

Item: 18

Special General Meeting of the Council: 30 June 2020.

Orkney's Community Wind Farm Project.

Planning Applications – Governance Arrangements.

Joint Report by Chief Executive and Executive Director of Development and Infrastructure.

1. Purpose of Report

To consider governance arrangements in respect of the Council's role as a consultee or inquiry participant in the determination by the Scottish Ministers of the Council's planning application for a wind farm development at Quanterness and, in the event that they are also called in, the Council's planning applications for wind farm developments at Hoy and Faray.

2. Recommendations

The Council is invited to note:

2.1.

That three wind farm sites are currently being developed as part of Orkney's Community Wind Farm Project, namely:

- Wee Fea, Hoy.
- Quanterness, St Ola.
- Faray.

2.2.

That a planning application has been submitted for the site at Quanterness, with separate planning applications for the remaining two sites likely to be submitted later in 2020.

2.3.

That, as each site has a capacity lower than 50 megawatts, the planning applications must be submitted to Orkney Islands Council, as local planning authority, rather than direct to Scottish Ministers.

2.4.

That, on 10 December 2019, the Council resolved:

- That, upon submitting the first planning application for sites related to Orkney's Community Wind Farm project, the Chief Executive should make a request to the Scottish Government that, based on national significance, the application be called in for determination by the Scottish Ministers.
- That, should the Scottish Government accept the request outlined above, the same action should be taken for future planning applications relating to Orkney's Community Wind Farm Project.

2.5.

That, on 19 February 2020, the Chief Executive made a request to the Scottish Government to call in the planning application for the proposed wind farm development at Quanerness.

2.6.

That, on 24 March 2020, the Scottish Government responded by issuing a Direction to call in the planning application for the wind farm development at Quanerness.

2.7.

That the reasons given for the Direction included that the proposed development raised matters which were of national importance in the context of expectations set out in National Planning Framework 3 for the Pentland Firth and Orkney Waters area and the need for an enhanced high voltage energy transmission network.

2.8.

That, in light of the terms of the Council's determination referred to in paragraph 2.4 above, arrangements are currently in hand to request the Scottish Government to call in the planning applications for the wind farm developments at Hoy and Faray.

2.9.

That, in light of the Direction referred to in paragraph 2.6 above, the Scottish Ministers will now act as planning authority and the Council, as planning authority, will have no locus to determine the application.

2.10.

That it is likely that the Reporter, on behalf of the Scottish Ministers, will invite a consultation response from the Council as the local planning authority.

2.11.

That it is also possible that the Reporter will hold a Local Inquiry under the usual inquiry rules and, as such, the Council, as the local planning authority, may be expected to participate in that inquiry.

2.12.

The options set out in section 5 of this report, in respect of how the Council could respond to such a consultation or participate in such an inquiry.

It is recommended:

2.13.

That the Council consider the options in section 5 and determine which option is to be followed in terms of further procedure in relation to the Council's planning application for a wind farm development at Quanterness and, in the event that they are also called in, the Council's planning applications for wind farm developments at Hoy and Faray.

3. Background

3.1.

The Council is developing three wind farm sites as part of its Community Wind Farm Project, namely:

- Wee Fea, Hoy.
- Quanterness, St Ola.
- Faray.

3.2.

The Council is seeking to achieve planning permission in each case by the end of 2021.

3.3.

The three developments would contribute to the Needs Case for a new improved grid connection between Orkney and the Scottish Mainland. Grid connections for the three sites are likely to be submitted shortly. A new interconnector for Orkney has been identified by the Council as being required to achieve savings in its own energy costs and also to generate income by selling any surplus electricity to the Grid. The income generated would be paid to the Council and might then be used by the Council to fund a range of services across Orkney.

3.4.

In September 2019, the electricity market regulator, Ofgem, published its final decision on the Needs Case for the new interconnector. It determined that there is a need for the connection and that, in order to trigger a new 220 megawatt (MW) cable, 135 MW of new generation will require to have obtained planning permission, be signed up to a grid connection agreement, and have passed a financial audit before the end of 2021. Currently, less than 40 MW of new generation has gained planning permission.

3.5.

Noting that there are a number of other private projects at different stages of development, the maximum energy generation of the three wind farm developments referred to in section 3.1 is cumulatively circa 72 megawatts. They would therefore make a significant contribution to the interconnector needs case.

3.6.

A planning application has been submitted for the site at Quanterness, with separate planning applications for the remaining two sites likely to be submitted later in 2020.

3.7.

As each site has a capacity lower than 50 megawatts, the planning applications must be submitted to Orkney Islands Council, as local planning authority, rather than direct to Scottish Ministers.

3.8.

At the General Meeting held on 10 December 2019, the Council resolved that, upon submission of the first planning application for the three sites related to Orkney's Community Wind Farm project, the Chief Executive should make a request to the Scottish Government that, based on national significance, the application be called in for determination by the Scottish Ministers.

3.9.

On 19 February 2020, the Chief Executive submitted a request to the Scottish Government to call in the planning application for the proposed wind farm development at Quanterness.

3.10.

On 24 March 2020, the Scottish Government responded and issued a Direction to call in the planning application for the wind farm development at Quanterness. The reasons given for the Direction included that the proposed development raised matters which were of national importance in the context of expectations set out in National Planning Framework 3 for the Pentland Firth and Orkney Waters area and the need for an enhanced high voltage energy transmission network.

3.11.

Arrangements are currently in hand to request the Scottish Government to call in the planning applications for the wind farm developments at Hoy and Faray.

4. Planning Procedure

4.1.

The effect of a call-in by Scottish Ministers of a planning application is that the Scottish Ministers will act as the planning authority and determine the application. The statutory role of the Council is primarily as applicant. The Council, as planning authority, will have no locus to determine the application.

4.2.

Nonetheless, it is likely that the Reporter to the Scottish Ministers will seek a consultation response from the Council in its capacity as the local planning authority. It is also possible that the Reporter will hold a Local Inquiry in terms of the usual inquiry rules, and, as such, the Council may be expected to participate in that.

4.3.

Given that the determination of the planning application will be by the Scottish Ministers, there is no legal bar of itself to the Council, as planning authority, offering its own view if asked by the Reporter for a response. Any view expressed will not be binding on the Reporter. It will still be for the Ministers to determine the application and their independence will ensure that the decision will be taken based on the independent assessment of the merits by the Scottish Ministers.

4.4.

Given that Elected Members will not be determining the application, no issue arises in terms of the Councillors' Code of Conduct if any Elected Member participating in the response has had prior involvement in the progress of the projects. The Councillors' Code of Conduct applies where an Elected Member gives grounds to doubt his / her impartiality when he / she is participating in a decision. That is not the case here as the decision is being made by the Ministers.

5. Options Appraisal – Response to Reporter

5.1.

Given that the decision will be one for the Reporter and Scottish Ministers, on one view any questions of conflict of interest are resolved by the introduction of that independent decision-making process into the consideration of the developments. On that view, Elected Members are at liberty to say whatever they wish when responding to a consultation by the Reporter or participating in an inquiry by the Reporter in respect of the specific applications.

5.2.

However, that might be overly simplistic as having full liberty to speak in these terms might cause problems in relation to any future application where what was said or done now by an Elected Member could be used to argue that such an Elected Member was actually or apparently biased.

5.3.

In the context of those risks, the potential means by which the Council could respond to a consultation by the Reporter, or participate in an Inquiry by the Reporter, in respect of the planning applications for sites related to the Community Wind Farm Project, are presented and considered in turn.

5.4. Option 1 – Full Council

5.4.1.

There would be no legal bar on this. Care would however need to be taken by Elected Members to avoid saying something which could cut across any later application of a similar type and which could be used by an aggrieved person to argue that there was an actual or apparent bias on the part of that Elected Member because of views expressed during a response in the current application.

5.4.2.

The Councillors' Code of Conduct provides:

“7.11 If you propose to take part in the decision-making process you must not give grounds to doubt your impartiality. You must not make public statements about a pending decision, to ensure that you are not seen to be prejudging a decision which will be made at the meeting where it can be anticipated that the information required to take a decision will be available. You must not indicate or imply your support or opposition to a proposal, or declare your voting intention, before the meeting. Anyone who may be seeking to influence you must be advised that you will not formulate an opinion on a particular matter until all available information is to hand and has been duly considered at the relevant meeting.”

5.4.3.

The Full Council will not “decide” the application in the sense covered by paragraph 7.11. Nonetheless, the Code is not exhaustive of the common law principles of natural justice and the rule against bias (actual or apparent). Questions of prejudgment or expressions of support or opposition would still arise if, in due course, what an Elected Member said or did via Full Council now, might be used at a later date to argue that they were biased in the context of another application.

5.4.4.

Safeguards

There is a degree of latitude as to what views can be expressed but, even so, content and language would require to be appropriate and would need to be focused on the planning merits of the application.

5.4.5.

In the case of *R (Island Farm Developments Limited) -v- Bridgend County Borough Council* [2006] EWHC 2189, the Court observed,

“The reality is that councillors must be trusted to abide by the rules which the law lays down namely that, whatever their views, they must approach their decision-making with an open mind in the sense that they must have regard to all material considerations and be prepared to change their views if persuaded that they should...[U]nless there is positive evidence to show that there was indeed a closed mind, I do not think that prior observations or apparent favouring of a particular decision will suffice to persuade a court to quash the decision.”

5.4.6.

Risk of “positive evidence to show that there was a closed mind” in determining future applications would be able to be avoided by focusing in the present case on planning issues, which could still raise issues of policy, both local and national. The scope for any later challenge would be very much reduced if focus was placed on the sorts of issues that the Reporter and Scottish Ministers will need to focus on in making a decision on the application.

5.4.7.

In saying this, Elected Members may wish to make a more positive case for or against the application. Provided there is no evidence to show a closed mind, then such views would still be able to be expressed.

5.4.8.

Ultimately, Section 25 of the Town and Country Planning (Scotland) Act 1997 states that a Planning Authority’s decision on a planning application must be made in accordance with the Development Plan, unless material considerations indicate otherwise. The Plan itself is a material consideration. For “planning authority”, one must read in this context “the Reporter-Scottish Ministers”.

5.4.9.

Two main tests are used when deciding whether a consideration is material and relevant:

- It should serve or be related to the purpose of planning. This means that it should relate to the development and use of the land.
- It should fairly and reasonably relate to the particular application.

5.4.10.

Annex A of Scottish Planning Circular 3/2013 contains a useful discussion of Material Considerations in planning decision-making. Ultimately, however, it is for the Courts to decide on a case by case basis what is material. An extract from Annex A is attached as Appendix 1 to this report for reference.

5.4.11.

Types of issues which are material considerations are listed in Appendix 2 to this report.

5.4.12.

Looking at the list in Appendix 2, for example, inclusion of any views which might seem to support (or oppose) the present application should be very much focused on the merits (or otherwise) of the application and not windfarm development (by any developer) in general or developments by the Council in general or windfarm applications in particular. One can see that “*Political considerations or ideological dislikes*” would need to be avoided (for example “objection to all windfarms” or “all windfarms are good” or “only publicly owned windfarms are acceptable”), but “*the needs of an area (employment, commercial, social...*” would be potentially relevant and material.

5.4.13.

There is, therefore, within the scope of consideration of any response a reasonably wide, if not very wide, latitude open on what would be relevant planning matters and provided the language used would not cut across any later Planning Committee work which a Member of Full Council might have in showing “positive evidence of a closed mind” then there would be no difficulty with the Full Council responding to the Reporter’s consultation.

5.4.14.

If a member of the Strategic Projects Board, which has been established to secure and scrutinise progress on the projects, participates in this process then, for the sake of transparency, this would need to be specifically identified within any response and the extent of any prior involvement summarised. This will mean that the Reporter will be made aware of their involvement. It would then be for the Reporter to consider how much weight that has on the response.

5.4.15.

An advantage of a Full Council response is that, if it is in favour of the application, it would demonstrate a united front by the Council in its capacity as developer and planning authority. Conversely, a response that was not supportive of the application might suggest to the Scottish Ministers that the Council did not support its own project.

5.5. Option 2 – Planning Committee

5.5.1.

This would also be competent. It would need to be on behalf of the Council as Planning Authority.

5.5.2.

This approach would carry the advantage of having Councillors involved who are specialists in planning policy and development.

5.5.3.

It would also help to show a separation of roles and dilute scope for arguments of the type that could emerge if the full Council responded as noted above and where, for example, Members both on the Full Council and the Planning Committee felt more constrained in expressing a view than Members who did not sit on the Planning Committee.

5.5.4.

Nonetheless, in principle, there would be no difficulty with going down the Full Council route, because, ultimately, Members, wherever they sit, should, like any participant to a planning application determination, focus on planning considerations and where they may also at a later date need to make a decision on a further windfarm application avoid “positive evidence of being closed minded”.

5.5.5.

Overall, it seems unlikely that having a split between Full Council and Planning Committee would necessarily create a sufficiently meaningful advantage over Full Council provided both had regard to the safeguards suggested in sections 5.4.4. to 5.4.14. It may also be that the Reporter would have difficulty in accepting a view that was representative of only a sub-set of Councillors as, in terms of any consultation, it is probable that he or she will want a response from the Council (and not a disparate part of it).

5.6. Option 3 – Planning Officers

5.6.1.

This would need to be very much a planning officer assessment as if making a recommendation to the Planning Committee.

5.6.2.

They could respond on behalf of the Council and, because any response would be technical given their role, and any decision would only ever be made by the Planning Committee or Full Council, the risk of bias in a later application would be gone.

5.6.3.

A potential issue is that officers might find it more difficult to comment on matters which might be seen as wider policy issues for the Council which were still planning considerations, for example, local support for or against; desirability by reason of employment, benefit to the area, etc, but which Elected Members felt were still important and ought to be raised.

5.6.4.

While this would be an option with little risk, it might also be seen as one which carried with it scope for not being as informed as might a response from either the Full Council or the Planning Committee allied in either case to technical input from Officers. The Reporter might place less weight on a response from Planning Officers than one which comes from the Council.

5.6.5.

There may also be an argument from the perspective of local democratic accountability that, if the views of officers were heard, but not Members who were in touch with constituents, that might dilute local involvement in the planning process.

5.7. Option 4 – Full Council exclusive of Members of Planning Committee who wish not to participate

5.7.1.

Although there is no bar to Members of the Planning Committee participating in a Full Council response given the safeguards outlined in sections 5.4.4 to 5.4.14, some of them may wish to take a view on whether they would prefer not to sit on Full Council for the reasons given in section 5.4.1.

5.7.2.

This would arguably be a balanced option. It would allow a response to be given by the Council whilst respecting the wishes of those Planning Committee Members who would prefer not to risk being associated with a response that might compromise their perceived impartiality when considering future applications.

6. Discussion

6.1.

All options would be competent and ultimately the question is one of relative risk and perception. In terms of categorisation of risk the lowest level would be response by officers, while the highest would be Full Council. However, risk needs to be understood in the context of the risk being in the main “positive evidence of a closed mind” which could be used in a challenge to a later planning decision by the Council, whether made by the Council or by the Planning Committee. With the safeguards referred to, the risk would appear to be small one.

6.2.

From a developer perspective, Option 1 would convey to the Reporter a strong signal of support from across the Council for the development if the consultation response was supportive of the application. The Reporter would also be likely to place more weight on a response from the Full Council than on a response from a sub-set of the Council or from Officers, which might not necessarily be perceived as representative of the Council's position.

6.3.

Whilst still constituting a response from the Council, Option 4 might address any concerns by Members of the Planning Committee of saying something which could compromise their perceived impartiality in any future planning application if the safeguards outlined above are not observed.

7. Corporate Governance

This report relates to governance and procedural issues and therefore does not directly support and contribute to improved outcomes for communities as outlined in the Council Plan and the Local Outcomes Improvement Plan.

8. Financial Implications

There are no direct financial implications arising from the recommendations contained in this report.

9. Legal Aspects

The legal aspects are contained within the body of this report.

10. Contact Officers

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11. Appendices

Appendix 1: Extract from Annex A to Scottish Planning Circular 3/2013.

Appendix 2: Types of issues which have been held to be material considerations.

Extract from Annex A to Scottish Planning Circular 3/2013

Annex A: Defining a Material Consideration

1. Legislation requires decisions on planning applications to be made in accordance with the development plan (and, in the case of national developments, any statement in the National Planning Framework made under section 3A(5) of the 1997 Act) unless material considerations indicate otherwise. The House of Lord's judgement on *City of Edinburgh Council v the Secretary of State for Scotland* (1998) provided the following interpretation. If a proposal accords with the development plan and there are no material considerations indicating that it should be refused, permission should be granted. If the proposal does not accord with the development plan, it should be refused unless there are material considerations indicating that it should be granted.

2. The House of Lords judgement also set out the following approach to deciding an application:

- Identify any provisions of the development plan which are relevant to the decision.
- Interpret them carefully, looking at the aims and objectives of the plan as well as detailed wording of policies.
- Consider whether or not the proposal accords with the development plan.
- Identify and consider relevant material considerations for and against the proposal.
- Assess whether these considerations warrant a departure from the development plan.

3. There are two main tests in deciding whether a consideration is material and relevant:

- It should serve or be related to the purpose of planning. It should therefore relate to the development and use of land, and
- It should relate to the particular application.

4. The decision maker will have to decide what considerations it considers are material to the determination of the application. However, the question of whether or not a consideration is a material consideration is a question of law and so something which is ultimately for the courts to determine. It is for the decision maker to assess both the weight to be attached to each material consideration and whether individually or together they are sufficient to outweigh the development plan. Where development plan policies are not directly relevant to the development proposal, material considerations will be of particular importance.

5. The range of considerations which might be considered material in planning terms is very wide and can only be determined in the context of each case. Examples of possible material considerations include:

- Scottish Government policy and UK Government policy on reserved matters.
- The National Planning Framework.
- Policy in the Scottish Planning Policy and Designing Streets.
- Scottish Government planning advice and circulars.
- EU policy.
- A proposed strategic development plan, a proposed local development plan, or proposed supplementary guidance.
- Guidance adopted by a Strategic Development Plan Authority or a planning authority that is not supplementary guidance adopted under section 22(1) of the 1997 Act.
- A National Park Plan.
- Community plans.
- The environmental impact of the proposal.
- The design of the proposed development and its relationship to its surroundings.
- Access, provision of infrastructure and planning history of the site.
- Views of statutory and other consultees.
- Legitimate public concern or support expressed on relevant planning matters.

The planning system operates in the long term public interest. It does not exist to protect the interests of one person or business against the activities of another. In distinguishing between public and private interests, the basic question is whether the proposal would unacceptably affect the amenity and existing use of land and buildings which ought to be protected in the public interest, not whether owners or occupiers of neighbouring or other existing properties would experience financial or other loss from a particular development.

Types of issues which have been held to be material considerations

Types of issue which **are** material considerations include:

- Scottish Government Policy and UK Government policy on reserved matters.
- European policy.
- Supplementary Planning Guidance, including proposed Supplementary Guidance.
- Scottish Planning Policy (SPP), Planning Advice Notes (PANs) and Circulars.
- National Planning Framework.
- Policies in the emerging Development Plans, including proposed plans which are not yet “adopted” (Local Development Plans) or “approved” (Strategic Development Plans).
- National Park Plans.
- Community Plans.
- The National Waste Management Plan and Scotland’s Zero Waste Plan.
- Views of statutory and other consultees.
- Suitability of the site for the proposed development (e.g. contamination/flooding issues).
- Visual appearance of the proposed development and its relationship to its surroundings. This is a complicated area but can include:
 - Building materials.
 - Height, scale, massing, design, density and layout of development, particularly in comparison with other buildings in the locality.
 - Landscaping proposals.
 - Privacy, over-shadowing, over-development (overcrowding), and lack of natural light.
 - Environmental Impact – such as pollution and contamination.
 - Impact on archaeology.
 - Impact on nature conservation.
 - Impact on setting of listed buildings or conservation area.
 - Nuisances caused by the development.
 - Adverse safety impact, e.g. the siting of a hazardous installation such as a firework factory next to houses.
 - Compatibility with existing uses, e.g. the mix of uses found in town centres, such as shops, offices and cafes, can be mutually beneficial.
 - Economic benefits, e.g. creation of jobs.

- The needs of an area (employment, commercial, social or leisure facilities, affordable housing).
- Provision of suitable access and transportation (including road safety, parking issues, effect on pedestrians and cyclists, and amount of traffic generated).
- Adequacy of infrastructure (e.g. sewerage, drainage and water).
- Creation of an undesirable “precedent”, making it difficult to resist similar proposals elsewhere (but this should not be over-emphasised).
- Planning history of the site (including decisions on previous planning applications on the same site, particularly appeal or court decisions).

Items which are **not** material considerations and are therefore not relevant to planning include:

- Personal circumstances of the applicant, e.g. devaluation of property, private property rights including boundary and access disputes.
- Private interests, e.g. loss of a view, competition between businesses.
- Moral considerations (e.g. to betting shops), or religious objections (e.g. religious objection to working on Sunday).
- Political considerations or ideological dislikes, e.g. private hospitals.
- Cost of the development and the financial means of the applicant (these are not likely to be material considerations unless there is clear evidence of wider impacts if the development fails).
- Title restrictions.
- Applicant’s lack of ownership of the site.
- Issues covered by other legislation, e.g. health and safety regulations, licensing, building control.
- Any factor indicating that there is a lack of any reasonable prospect of the development proceeding.