Town and Country Planning Act 1990

Shropshire Council Position Statement

in relation to draft Unilateral Undertaking submitted by the Appellant

APPEAL on behalf of ECONERGY INTERNATIONAL LTD against the refusal of SHROPSHIRE COUNCIL of an application for erection of an up to 30MW Solar PV array, comprising ground mounted solar POV panels, vehicular access, internal access tracks, landscaping and associated infrastructure, including security fencing, CCTV, client storage containers and grid connection infrastructure, including substation buildings and off-site cabling

Land to the West of Berrington Shrewsbury Shropshire SY5 6HA

PINs Ref: APP/L3245/W/23/3332543

LPA Ref: 22/04355/FUL and 23/03207/REF

Introduction

1. Scope

1.1. The Council and the Appellant were not able to come to an agreement on the Unilateral Undertaking ("**UU**"). This Position Statement sets out the Council's position concerning the UU submitted by the Appellant as part of the Appeal.

1.2. The Council notes that reference is made to "Mitigation Land". Arguably, this should be referred to as the "Compensation Land" (given its purposes in the mitigation hierarchy). However, for convenience, the language of "Mitigation Land" is used throughout.

Council's Position

2. The Parties

2.1. The Council is not able to confirm with certainty that the correct parties with an interest in the Site have been made a party to the UU but rely on the Appellant's solicitor's confirmation that there was a Settlement Trust and that the beneficiaries/trustees of that trust are those set out as the First Owner in the UU - evidence of the trust (and therefore the trustees) has not been provided to the Council.

3. In relation to the Appellant's most recent suggestion to employ the combination of a Grampian-style condition and a UU for the mitigation skylark strategy.

3.1. The Council does not consider that this is sufficient to deal with mitigating the impacts of the Proposed Development.

3.2. The Council refers to the Office of the Deputy Prime Minister (ODPM) Circular 06/2005 (Defra Circular 06/2005) – Government Circular: Biodiversity and Geological Conservation – statutory Obligations and their impact within the planning system ("**Circular 06/2005**"). This relates to the application of the law

relating to planning and nature conservation as it applies in England. It should be applied within the current statutory nature conservation context as well as the national policy context of the NPPF and the PPG.

3.3. Current advice contained within Part IV of Circular 06/2005 deals with the "*Conservation of Species Protected by Law*".

3.4. §98 of the Circular states:

> *"The presence of a protected species is a material consideration when a planning authority is considering a development proposal that, if carried out, would be likely to result in harm to the species or its habitat".*

3.5. §99 goes on to state:

> "*It is essential that the presence or otherwise of protected species, and the extent that they may be affected by the proposed development, is established <u>before the planning permission is granted</u>, otherwise all relevant material considerations may not have been addressed in making the decision*" (emphasis added).

3.6. The Council would argue therefore that it is essential that the presence of protected species and the extent that they may be impacted by the development is established before permission is granted – otherwise, all relevant material considerations may not be addressed in making the decision. This requirement also applies to the proposed Mitigation Land, as without this baseline information it is uncertain if the proposed measures address adverse effects of the development or mean that the adverse impacts of the development can be overcome, and/or if it would result in adverse effects on protected habitats and species present in the Mitigation Land.

3.7. In addition, the Council notes the point made in the Appellant's Main Proof §6.15 which highlights the fact that an NE screening is outstanding to cover the proposal of arable conversion on the mitigation land. This has been addressed in §2.40 of Ms Corfe's Rebuttal Proof.

3.8. The Circular goes on to say:

> *"The need to ensure ecological surveys are carried out should therefore only be left to coverage under planning conditions in exceptional circumstances, with the result that the surveys are carried out after planning permission has been granted.".*

3.9. Whilst Circular 06/2005 does not define what it considers to be "*exceptional circumstances*" this is addressed in BS42020 A Code of Practice for Biodiversity in Planning and Development ("**the British Standard**")

3.10. This British Standard is intended to assist those consenting development and gives recommendations *for a "rigorous professional, scientific and consistent approach ……at key stages of the planning application process"*. All British Standards are subject to extensive consultation including representatives from relevant organisations which in this case included Natural England and relevant government departments, which would have been DEFRA for this Standard published in 2013.

3.11. §9.2.4 of the British Standard on conditioning additional ecological investigations, surveys and assessments states:

> "*The presence or absence of protected species, and the extent to which they could be affected by the proposed development, should be established before planning permission is granted; otherwise all material considerations might not have been considered in making the decision. The use of planning conditions to secure ecological surveys after planning permission has been granted should therefore only be applied in exceptional circumstances, such as the following: a) where original survey work will need to be repeated because the survey data might be out of date before commencement of development; b) to inform the detailed ecological requirements for later phases of developments that might occur over a long period and/or multiple phases; c) where adequate information (see 6.2) is already available and further surveys would not make any material difference to the information provided to the decision-maker to determine the planning permission, but where further survey is required to satisfy other consent regimes e.g. an EPS Licence (see 9.3); d) to confirm the continued absence of a protected species or to establish the status of a mobile*

protected species that might have moved, increased or decreased within the site; e) to provide detailed baseline survey information to inform detailed post-development monitoring."

3.12. The Council's ecologist has confirmed that none of these exceptional circumstances apply to the Mitigation Land.

3.13. §98 of the Circular ends by saying *"However, bearing in mind the delay and cost that may be involved, developers should not be required to undertake surveys for protected species unless there is a reasonable likelihood of the species being present and affected by the development. Where this is the case, the survey should be completed and any necessary measures to protect the species should be in place, through conditions and/or planning obligations, before the permission is granted."*

3.14. It has been established that Skylark are present on the Application Site and the Mitigation Land (the Appellant's Expert Witness confirmed this was the case during a site visit on 10th January 2024) and will likely be affected by the proposed development such that the surveys should have been completed in accordance with the circular before permission is granted.

3.15. The presence of other protected species, including but not limited to, badger or great crested newt has not been established for the Mitigation Land as referenced in DC Proof 4.26 either.

4. The Mitigation Site is not suitable

4.1. The suitability of the proposed Mitigation Land is dealt with in the main in DC Proof §§4.47 – 4.65 and summarised in § 5.3 and in the Council's amended SOC. The Council does not propose setting this out again here. In brief summary, there is no ecological baseline verified by accepted field survey methods for the area proposed for the off-site skylark mitigation; nor has the Mitigation Land been subject to an impact assessment to identify what measures may be required to address adverse impacts that may arise through the adaption of the existing land use and agricultural practices (**DC Proof §3.**4) and the future land management activities/operations have not been confirmed (**DC Proof §4.28**).

4.2. The Council's ecology proof states - The Mitigation Strategy (**DC Proof §4.54**):

4.54. The mitigation as presented in the submitted documentation (CD 1.15 and CD 1.16) has not been subject to any desk based or field based ecological surveys including those that would establish the current status for breeding bird surveys and in particular the SoPI skylark. This information together with the foregoing is required to confirm that the land is:

a) Suitable and that it has sufficient carrying capacity to accommodate the displaced skylark from the Application Site.

b) Whether any change to the existing agricultural practices on the site is required including change to the existing habitat and the impact that this could have on the non-priority semi-improved grassland of a good quality.

c) Suitable for the proposed changes to habitats/land management i.e. reversion to arable, and whether this would result in impacts requiring assessment or any separate consent/approval given its proximity to Berrington pool SSSI and Midland Meres and Mosses Phase 1 Ramsar site

5. The UU – drafting

5.1. These points do not overcome the in-principle issues associated with the UU as set out above, but in order to assist the Inspector, additional observations on drafting are set out here.

5.2. Recital (I) – remove bracket before "and the Mortgagee" and corresponding closing bracket.

5.3. Definition of "Skylark Mitigation Strategy" – remove "*and attached to this Deed at Schedule 3 as may be amended from time to time in writing as agreed in writing by the Council at its absolute discretion"* and therefore any reference in the UU to Schedule 3. Adds lack of clarity as to Mitigation Strategy as this strategy is not agreed so argue not appropriate to include in UU.

5.4. Clause 3.3 – to also refer to binding the Mortgagee in relation to its interest in the Application Site

5.5. Clause 3.5 – delete “or Mitigation Site”. Development on the Mitigation Site may affect the ability to carry out the Mitigation Strategy so reference to Mitigation Site here should be deleted.

5.6. Para 2 Schedule 1 – amend to insert before “the Council” the words “and approved in writing by” to be in line with the previous drafting which required the Council to confirm that the approved strategy had been implemented to its satisfaction.

5.7. Para 3 – after “maintain” add “and comply with”

5.8. The Council requires the following additional paragraph to be inserted:

“4. Not to allow permit or carry on the Development if the mitigation strategy should cease for any reason. Within a period of 6 months of cessation of the Mitigation Strategy a scheme for the decommissioning of the solar farm and its ancillary equipment, and how the land is to be restored, to include a programme for the completion of the decommissioning and restoration works, shall be submitted to the Council for its written approval. The solar farm and its ancillary equipment shall be dismantled and removed from the site and the land restored in accordance with the approved scheme and timescales.”

The Appellant does not agree with the addition of this paragraph. They have in correspondence made an analogy to BNG only binding the owner of the BNG land but I am not sure that that is appropriate here or even correct. The Owner of the Application Site clearly needs to be a party to the UU and be bound by its terms as otherwise the Application Site and Mitigation Site would be operating independently of each other.

5.9. The Development cannot commence unless and until the mitigation has been provided. I would argue that BNG is different, as BNG is needed as a result of government policy but the need for Mitigation Land here is practical and as a direct result of the development so is linked to the development in a practical and meaningful way. BNG is not analogous as it is not dealing with a direct impact of the development in the way that Skylark Compensation is. The situation with the Skylark is different as we are dealing with the habitat of a protected species which could be threatened where their natural habitat has been disturbed if the mitigation land was also disturbed/ceased. BNG is a government initiative/policy and doesn’t specifically affect an identified species on an identified piece of land.

5.10. The Council would question how the Appellant would propose that compliance with the Mitigation Strategy is enforced in the event that the operation of the Mitigation Strategy fell away. The enforcement mechanism (an injunction) would not bring any certainty. We do not know what the Court would or could order. The Inspector/Council can only have certainty if decommissioning is required in the event the mitigation falls away.

5.11. Also, the Council does not agree with the Appellant's argument that the additional §4 is not needed because the Council can enforce against the owner of the Mitigation Site. It is not possible to foresee all circumstances that may happen, it may be that some event occurs that destroys the Mitigation Site land such that even if enforcement action was taken it is not rectifiable to enable the Mitigation Strategy to continue to be implemented in a satisfactory manner. The Council would require the development to cease should the Mitigation Strategy cease as it is the Mitigation Strategy which makes the development acceptable. Without the mitigation, the Skylark and its habitat is likely to be threatened. If the Appellant is concerned that the Mitigation Strategy may not be complied with for a temporary period with valid reason such that the decommissioning the solar farm would be disproportionate, the Council may consider amended wording to allow temporary periods of cessation in the performance of the Mitigation Strategy that did not impact on the strategy overall but this has not been suggested or requested at present.

6. The Location Plan

6.1. There are discrepancies between the Mitigation Strategy Plan and the UU Plan. Areas hatched yellow on the attached plan are included in the Mitigation Site on the UU plan but not the Mitigation Strategy Plan. There are also areas within the Mitigation Site on the Mitigation Strategy Plan that are not referred to in its key so would question whether these are included within the Mitigation Site or not.

6.2. The Appellant was asked to provide clarity on the position and confirm the extent of the Mitigation Site but was not forthcoming with this information as they said that the Skylark Mitigation Strategy and therefore the areas to which it applies have not yet been fixed and are to be subject to the suggested condition. The Council is of the opinion that even if compliance with the strategy to be approved is capable of being bound by the UU, the UU is not capable of binding any land that is not identifiable as mitigation land at the time of entering into the UU. Therefore how

would the full extent of the site be managed and maintained if the approved Mitigation Site transpired to be wider than that identified in the UU.

5 March 2024