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Solar Farm planning permission quashed on efficiency and land take

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Commercial and Construction

26TH FEB 2024

Energy , Planning

The High Court has quashed the planning permission and a non-material amendment, for a solar farm at Burnhope, County Durham.

The approval of solar farms is subject to two alternative regimes: planning permission on application made to the local planning authority where the capacity is 50MW of electricity or less; whilst larger schemes can only be approved by the Secretary of State making a development consent order under the Planning Act 2008. The Court referred to this as the Statutory Capacity Threshold.

The planning application was submitted with a claimed capacity of 49.9MW, so just below the Statutory Capacity Threshold. The application was then amended to station solar arrays closer together. The local planning authority failed to appreciate that this significantly increased the number of arrays and so increased the surface area of the panels by over 60%. The developer still maintained that the capacity was 49.9MW.

The metadata on the files submitted by the developer showing drawings of the panels showed the manufacturer and specification of panels on which the drawings were based: Longi 540W in the original application, and Trina 685Wp in the amended scheme.

A local resident, Mr Ian Galloway, brought judicial review proceedings contending that the permission had either authorised a solar farm above the 50MW limit or one with grossly inefficient panels, and so the council failed to take into account that the scheme could have covered a smaller area.

Mr Justice Fordham dealt with several issues on the interpretation of the planning permission. He found that the metadata was not incorporated into the planning permission, so the approval had not been of 685W panels. The permission had though approved the number and size of panels on the drawings. He rejected the Council and developer's arguments that granting permission in accordance with the application incorporated the design and access statement, planning statement and 'relevant emails' in the permission, and the capacity of the site was not limited by the permission to 49.9MW. He also held that the conditions on the permission bound the scheme to the approved plans (considering *R (Swire) v Canterbury City Council [2022] EWHC 390 (Admin)*).

The question then was what was the capacity of the solar farm? The Court considered its task was not helped by the developer's failure to explain how it had calculated the capacity in breach of its duty of candid disclosure (para 91). The then draft National Policy Statement on Renewable Energy identified two possible means of calculation: 'the total capacity of a solar farm can be measured either in terms of the combined capacity of installed solar panels (measured in DC) or in terms of combined capacity of installed inverters (measured in AC)'. Mr Justice Fordham referred to these as the Combined-Panels Method and the Combined-Inverters Method respectively (see para 16-20).

The DC output of the solar farm could be calculated from the area of the panels and outputs of the Longi and Trina panels or the example panel given in the draft NPS. On this basis, whilst the original application would have a 48.55MW DC capacity with Longi 540s (and similar if the other panels were used), the DC output of the amended scheme would be 75.70MW with the Trina panels and at least 72.5MW with the other sample panels. So, by the Combined Panels Method the DC output of the panels would be well over the 50MW threshold and such a scheme would have to be promoted as a nationally significant infrastructure project rather than by a planning application.

The Court said that the capacity might be calculated by the Combined-Inverters Method, but there was no explanation of this by the developer, nor exploration of it by the Council. The capacity of the inverters was not set out.

Since the capacity of the panels was not fixed by the permission and the Combined Inverters Method might be able to be used, the Court was not persuaded that the Council had granted planning permission for a scheme over 50MW.

However, if the Combined-Inverters Method was being used there was no consideration of the 'Accompanying Proviso' in the draft NPS (judgment, para 20):

"AC installed export capacity should not be seen as an appropriate tool to constrain the impacts of a solar farm. Other measurements, such as panel size, total area and percentage of ground cover should be used to set the maximum extent of development when determining the planning impacts of an application"

It was, the Court held (para 82):

"an obviously material consideration as to whether the grant of Planning Permission was 'approving more panels over a larger area than were required' for a 50MW solar farm, and as to the implications of that for the blue areas of solar panel coverage and remaining green areas, where those blue and green areas were to be, and who would decide."

Fordham J asked (para 89):

"If your conventionally-measured capacity is 50% over the Statutory Capacity Threshold: why do you need so much blue?; why can't there be more green?"

Consequently, the permission was quashed.

Shortly before the High Court hearing the local planning authority had approved a non material amendment under section 96A of the Town and Country Planning Act 1990 to expressly articulate what the council and developer said was already the true meaning of the planning permission. This imposed a condition limiting the capacity to 49.9MW (AC) and altered the condition which required precise details to be approved to contend that the number and size of panels could be changed and so determine the capacity.

Condition 4 required the development to be carried out in strict accordance with the approved plans. Condition 12 (prior to amendment) required precise details of above ground structures to be approved. The NMA change to condition 12 was to allow these details to be approved *'Notwithstanding the detail in the approved plans set out in condition no.4'*. Fordham J held this was a material change.

The Court held that the original planning permission did not cap the capacity of the solar farm (para 70) and did not allow departures from the approved plans (para 61). Consequently, the NMA was unlawful for those reasons. So as with other recent quashings (*R(Milne-Skillman) v Horsham District Council*[2023] EWHC 2919 (Admin) and *R(Dennis) v London Borough of Southwark*[2024] EWHC 57 (Admin)) a non-material amendment which purported to clarify a planning permission failed because the permission was misinterpreted.

The NMA was also unlawful in any event because the original planning permission was vitiated by the failure to have regard to an obvious material consideration (para 92).

On procedure the Court found was also legitimate for the Claimant to seek to amend the original judicial review proceedings to challenge the NMA (para 8). The council and developer's resistance to this, on the

basis of it being a 'rolling judicial review', caused the claimant to issue a second set of proceedings, and ultimately to recover two sets of costs.

The Court also considered *Hillside Parks Ltd v Snowdonia National Park Authority*[2022] UKSC 30 [2022] 1 WLR 5077 and held that the planning permission was for an integrated and non-severable scheme. If the permission had authorised a solar farm exceeding the Statutory Capacity Threshold, then the developer could not simply choose to build a smaller solar farm on part of the fields.

The main practical issue that comes out of the case is the focus on how capacity is calculated. If a solar farm is relying on the alternating current (AC) output to stay within the 50MW capacity limit then there will have to be an explanation as to how that is calculated and whether the inverters are the most efficient. Quite simply, are there more solar panels than are needed to generate 50MW AC?

R (Galloway) v Durham County Council [2024] EWHC 367 (Admin) (21st February 2024).

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