

Appeal Decision

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Appeal Reference:	2021/A0113.
Appeal by:	MPG Wind.
Appeal against:	The non-determination of an application for full planning permission.
Proposed Development:	Proposed retention of existing turbine tower, replacement of existing turbine nacelle and blades with new nacelle and blades. The replacement nacelle and blades will create a hub height of 40m with a maximum rotor diameter of 31m and tip height of 55.5m (up to 250kW max). Retention of existing 2no. kiosks and section of track, along with proposed relocated access and creation of a new section of gravel track for access purposes.
Location:	Lands approximately 230m to the north west of 15 Barnmeen Road, Rathfriland.
Planning Authority:	Newry, Mourne and Down District Council.
Application Reference:	LA07/2021/1088/F.
Procedure:	Written representations and Commissioner's site visit on 5 th August 2022.
Decision by:	Commissioner Laura Roddy, dated 20 th March 2023.

Decision

1. The appeal is allowed and full planning permission is granted, subject to the conditions set out below.

Reasons

2. The main issue in this appeal is whether the proposed development would have an unacceptable adverse impact on residential amenity.
3. Section 45(1) of the Planning Act requires that regard must be had to the local development plan (LDP), so far as material to the application. Section 6(4) of the Act requires that where in making any determination under the Act, regard is to be had to the LDP, the determination must be made in accordance with the plan unless material considerations indicate otherwise.
4. As Newry, Mourne and Down District Council has not, as yet, adopted a Plan Strategy for the district, the Banbridge, Newry and Mourne Area Plan 2015 (BNMAP) acts as the local development plan for the area in which the appeal site is located. In it, the appeal site lies in the countryside outside of any settlement limit. The BNMAP has no plans or policies that are relevant to the appeal proposal. Accordingly, the proposal would be in accordance with the plan.

5. The Strategic Planning Policy Statement for Northern Ireland (SPPS) sets out the transitional arrangements that will apply until a local authority has adopted a Plan Strategy for its council area. The SPPS retains certain existing Planning Policy Statements (PPSs) including Planning Policy Statement 21: Sustainable Development in the Countryside (PPS21) and Planning Policy Statement 18: Renewable Energy. There is no conflict between the provisions of the SPPS and those of retained policy regarding issues relevant to this appeal. Therefore, in accordance with the transitional arrangements set out in the SPPS, the appeal should be determined in accordance with the retained policies of PPS21 and PPS18.
6. Policy CTY1 of PPS21 states that there are a range of types of development which are acceptable in principle in the countryside. One of these is renewable energy projects in accordance with PPS18. Policy RE1 of PPS18 permits development which generates renewable energy provided it will not result in an unacceptable adverse impact on five criteria. Criterion (a) relates to public safety, human health or residential amenity.
7. Policy RE1 of PPS18 goes on to state that applications for wind energy development will also be required to demonstrate compliance with seven additional criteria including (vi) that the development will not cause significant harm to the safety or amenity of any sensitive receptors (including future occupants of committed developments) arising from noise; shadow flicker; ice throw; and reflected light.
8. The Council has no objection to the appeal proposal, subject to the imposition of planning conditions. However, third parties have raised concerns regarding the appeal proposal, including its noise impact. Concerns were also raised by third parties regarding noise, shadow flicker and the health impacts of the existing turbine on the site (a Siva 250kw turbine). This turbine is subject to an Enforcement Notice (EN) which has been appealed to the Commission (see conjoined appeal 2020/E0056). Matters relating to the existing turbine, and its impacts, are outwith the remit of this appeal. In any event, the appeal proposal seeks to address the concerns raised by third parties.
9. The appellant submitted a noise impact assessment (NIA) in support of the appeal proposal. The NIA was prepared in accordance with ETSU-R-97 which the Best Practice Guidance (BPG) to PPS18 describes as a framework for the measurement of windfarm noise. It gives indicative noise levels calculated to offer a reasonable degree of protection to wind farm neighbours, without placing unreasonable restrictions on wind farm development. Background noise surveys were carried out at 76 Newry Road which is considered to be representative of the nearest third party property. Predicted noise levels were provided for four different turbine models (Vestas V29, Micon M530, Micon M750 and WTN29). All of the turbine models assessed demonstrated compliance with the industry standard acceptable daytime and night time noise limits, in line with ETSU-R-97. A cumulative assessment was also carried out which considered the impacts of the proposed turbine models with three other existing turbines that are located within 2.25km from the appeal site. Again, all of the predicted noise levels were within the accepted industry limits.

10. The Council is satisfied that the NIA is robust and I was given no persuasive evidence by the third parties to dispute its conclusions. The appellant has confirmed the nacelle will be replaced in its entirety, as per the description of the development, not just the cover as suggested by some third parties. Whilst the third parties also raised concerns regarding the proposed nacelle being an upgrade/alteration as opposed to a new turbine, in the event of approval, conditions could be imposed to ensure noise levels from the turbine do not breach the predicted levels in the NIA. A condition could also be imposed should a complaint about noise emissions arise.
11. A third party raised concerns regarding the potential impacts of the appeal proposal on her children who have medical problems, and their ability to live happily and comfortably in their home. The main concern appears to be predicated on potential noise and shadow flicker impacts. The property concerned has not been assessed in the NIA as it is more than 500m from the proposed turbine. The NIA indicates that noise levels arising at properties within 500m of the turbine would be acceptable and within the required limits set by prevailing national guidance. Given this, it follows that the appeal proposal should not cause significant harm or noise nuisance at a property more than 500m from the source of the noise. In relation to shadow flicker, the BPG to PPS18 advises that problems caused by shadow flicker are very low at distances greater than 10 rotor diameters from a turbine. There are two houses within 10 rotor diameters (or 310m) of the proposed turbine. One is financially associated with the proposed development and the other is not considered to be habitable. Given that the distance to the other properties is greater than that endorsed by the BPG, it is unlikely there would be unacceptable impacts arising from shadow flicker as a result of the proposed turbine.
12. The appellant has provided an extract from the 'Wind Turbine Health Impact Study: Report of Independent Expert Panel 2012'. This concludes there is no evidence of health effects from exposure to wind turbines, no association between noise from wind turbines and psychological distress or mental health and no association between noise from wind turbines and a number of other health conditions. It also found shadow flicker does not pose a risk for eliciting seizures as a result of photic stimulation. The conclusions from this report aid in reinforcing the above findings. In any event, most of the concerns around health were based on the existing turbine and not the proposed turbine. The third parties' concerns in all of the above matters are not therefore sustained.
13. Overall, no persuasive evidence was provided that the appeal proposal would have an adverse impact on health. For the reasons stated above, I consider the appeal proposal would not have an unacceptable impact on residential amenity or human health. It would not cause significant harm to the safety or amenity of any sensitive receptors and complies with Policy RE1 of PPS18 insofar as stated.
14. General concerns were raised by third parties in respect of the welfare of animals, specifically buzzards and bats. A bat activity survey was submitted. The findings of the assessment based on the recordings by the static detectors, supplemented by on site activity surveys, show bat activity to be low. The survey also indicates that the appeal proposal would not be likely to pose a risk to local populations of bats given the low level of activity. There would be no significant impact on commuting or foraging bats as a result of the appeal proposal. I was given no evidence to

dispute these findings. Additionally, a letter was provided from a consultant on behalf of the appellant confirming that, as the habitats within the vicinity of the appeal site comprise arable fields and a defunct hedgerow, there is no evidence to suggest the presence of nesting common buzzards, red kites or other notable species of birds. The third parties did not present me with any persuasive evidence that the proposed development would have an adverse impact on any protected species.

15. I accept the appellant's evidence is robust in respect of birds and bats and consider the appeal proposal would not have any unacceptable adverse impact on biodiversity or nature conservation. The third parties' concerns in this respect are not upheld.
16. Other concerns raised regarding administrative issues arising throughout the processing of the planning application are matters between the appellant and the Council. They are outwith the confines of this appeal. Under the planning process, an appellant is entitled to apply for planning permission to develop land and there is no restriction on the number of applications that can be submitted.
17. Third parties' referred to the proposal as a 'wind farm'. However, the SPPS defines such as development comprising more than two turbines. Accordingly, the appeal proposal is not a wind farm and is not required to meet the separation distances set in policy for wind farms. Furthermore, the Council carried out Environmental Impact Assessment (EIA) screening to determine whether the planning application should have been accompanied by an Environmental Statement. They considered it did not and I agree given the parameters of the EIA Regulations.
18. Article 1 of the First Protocol of the Human Rights Act 1998, which provides for the protection of property and the peaceful enjoyment of possession, is engaged in this appeal. However, these are qualified rights, and the legislation envisages a balance be struck between the interests of individuals and society as a whole. The appeal proposal accords with planning policy, and I consider my findings to be reasonable in balancing the rights of the individual with the public interest. It follows that there would be no unacceptable or disproportionate infringement of the third parties' rights under the Human Rights Act 1998.
19. The appeal proposal complies with PPS18 and there is no material consideration which outweighs this conclusion.
20. Noise conditions would be necessary for the reasons outlined previously to protect residential amenity. A condition is necessary to ensure that a safe access is provided in the interests of road safety. A decommissioning condition is also necessary in the interests of visual amenity.

Conditions

- 1) The level of noise emissions from the wind turbine hereby approved (including the application of any tonal penalty) shall not exceed the values set out in the table below. Noise limits for dwellings which lawfully exist or have planning permission for construction at the date of this permission but are not listed in the table below shall be those of the physically closest location listed in the table, unless otherwise agreed in writing by the Planning Authority.

Property	Wind Speed at 10m Height (m/s)								
	4	5	6	7	8	9	10	11	12
	Noise Limits, dB LA90,10min								
6 Barnmeen Road	30.5	31	31.4	31.9	32.3	32.8	33.2	33.2	33.2
10 Barnmeen Road	34	34.5	34.9	35.4	35.8	36.3	36.7	36.7	36.7
15 Barnmeen Road (FI)	39.4	39.9	40.3	40.8	41.2	41.7	42.1	42.1	42.1
16 Barnmeen Road	33.8	34.3	34.7	35.2	35.6	36.1	36.5	36.5	36.5
24 Barnmeen Road	32.5	33	33.4	33.9	34.3	34.8	35.2	35.2	35.2
82 Newry Road	30.8	31.3	31.7	32.2	32.6	33.1	33.5	33.5	33.5
76 Newry Road	32.5	33	33.4	33.9	34.3	34.8	35.2	35.2	35.2

- 2) Within 28 days of being notified by the Planning Authority of a reasonable complaint from the occupant of a dwelling which lawfully exists or has planning permission at the date of this consent, the wind turbine operator shall, at their expense, employ a suitably-qualified person to assess the level of noise emissions from the wind turbine at the complainant's property. The Planning Authority shall be notified not less than 2 weeks in advance of the date of commencement of the noise monitoring. The wind turbine operator shall provide to the Planning Authority the consultant's assessment and conclusions regarding the said noise complaint, including all calculations, audio recordings and the raw data upon which that assessment and conclusions are based. Such information shall be provided within 3 months of the date of the written request of the Planning Authority unless otherwise extended in writing by the Department.
- 3) The vehicular access arrangements shall be provided in accordance with Drg No 3432-L03 prior to the replacement of the turbine nacelle and blades hereby approved.
- 4) Within 12 months of the cessation of electricity generation at the site all structures shall be removed, and the land restored in accordance with a scheme to be submitted to and agreed in writing with the Planning Authority at least one year prior to the commencement of any decommissioning works.
- 5) The development shall be begun before the expiration of five years from the date of this permission.

This decision relates to the following drawings:-

Drawing No.	Title	Scale	Date Received by Council
3432 – L01	Site Location Plan	1:2500	21 st May 2021
3432 – L02	Existing Site Plan	1:500	21 st May 2021
3432 – L03	Proposed Site Plan	1:500	30 th June 2021
3432 – L04	Wind Turbine and Sub-Station Kiosk Plans and Elevations	Turbine - 1:250 Kiosk - 1:100	30 th June 2021

COMMISSIONER LAURA RODDY

List of Documents

Planning Authority:-	"A1" Statement of Case by Newry, Mourne and Down District Council. "A2" Rebuttal Comments by Newry, Mourne and Down District Council.
Appellant(s):-	"B1" Statement of Case by Clyde Shanks on behalf of MPG Wind. "B2" Rebuttal Comments by Clyde Shanks on behalf of MPG Wind.
Third Parties:-	"C1" Statement of Case by Ms Killen on behalf of 227 representatives. "C2" Statement of Case by Ms Sloane on behalf of 26 representatives.