Regulations.

205. Whether the Council was required to treat it as a "development plan document" and whether it could treat it as a "supplementary planning document" depends on whether it was a document of a description falling within one of the sub-paragraphs in regulation 5(1)(a) of the 2012 Regulations and, if it did, within which of those sub-paragraphs it fell. In my judgment the new statements of policy in the "Emerging Policy" that were not already contained in the adopted development plan did not fall within sub-paragraphs (i) or (iv) of regulation 5(1)(a). But they did fall within sub-paragraph (iii). They were statements regarding the environmental, social and design objectives that the Council considered relevant to the development of wind turbines. The development of wind turbines is something that, under policies D4 and D5 in its Local Plan, the Council wishes to encourage in the period in which those policies still have effect.

206. Accordingly in my judgment the Council was entitled to adopt the Wind SPD as a "supplementary planning document". The first of three four grounds on which the Claimant impugns the adoption of the Wind SPD fails.

207. The second main ground on which the Claimant relies is that the "Emerging Policy" was in conflict with the adopted development plan for the Borough.

208. In my judgment no reasonable person could have concluded that the minimum separation distances from any residential dwelling in excess of 350m specified in the "Emerging Policy" were not in conflict with the adopted development plan. Policy D5 in that Plan states that, if certain other conditions are satisfied, planning permission will be granted for a wind turbine if it is at least 350m from any residential dwelling. Only if a proposed wind turbine meets the minimum distances in excess of 350m specified in the "Emerging Policy", however, will planning permission be granted for it in accordance with that policy. In substance, therefore, the "Emerging Policy" seeks to amend the relevant minimum distance requirement in Policy D5 and is plainly in conflict with it. A proposal that is to be granted planning permission in accordance with Policy D5 is not to be granted planning permission in accordance with the "Emerging Policy".

209. The Council submitted, however, that the minimum separation distances from the nearest dwelling specified in the "Emerging Policy" are not in conflict with the adopted development plan, if regard is also had to Policies D1 and D2 of the Local Plan. Even if the Council had in fact also taken Policies D1 and D2 into account, in my judgment that was likewise a conclusion no reasonable authority could have reached. Policies D1 and D2 provide that planning permission will be refused in certain specified circumstances which depend on the effect which a particular proposal may or may not have. If those two policies do not require planning permission to be refused in accordance with the adopted development plan for a proposal which complies with Policy D5, then refusing planning permission when Policy D5 requires to be granted is not something that would be in accordance with the adopted local plan. It would be in conflict with it. By contrast, if those policies require planning permission to be refused in accordance with the development plan, then "Emerging Policy" is in conflict with the adopted development plan in requiring planning permission to be granted nonetheless if the proposal complies with the minimum separation distances it specified.

210. Either the "Emerging Policy" fails to provide that planning permission will be granted when the adopted development plan requires it to be granted (by effectively amending the relevant minimum distance requirement in Policy D5) or it provides that planning permission will be granted when the development plan requires that it should be refused. In either case it is in conflict with the adopted development plan. No reasonable person could have thought otherwise.

211. The Claimant has not shown that the "Emerging Policy" is in conflict with the adopted development plan on any other basis.

212. But in my judgment this claim for judicial review succeeds on this ground for these reasons.

213. The third main ground on which the Claimant relies is that, in preparing the Wind SPD, the Council failed to have regard to guidance issued by the Secretary of State. I have considered this complaint on the assumption that the "Emerging Policy" was not in conflict with the adopted development plan and that it merely provides further detail to supplement what is in that plan.

214. One of the main points relied on in support of this ground was the contention that any specification of minimum distance requirements from a sensitive receptor, which a proposed wind turbine has to satisfy regardless of whether it will in fact have any unacceptable adverse impact on it, is incompatible with the Secretary of State's guidance. A local policy that planning permission must be refused if a wind turbine does not meet a minimum separation distance in such a case, regardless of whether its actual impact was unacceptable, would be not be compatible with the Secretary of State's guidance. But his guidance is not to the effect that local development documents should not include any criteria-based policy that provides for planning permission to be granted if a wind turbine is located more than a certain distance from a sensitive property. It may be possible to predict with reasonable confidence that compliance with such a criterion will mean that the type of wind turbine to which the policy applies will not have an unacceptable adverse visual or acoustic impact. It may thus serve, in accordance with the Secretary of State's guidance, to encourage proposals for such development in appropriate locations without necessarily excluding it elsewhere if it can be shown a wind turbine will not have such an unacceptable adverse impact.

215. In any event Policy D5 the Wind SPD itself contains a minimum distance requirement. On the assumption I have made, the question is whether the Council failed to have regard to the Secretary of State's guidance when providing further detail to supplement what is in that plan. The Wind SPD fairly summarised the guidance issued by the Secretary of State, including that relating to ETSU-R-97 (as Mr Nardell effectively accepted). There is nothing to suggest that the Council failed to have regard to what the document contained when preparing and adopting the "Emerging Policy" which the same document also contained. Nor has the Claimant shown that the Council must have misconstrued such guidance if it thought that the "Emerging Policy" was consistent with the Secretary of State's guidance that it should take a positive approach to such development. Whether the separation distances proposed in that policy were justified by concerns about the adequacy of ETSU-R-97 and by any additional visual impact resulting from the increasing size of wind turbines since the local plan was adopted, and thus whether it adopted a sufficiently positive approach to wind turbine development to accord with the Secretary of State's advice given the need for environmental protection, opportunities in the Borough and other local circumstances, are matters of planning judgment. The Secretary of State has powers to intervene if his judgment differs from the Council's. But that planning judgment is not a matter for this court in the absence of any challenge to the rationality of the "Emerging Policy", and to the reasoned justification which document was required to contain for that Policy, in the light of the guidance issued by the Secretary of State. The Claimant has not mounted such a challenge.

216. The third ground on which the Claimant impugned the Wind SPD accordingly fails.

217. The fourth ground likewise fails. In my judgment a local planning authority can only treat a "local development document" as a "development plan document" and adopt it as such if it is a document which the Secretary of State has specified as one which is a "development plan" document. The Council had no discretion to treat the Wind SPD as such a document. Even if it had, it was entitled to treat it as a "supplementary planning document" and the Claimant has not shown that it did so

for any improper purpose generally or having regard to the Secretary of State's guidance.

218. This claim for judicial review accordingly succeeds but only on the ground that, in breach of the requirement imposed by regulation 8(3) of the 2012 Regulations, the "Emerging Policy" in the Wind SPD was in conflict with the adopted development plan.

**Annex: relevant guidance issued by the Secretary of State**

1. PPS22 (2004) set out the Government's planning policy with respect to renewable energy. That document was one of those replaced by the National Planning Policy Framework. The Government also published the Companion Guide in 2004. That document was one that was not said to have been replaced by the National Planning Policy Framework.

2. The Companion Guide states *inter alia* that:

> "2.16 The use of criteria-based policies is an essential part of the approach established under PPS22.....At local planning authority level, criteria based policies should be developed to reflect specific local circumstances.
>
> 2.17 This guide includes advice on the framing of appropriate criteria-based policies on....local level (section 4).
>
> 2.18 However, there are some general guiding principles that are relevant at both levels.
>
> • There is a need to make clear in policy that the planning body or authority will be supportive of renewable energy proposals in locations where environmental, economic and social impacts can be addressed satisfactorily.
>
> • ....
>
> • Only the key criteria relevant to the level of planning should be included in order to assist decision-making at that level. This will ensure that the issues will be considered at the most relevant level with appropriate input from public involvement and statutory consultation. For some more detailed issues inclusion in a supplementary planning document may be more appropriate....."

3. In section 4 of the Companion Guide dealing with criteria-based policies, it is stated in relation to standalone renewable energy schemes that:

> "4.11 Any policy should begin with a statement of general support for renewables. It is usual to then list the issues that will be taken into account in considering specific applications:
>
> • there will be reference to impact on landscape, townscape, natural, historical and cultural features and areas....;
>
> • there will be specific reference to the impacts on the amenity of the area (or particular sub-areas within it) in relation to visual intrusion, noise, dust, odour and traffic generation. Here authorities will need to consider use of zones of visual influence, cumulative effect and separation distance (for noise see the Technical Annex on wind for further details). The impacts, as above, will differ with the technology, the scale of the proposal and the sensitivity of the local area (for instance, proximity to housing).
>
> 4.18. Most renewable energy policy should be expressed at the regional level, supported at local level, and worked out through the development control

(application-specific) process. However, supplementary planning documents could play a critical role in implementing renewable schemes, and have the potential to act as a tool in raising awareness of the potential of a particular technology or technologies."

4. In the part of the Annex to the Companion Guide dealing with Planning Issues relating on-shore wind, it was stated in relation to "landscape and visual impact" that:

> "Modern wind turbines are large structures sometimes over 100 metres tall, and inevitably will have an impact on the landscape, and the visual environment. Due to the importance attached to landscape and visual impact, the subject is dealt with in some depth in the Companion Guide (see Sections 3 ,4 and 5)."

5. Reflecting paragraph 19 of PPS22, the Companion Guide recommended that "issues of landscape and visual impact should be addressed at the scheme-specific level"[39].

6. In the same part of the Annex to the Companion Guide, it was stated in respect of noise that:

> "41. Well-specified and well-designed wind farms should be located so that increases in ambient noise levels around noise-sensitive developments are kept to acceptable levels with relation to existing background noise. This will normally be achieved through good design of the turbines and through allowing sufficient distance between the turbines and any existing noise-sensitive development so that noise from the turbines will not normally be significant. Noise levels from turbines are generally low and, under most operating conditions, it is likely that turbine noise would be completely masked by wind-generated background noise.
> ...
>
> 44. The report, "The Assessment and Rating of Noise from Wind Farms" (ETSU-R-97), describes a framework for the measurement of wind farm noise and gives indicative noise levels calculated to offer a reasonable degree of protection to wind farm neighbours, without placing unreasonable restrictions on wind farm development or adding unduly to the costs and administrative burdens on wind farm developers or planning authorities. The report presents the findings of a cross-interest Noise Working Group and makes a series of recommendations that can be regarded as relevant guidance on good practice. This methodology overcomes some of the disadvantages of BS 4142 when assessing the noise effects of wind farms, and should be used by planning authorities when assessing and rating noise from wind energy developments (PPS22, paragraph 22)."

Paragraph 22 of PPS22 had stated in relation to noise from renewable technologies *inter alia* that

> "Local planning authorities should ensure that renewable energy developments have been located and designed in such a way [as] to minimise increases in ambient noise levels. Plans may include criteria that set out minimum separation distances between different types of renewable energy projects and existing

[39] see eg section [5.4], [5.11] and [5.14].

developments. The 1997 report by ETSU for the Department of Trade and Industry should be used to assess and rate noise from wind energy development."

7. The Noise Working Group that produced ETSU-R-97 had considered three types of potential noise limits: (i) a minimum separation distance between the development and the nearest properties; (ii) an absolute limit based on the average level of noise not to be exceeded in specified time period; and (iii) a relative limit based upon a permitted increase in noise level with respect to the background noise level. At that time Government guidance in PPG22 then indicated that experience suggested that there was unlikely to be a significant noise problem for a residential property situated further than distances of 350-400m from a wind turbine. The Working Group considered, however, that "The difference in noise emissions between different types of machine, the increase in scale of turbines and wind farms seen today and topographical effects ..all dictate that separation distances of 350-400 metres cannot be relied upon to give adequate protection to neighbours of wind farms." It considered that separate day time and night time noise limits at the nearest noise sensitive properties set relative to the background noise were more appropriate in the majority of cases with absolute noise limits being set for such properties in low noise environments.

8. The Regional Strategy for the South East of England, "**the South East Plan**", was published by the Secretary of State in May 2009. In it Policy NRM15 stated that

> "local development documents should encourage the development of renewable energy to achieve regional and sub-regional targets. Renewable energy development, particularly wind and biomass, should be located and designed to minimise adverse impacts on landscape, wildlife, heritage assets and amenity...."

9. Paragraph [9.22] of the South East Plan stated that:

> "LDDs, together with supplementary planning documents should reflect the availability of different resources and include guidance on the circumstances in which renewable energy developments will be acceptable in principle and be most likely to be permitted, taking into account the need to adapt to changing technologies".

Against that background Policy NRM16 "Renewable Energy Development Criteria" stated *inter alia* that:

> "Through their local development frameworks and decisions, local authorities should in principle support the development of renewable energy. Local development documents should include criteria-based policies that, in addition to general criteria applicable to all development, should consider the following issues:
>
> ... ....
>
> (ii) the potential to integrate the proposal with existing or new development..."

The South East Plan then continues:

"9.102 All proposals should be considered on their individual merits with regard to scale, location, technology type and cumulative impact. Identification of criteria may aid decision-making when assessing proposals coming forward.

9.103 However, it is essential that such criteria are phrased in a positive way and are seen as supporting other policies that generally encourage renewable energy development. The provisions and criteria of other policies, for example for protection of biodiversity, landscape and amenity will apply to all developments and should be considered in addition to those set out below. In addition, these issues will be part of environmental assessments undertaken for such developments."

10. The National Planning Policy Framework was published by the Secretary of State in March 2012. It replaced many previous documents providing guidance that he had issued. In addition to more general advice, the Framework states, in its section dealing with meeting the challenge of climate change, that:

"97. To help increase the use and 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;[17]

• support community-led initiatives for renewable and low carbon energy, including developments outside such areas being taken forward through neighbourhood planning...

98. When determining planning applications, local planning authorities should:

• not require applicants for energy development to demonstrate the overall need for renewable or low carbon energy and also recognise that even small-scale projects provide a valuable contribution to cutting greenhouse gas emissions; and

• approve the application [unless material considerations indicate otherwise] if its impacts are (or can be made) acceptable. Once suitable areas for renewable and low carbon energy have been identified in plans, local planning authorities should also expect subsequent applications for commercial scale projects outside these areas to demonstrate that the proposed location meets the criteria used in identifying suitable areas."

11. Footnote 17 is of significance. It provides that:

> "In assessing the likely impacts of potential wind energy development when identifying suitable areas, and in determining planning applications for such development, planning authorities should follow the approach set out in the National Policy Statement for Renewable Energy Infrastructure (read with the relevant sections of the Overarching National Policy Statement for Energy Infrastructure, including that on aviation impacts). Where plans identify areas as suitable for renewable and low-carbon energy development, they should make clear what criteria have determined their selection, including for what size of development the areas are considered suitable."

12. EN-3 was presented to Parliament by the Secretary of State in July 2011. It was originally addressed to the Infrastructure Planning Commission ("IPC"). But that body's functions under the 2008 Act were assumed by the Secretary of State himself when it was abolished as a result of section 128 of the Localism Act 2011. EN-3 is a statement of national policy that now provides the primary basis for decisions by the Secretary of State on whether to grant development consent under the Planning Act 2008 for such renewable energy infrastructure whose capacity, in the case of on-shore wind, is in excess of 50MW. Any need for such development consent for such infrastructure replaces the need to obtain planning permission for it. The approach to whether or not such a development consent granted is, as Mr Harwood pointed out, different from that required when determining whether or not planning permission should be granted. Effectively any national planning policy statement (such as EN-3) displaces the development plan as the basis upon which the decision must be taken unless other relevant considerations indicate otherwise.

13. Under the heading "proximity of site to dwellings", paragraph [2.7.6] of EN-3 states in relation to on-shore wind that:

> "Commercial scale wind turbines are large structures and can range from tip heights of 100m up to 150m although advances in technology may result in larger machines coming on the market. All wind turbines generate sound during their operation. As such, appropriate distances should be maintained between wind turbines and sensitive receptors to protect amenity. The two main impact issues that determine the acceptable separation distances are visual amenity and noise. These are considered in the Landscape and visual (paragraph 2.7.46) and Noise and vibration (paragraph 2.7.52) impact sections below."

14. In relation to their landscape and visual impact, EN-3 states that:

> "2.7.46. Generic landscape and visual impacts are covered in Section 5.9 of EN-1. In addition, there are specific considerations which apply to onshore wind turbines, which are set out in the following paragraphs.
>
> 2.7.48. Modern onshore wind turbines that are used in commercial wind farms are large structures and there will always be significant landscape and visual effects from their construction and operation for a number of kilometres around a site.
>
> 2.7.49. The arrangement of wind turbines should be carefully designed within a site to minimise effects on the landscape and visual amenity while meeting technical and operational siting requirements and other constraints.

2.7.50. There are existing operating wind farms where commercial scale wind turbines are sited close to residential dwellings. The IPC should consider any evidence put before it on the experience of similar-scale turbines at similar distances to residential properties.

2.7.51. It is unlikely that either the number or scale of wind turbines can be changed without significantly affecting the electricity generating output of the wind farm. Therefore, mitigation in the form of reduction in scale may not be feasible."

15. When dealing with noise, EN-3 states inter alia that:

"2.7.55 The method of assessing the impact of noise from a wind farm on nearby residents is described in the report, "The Assessment and Rating of Noise from Wind Farms" (ETSU-R-97)[32]. This was produced by the Working Group on Noise from Wind Turbines Final Report, September 1996 and the report recommends noise limits that seek to protect the amenity of wind farm neighbours. The noise levels recommended by ETSU-R-97 are determined by a combination of absolute noise limits and noise limits relative to the existing background noise levels around the site at different wind speeds. Therefore noise limits will often influence the separation of wind turbines from residential properties.

2.7.57 The IPC should consider noise and vibration impacts according to Section 5.11 of EN-1 and use ETSU-R-97 to satisfy itself that the noise from the operation of the wind turbines is within acceptable levels.

2.7.58 Where the correct methodology has been followed and a wind farm is shown to comply with ETSU-R-97 recommended noise limits, the IPC may conclude that it will give little or no weight to adverse noise impacts from the operation of the wind turbines.

2.7.59 Where a wind farm cannot demonstrate compliance with the recommended noise limits set out in ETSU-R-97, the IPC will need to consider refusing the application unless suitable noise mitigation measures can be imposed by requirements to the development consent."

16. Mr Nardell also drew attention to the statement in EN-3 that:

"There is a significant risk that a policy that was significantly less tolerant than EN-3 of adverse visual impacts would result in many fewer wind farms being consented, and that it would benefit many fewer people than it disadvantaged (as a result of reduced security of supply and failure to meet targets for reducing greenhouse gas emissions). Policies that were less tolerant than EN-3 of potential adverse noise and shadow flicker impacts would probably be less likely to make a significant impact on consenting of development proposals. As a result they would be unlikely to make a significant difference even to those potentially adversely affected by such impacts and would have a smaller, but still adverse, impact on security of supply and positive impacts to climate change brought about by renewable energy development. For these reasons, the approach in EN-3 is preferred."