

DARLINGTON BOROUGH COUNCIL

PLANNING APPLICATIONS COMMITTEE

COMMITTEE DATE: 19 June 2013

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APPLICATION REF. NO:	12/00751/FUL
STATUTORY DECISION DATE:	20/02/13
WARD/PARISH:	Sadberge and Whessoe
LOCATION:	Moor House, Bishopton Lane, Great Burden.
DESCRIPTION:	Erection of six wind turbines and ancillary works without complying with condition 22 of planning permission 11/00160/FUL , and substituting an alternative condition with revised wording
APPLICANT:	Banks Renewables Ltd.

APPLICATION AND SITE DESCRIPTION

This application seeks to remove condition 22 of the original planning permission for six wind turbines which relates to Excess Amplitude Modulation (EAM) and replace it with an alternative condition. The applicants have confirmed that they will rely on the revised version 4 of the Environmental Statement that accompanied the original planning permission in support of granting permission for the development with a revised condition 22.

Consideration of the application was deferred at a previous Committee meeting on 6 February 2013 to allow the applicant's proposed Environmental Management Plan (EMP) to be publicised and considered. Consideration was further deferred at the 27 March Committee meeting to enable the applicants to explore the option of providing an alternative condition to that originally submitted that would give protection to residents in the event of EAM occurring. The wording of this condition and further revisions to the EMP that accompanied this were previously circulated to Members.

In terms of the overall application the principle of development remains acceptable and there have been no other changes to the application. It is therefore considered that the assessment made under application 11/00160/FUL remains valid and there have been no material changes that necessitate these issues being re-assessed. A screening opinion was previously issued to the applicant confirming that a further environmental assessment would not be required to accompany this planning application.

Therefore the only issue for consideration in this application is whether the wording of the original and revised condition 22 meet the test of conditions set out in the National Planning Policy Framework, that is given the evidence submitted whether the condition is still seen as

necessary, relevant to planning and to the development to be permitted, enforceable, precise and reasonable in all other respects. If the condition is considered to be acceptable, Members will need to decide whether the proposed revised wording is preferable to that of the original condition. Whilst a number of authorities have previously included an EAM condition as a precautionary measure, an approach replicated in Darlington, there is now a considerable body of cases where Planning Inspectors have declined the use of such a condition on grounds that it would fail to meet the various tests for conditions set out in government advice. In this context, officers have sought external legal and technical advice with respect to the validity of such a condition which will be referred to later in the report.

It is important to emphasise that the proposal under consideration does not involve the removal or alteration to any of the other conditions designed to control the general noise levels at various noise sensitive locations resulting from the operation of the turbines.

The original wording of condition no. 22 is as follows:-

On the written request of the local planning authority, following a complaint to it considered by the local planning authority to relate to regular fluctuation in the turbine noise level (amplitude modulation), the wind farm operator shall at its expense employ an independent consultant approved in writing by the local planning authority to undertake the additional assessment outlined in Guidance Note 5 to ascertain whether amplitude modulation is a contributor to the noise complaint as defined in Guidance Note 5. If the said assessment confirms amplitude modulation to be a contributor as defined in Guidance Note 5, the local planning authority shall request that within 28 days of the completion of the noise recordings referred to in Guidance Note 5, the developer shall submit a scheme to mitigate such effect. Following the written approval of the scheme and the timescale for its implementation by the local planning authority the scheme shall be activated forthwith and thereafter retained.

The proposed revised wording is:

In the event of a complaint from a resident local to the consented wind farm relating to noise and, in the opinion of the LPA, there is clear evidence that this is a consequence of the level or characteristics of noise attributable to the operation of the said wind farm such that harm to living conditions is being caused to the aforementioned complainant, the operator shall within 2 weeks (unless otherwise agreed in writing with the LPA) of the LPA communicating its aforementioned opinion submit measures to be agreed in advance with the LPA to address either before or at the time of their occurrence the characteristics identified as causing the said harm. Such measures will include a timescale for their implementation and measures to monitor and demonstrate their effectiveness. Thereafter the wind farm shall be operated in accordance with any such measures agreed under the terms of this condition.*

**Such evidence will have been gathered in accordance with the procedures set down in the current EMP agreed under the terms of this consent.*

Reason: In order to protect residential amenity.

The Environmental Management Plan (EMP), referred to in the condition, sets out the procedures for investigating and resolving EAM noise issues and essentially includes the following elements:-

- Operator to carry out an initial investigation of a complaint and to report to the LPA within 2 days.

- If this is inconclusive a further investigation would follow by a qualified noise expert including use of sound monitoring equipment; interview with complainants; noise monitoring in accordance with a methodology to be agreed with the LPA; logging of prevailing weather data.
- Fortnightly update on progress.
- Investigation report to be provided to LPA within 28 days of initial investigations
- If deemed required in agreement with the LPA (not to be unreasonably withheld) a further investigation to be undertaken by an independent consultant for a period of no greater than 2 months and the findings to be reported to the LPA.
- Where the investigation(s) reveals, in the opinion of the LPA, that unacceptable levels of noise are being produced (as defined in accordance with current best practice) then within 2 weeks a mitigation strategy to be submitted to the LPA for agreement designed to solve the noise problem at or before the time of its occurrence.
- The above process to be repeated until the complaint is removed or the mitigation is demonstrated by the operator to be effective.

A description of what constitutes EAM is given below under the Planning Issues heading.

PLANNING HISTORY

Planning application 08/00777/FUL was submitted in October 2008 for a wind monitoring mast and was approved in November 2008.

Planning application 09/00741/FUL was submitted by Moor House Wind Farm Ltd in November 2009. That scheme contained a total of ten turbines. Four of the turbines were planned to be 110 metres tall and six were planned to be 100 metres. The planning application was refused permission by the Planning Applications Committee on 10 November 2010 on visual amenity grounds.

Planning application 11/00160/FUL was submitted in early 2011 for six wind turbines and approved in October 2011 with numerous conditions imposed, one of which was condition 22 which relates to Excess Amplitude Modulation.

PLANNING POLICY BACKGROUND

National Planning Policy Framework – Section 10, Meeting the challenge of climate change, flooding and coastal change.

Regional Guidance

The Coalition Government has now abolished the Regional Spatial Strategy for the North East however the evidence base which was collected in producing the RSS is still be capable of being material to planning decisions. This was confirmed in a letter from the Government's Chief Planner to all local authorities in July 2010. This is relevant to Moor House because the regional evidence base included two landscape capacity studies which relate to the Tees Plain and which were cited in the refusal reason of the original planning application.

The Local Development Plan – the adopted Core Strategy Policy CS3 - Promoting renewable energy.

Local Wind Farm Development Guidance:

Landscape Appraisal for Onshore Wind Development (GONE 2003).

Landscape Capacity Study for the East Durham Limestone area and the Tees Plain (North East Assembly and ARUP 2008 plus addendum).

RESULTS OF CONSULTATION AND PUBLICITY

There have been a number of objections submitted from local residents and others. They have taken the form of individual letters and E mails in addition to pro forma notes signed and addressed by local residents. The numbers of objections were as follows:

14 individual letters/ e-mails

Approximately 85 pro forma notes signed by some 145 individuals.

The main reason for objecting to the application is that residents did not want to see the condition removed as it is seen as a form of protection against noise nuisance that may be caused by Excess Amplitude Modulation.

Other issues raised include:

- The condition should be re drafted not removed
- The applicant's original noise report indicated that there is a "greater than average risk of AM at this site".
- Just because the cause of EAM is not fully understood, that should not mean the removal of condition 22 is acceptable.
Noise problems cannot be pursued via the Statutory Nuisance route as it is expensive for the Council and presents difficult legal and technical challenges.
- The Environmental Management Plan (EMP) is not seen as an effective alternative.
- Concerns with respect to aviation safety
- No evidence that legal advice has been sought in relation to the removal of the condition.
- A further environmental impact assessment is required
- There is a greater than average risk of EAM at this site so a new EMP should be prepared if condition 22 is to be removed.
- Legal opinion supports the lawfulness of the condition.
- Legal opinion supports the notion that the condition complies with Circular 11/95.
- The Human Rights Act should be taken into account.
- If condition 22 is necessary but cannot be imposed permission for the development should be refused.
- Considers that the Statutory Nuisance option of controlling EAM not suitable.
- The EMP may be acceptable if worded properly
- As a result of the most recent consultation on the revised condition and EMP a local resident objects to the proposal unless a full and comprehensive plan is put in place and implemented to deal with any noise nuisance that arises. A dedicated point of contact should be available to instigate action in a pre agreed timescale.

Consultee responses are as follows:

Sadberge Parish Council – Originally objected to the removal of the condition as it protects residents from noise nuisance caused by EAM. The application site is likely to suffer a greater than average risk from EAM nuisance as it experiences frequent periods of high wind shear which is associated with EAM. The Parish Council supports the revised wording of the condition providing that the Borough Council enforces the condition in a timely manner when required to do so.

Bishopton Parish Council - Objected to the removal of the condition as it protects residents from noise nuisance caused by EAM. More evidence of the impacts of removing the condition need to be provided by the applicants. Supports the proposal to amend the wording of the condition.

East and West Newbiggin Parish Meeting - The application site is likely to suffer a greater than average risk from EAM nuisance as it experiences frequent periods of high wind shear which is associated with EAM hence residents believe the condition should remain as a form of protection. The EMP proposed by Banks fails to provide this protection. More evidence of the impacts of removing the condition need to be provided by the applicants.

Little Stainton Parish Meeting – Nothing has changed since condition 22 was imposed so no reason to remove it now. Other wind farms without this condition have suffered noise problems from turbines. The application site is likely to suffer a greater than average risk from EAM nuisance as it experiences frequent periods of high wind shear which is associated with EAM. More evidence of the impacts of removing the condition need to be provided by the applicants. The revised condition is not considered to provide sufficient protection to residents.

Barmpton Parish Meeting – No objections to the proposal.

Seven Parishes Action Group – Support all that the above objecting Parishes say. Concerned that Statutory Nuisance legislation would not be a quick remedy if EAM problems arose. The removal of the condition should not have a financial justification as this is not a material planning consideration. Considers that the revised EMP does not improve protection for local residents from EAM nor give robust timescales for the problems to be solved. Maintains that the condition should be retained.

Environment Agency – no objections

Highways Agency – re-iterate previous stance and raise no objection to current application

Natural England – no further comment

Council Environmental Health Officer –

Previously commented when it was proposed to remove the condition:-

Since I commented previously regarding this application, the Council has received advice from Parsons Brinckerhoff(PB), which is an independent acoustic consultancy. Legal opinion has also been obtained. PB's advice is that it is not currently possible to construct a suitable condition for Excess Amplitude Modulation(EAM) that would meet the six tests of Circular 11/95. The legal opinion concurs with this view and also states that the Environmental Management Plan suffers from similar problems identified with respect to a possible planning condition.

Another option to control EAM should it occur is the statutory nuisance regime. However, PB have stated that the Defra report (produced by AECOM) notes, whilst it is theoretically possible to take nuisance action, it would be a significant "challenge" for a Local Authority to take this action due to the technical and legal challenges it would present. Therefore, it remains to be seen whether statutory nuisance action would be successful in resolving any EAM issue should it occur.

With regard to the most recent proposal to revise the wording of the condition:-

I have been involved in the consultations concerning the revision of the relevant sections of the Environmental Management Plan. These revisions have been beneficial as they include additional timescales for certain actions. In addition, an alternative condition to condition 22 has been put forward and this has also been subject to amendment. If it is feasible in planning terms, I would recommend that this alternative condition is attached to the planning permission, if this application is approved.

CPRE – No evidence provided that the condition is not required. The application site is likely to suffer a greater than average risk from EAM nuisance as it experiences frequent periods of high wind shear. Concerned that Statutory Nuisance legislation would not be a quick remedy if EAM problems arose.

PLANNING ISSUES

What is Excess Amplitude Modulation (EAM) to which condition 22 relates?

Noise is a sensitive subject and is discussed in detail during the determination of planning applications for wind turbines. It has also been debated through the appeal process and there have been numerous appeal decisions which have discussed the issue of noise at great length.

Excess Amplitude Modulation (EAM) and the need for a condition to control it has been one of the topics heavily debated through the appeal process. EAM is commonly referred to as blade swish. It would involve the control of noise that might occur over and above the normal level of blade swish noise. The appeal decision in relation to the Langford Wind Farm which was allowed states '*Amplitude Modulation (AM) or "blade swish" is an aspect of the aerodynamic noise from wind turbines that can be particularly noticeable or insistent but which is still not fully understood*'.

The companion guide to the former PPS22 states in paragraph 42 '*there are two quite distinct types of noise source within a wind turbine. The mechanical noise produced by the gearbox, generator and other parts of the drive train; and the aerodynamic noise produced by the passage of the blades through the air*'. The paragraph concludes by saying '*Aerodynamic noise from wind turbines is generally unobtrusive - it is broad-band in nature and in this respect is similar to, for example, the noise of wind in trees*'.

It is common knowledge that there have been instances at some wind farms of reported noise characteristics which could not be attributed to normal blade swish. The Government commissioned a study in to the phenomenon which was undertaken by the University of Salford, the findings were published in 2007. The research suggested a relatively low incidence of occurrences (evident in 4 and possibly another 8 sites out of a total of 133), however, these findings were based on descriptions of noise characteristics and later re-interpretation of the data suggested that the incidence might be as high as 25%.

Whilst several potential causes have been identified, despite the research undertaken by Salford University, there remains no consensus as to the trigger for excess amplitude modulation. The Appeal Decision in relation to land at Cotton Farm, St Neots which was allowed states that:

“Based on the findings of low incidence and the number of people affected being small, the Government's view is that there is not a compelling case for more work on AM and that the minimisation of increases in noise through the use of ETSU-R-97 remains appropriate”.

Various factors are considered to be possible causes of EAM, these include - squat turbine designs, linear turbine arrangements, turbines too closely spaced together, high levels of wind shear, reflective surfaces close to the receiver, topography, distance from dwellings, wind direction and background noise levels. It can be seen from the information above that there is little agreement over the causes of excess amplitude modulation and given the University of Salford's research it is considered that the incidence of it occurring is relatively low, although after re-interpretation this increased to potentially 25% of the 133 sites that were examined.

The tests of a condition as set out in the National Planning Policy Framework and Circular 11/95

The National Planning Policy Framework states in paragraph 206 that planning conditions should only be imposed where they are necessary, relevant to planning and to the development to be permitted, enforceable, precise and reasonable in all other respects. This guidance reflects the advice set out in Circular 11/95.

Circular 11/95 sets out that there are six tests for conditions. As a matter of policy the Circular states that conditions should only be imposed where they satisfy all of the tests. The tests are discussed in detail within paragraphs 14-42 of the Circular and explain that conditions should be:

- i) necessary - the guidance is that Local Planning Authorities in considering whether a particular condition is necessary, should ask themselves whether planning permission would have to be refused if that condition were not to be imposed.
- ii) relevant to planning - the guidance is that conditions should be relevant to planning, any condition which has no relevance to planning is ultra vires. Guidance also states in paragraph 22 that other matters are subject to control under separate legislation and a condition which duplicates the effect of other controls will normally be unnecessary.
- iii) relevant to the development permitted - a condition must fairly and reasonably relate to the development permitted. If it is not considered to relate to the development permitted it is considered ultra vires.
- iv) enforceable - the guidance states that a condition should not be imposed if it cannot be enforced. There are two aspects of this, the practicality of enforcement and whether compliance is reasonable. In terms of the practicality of enforcement, this relates to whether it is possible to detect a contravention and prove a breach of the condition's requirements. In terms of whether compliance is reasonable, in applying a condition it is necessary to consider whether the person carrying out the development can reasonably be expected to comply with it.
- v) precise - a condition must be worded so that it is precise in terms of being able to ensure that a condition is enforceable and also to ascertain what must be done to comply with it.
- vi) reasonable - a condition may be unreasonable even though it may be precisely worded and apparently within the powers available. It may be unreasonable because it is unduly restrictive or so onerous that as a matter of policy it should be avoided.

As set out above conditions should only be imposed on the grant of planning permission if they meet **all six** of the tests set out. Therefore, in applying a condition and similarly in assessing whether a condition should be removed, it is necessary to consider whether it passes all these tests. The guidance is very clearly set out in Circular 11/95 in that in applying a condition or assessing whether it should be removed authorities should ask themselves whether planning permission would have to be refused if that condition were not imposed. The argument that a condition will do no harm is no justification for its imposition; as a matter of policy a condition ought not to be imposed unless there is a definite need for it.

Paragraph 15 of Circular 11/95 states: ' The same principles, of course, must be applied in dealing with applications for the removal of a condition under section 73 or section 73A (of the Act): a condition should not be retained unless there are sound and clear-cut reasons for doing so.'

The following sections will consider condition 22 and assess whether it is appropriate to remove the condition or to retain it in its original or revised format.

The Applicant's position.

The applicant previously stated that they believed the original condition to be unlawful and therefore that it should be removed. They considered the condition was not necessary or reasonable and that it would struggle to be considered precise and enforceable, therefore not meeting the tests of a condition as set out in the National Planning Policy Framework and Circular 11/95. They also state that conditions imposed on the original planning permission ensure compliance with ETSU-R-97 derived noise limits in the interests of protecting the amenity of local residents.

Amplitude modulation is recognised within ETSU-R-97 'The Assessment and Rating of Noise from Wind Turbines' which is used throughout the UK to assess operational noise from wind turbines. However, the applicant acknowledges that the issue of EAM, a level of amplitude modulation of blade passing noise outside of the levels anticipated in ETSU, has been recognised as an isolated phenomenon.

They refer to the University of Salford commissioned research that has been noted above, highlighting that on the basis of the research the Government concluded that although EAM cannot be fully predicted, the incidence of EAM resulting from wind farms is low. There was therefore no compelling case for any further research and the Government continued to support the approach set out in the former PPS22. This approach is for local planning authorities to ensure that renewable energy developments have been located and designed in such a way to minimise increases in ambient noise levels through the use of the 1997 report by ETSU to assess and rate noise from wind energy developments.

The applicant highlighted further research in terms of the AECOM report commissioned by DEFRA to examine the use of statutory nuisance when dealing with wind farm noise complaints (released in April 2011). The AECOM report notes that the various risk factors which might give rise to EAM have been suggested, including linear layout of turbines, turbine spacing and high wind shear or a combination of these factors. The report concludes by stating that:

"despite research by numerous investigators over the last 20 years, there is to date no universally accepted explanation as to the causes of AM or means to predict its occurrence".

It also states that whatever the actual number of occurrences of EAM, it only occurs at a minority of wind farm sites for some of the time.

The applicant stated that there are isolated examples of Swinford, Chelveston and Denbrook where the EAM condition has been imposed, although these appear to be at odds with virtually every appeal decision since, including the Secretary of State's decisions at Woolley Hill, Wadlow, Barmoor, Sober Hill, Greenrigg/Ray and Crook Hill where no EAM condition has been imposed.

The issue of an EAM condition was considered by the Inspector within the Spaldington decision. In this decision the Inspector stated that:

'Whilst both schemes would display some of the characteristics thought to be associated with EAM, the current situation can be summed as, there is no agreement over what the cause of the phenomenon is, there is no agreement over what the level of risk is in relation to any one particular wind farm and there is no agreement how to measure it. Here, the evidence does not suggest that these sites pose any greater risk of EAM so as to adopt an approach that differs from ETSU. Moreover, where such an approach has been taken, I am aware of the problems that have arisen in attempting to construct appropriate conditions'.

The applicant concluded by assessing the condition in relation to the tests set out in Circular 11/95. The applicant stated that in light of the evidence before us, given the small number of sites where EAM has been identified and the absence of any proven risk factors, it is statistically highly unlikely that EAM would be an issue at the proposed development. The imposition of a condition cannot therefore be justified as necessary or reasonable.

In addition to this in light of the fact that there is no consensus on a robust assessment methodology for detecting EAM, it is not currently possible to draft a condition which includes a robust and tested means of determining the presence of EAM which would meet the tests of precision and enforceability.

The applicant concluded their evidence by stating that “the inclusion of a condition on the basis that it will do no harm is not sufficient justification. It is not appropriate to apply the precautionary principle unless there is objective scientific evidence to demonstrate that there is a real risk of EAM occurring on the application site. Such evidence does not exist”.

However with a view to addressing the concerns raised by the planning committee in terms of ensuring residents are protected against the EAM noise should it arise, the applicant has now offered to accept a condition with revised wording rather than have it removed altogether. The applicant has made the following statement in support of this position:-

“...it is unlikely that we will agree a form of words in the EMP that gives the Darlington Planning Committee the level of comfort that they require when considering this application. The primary reason for this is that the EMP was never intended to be a direct replacement for condition 22 and rather the EMP fulfils the role of adding a further degree of protection for local residents by setting out how our identified significant environmental aspects, such as noise, waste management and emissions to water or air are to be managed for the particular project.

As has been made clear by our legal and technical advice, as well as that of the Council, the planning condition should be removed regardless of any other measures put in place. Banks Renewables feel that a suitable way forward is to revert back to a replacement planning condition (see attached). The attached condition details that where in the opinion of the LPA there is clear evidence that noise attributable to the Moor House Wind Farm is causing a

nuisance to local residents the operator will submit measures to the LPA to the address the characteristics identified as contributing towards the nuisance. It is worth noting that the planning condition is to be read alongside the tabled EMP. The planning condition would deal with noise of any characteristic and therefore, we feel would address the concerns of the Council.”

Formulating a recommendation.

Officers previously sought advice on this matter from independent noise consultants, Parsons Brinkerhoff (PB). PB has examined the application and recent appeal history where EAM has been discussed at public inquiries. They advised as follows:

The potential for EAM has been discussed in relation to wind farm applications since it was first highlighted in the Hayes McKenzie Report on low frequency noise for DTI, and the investigations surrounding the wind farm site at Deeping St. Nicholas.

The TNEI document no 78868 reports that an EAM condition has only been imposed on four wind farms and since then that one of them has had the condition removed. PB believes this to be an accurate reflection of the current situation, and further understand that an application to remove the condition at another of these sites (Den Brook) is coming shortly.

On the basis of the current evidence, and the above discussion, I would be of the opinion that it is not currently possible to construct a suitable condition for EAM that would meet the six tests of Circular 11/95, but hope that current research will lead to a solution in the future. Environmental Health Officers should be encouraged to take swift action to invoke their powers under the Statutory Nuisance regime if EAM should occur.

When subsequently questioned about their original conclusion that there was a greater than average risk of EAM noise occurring at this site, the PB consultant responded:

I did indeed state in my previous report that based on the understanding at the time (2010), that the site could be at a greater than average risk of EAM occurring. A lot of research has been undertaken since then to try to understand further the mechanisms that could give rise to EAM, the findings of which were presented at an IOA conference last year. There is also some research that has yet to be published (e.g. the Renewables UK study). It is now less clear that the factors that lead to my original conclusion are the exact causes for AM, and therefore I am not now able to reach the same conclusion based on the available evidence. That is not to say that it wont occur, merely that we cannot predict the likelihood of its occurrence on the available evidence.

In order to arrive at a recommendation it is necessary to examine recent appeal decisions where EAM has been discussed by the Inspector, as such discussions are an important material consideration in relation to the application before Members.

In addition to the cases highlighted above where an EAM condition has not been imposed by Inspectors, a more recent example at Batsworthy Cross, Devon in October 2012 is worth highlighting.

The Appeal Inspector discusses the subject at some length (sixteen paragraphs) some of which are as follows:

I recognise that some people may be reluctant to complain about turbine noise affecting their home, because of fears that a history of complaints might depress the value of their property. Nevertheless, the available evidence suggests that wind farms, where OAM is known to occur, are uncommon; and that, even at those sites, the occurrence is intermittent. Despite laborious attempts to monitor OAM, confirmation of its occurrence through measurement is very rare. Several mechanisms have been suggested to explain its occurrence, but none have gained the general acceptance of professional acousticians working in the field.

There is some consensus that OAM is most likely to be noticed when background noise levels are low and wind shear is high but, again, this has not been firmly established. Certainly, there is no evidence to show that the appeal scheme is more likely to generate OAM than wind farms elsewhere. On that basis, and given the limited extent of known occurrences of this phenomenon, it could reasonably be argued that a condition to protect local residents against the potential effects of OAM is unnecessary. However, there is no doubt that those effects can have serious consequences and the absence of evidence to suggest that OAM would occur at Batsworthy Cross may simply reflect a lack of knowledge about the causative mechanisms.

Whilst it would be desirable to be able to control the occurrence of OAM by condition, it is not yet possible to reproduce the phenomenon under laboratory conditions; measure it; or, gauge the human response. There is no agreed dose response relationship or objective metric to describe it.

In the circumstances, the imposition of restrictions along the lines of those attached to planning permission for the Den Brook wind farm, would be unreasonable. Those conditions sought to limit the occurrence of AM in situations where changes in the measured LAeq, 125ms turbine noise level exceed 3dB. Whilst it may be possible to enforce such controls, there is nothing to show that this would reduce the harm caused by OAM.

The following paragraph is considered by Officers to be particularly pertinent:

I have strong reservations about controls which are reliant on a solution, (to control OAM,) being found in the foreseeable future. Following discussion at the inquiry, it seems inevitable that the wording of such a condition would carry so much uncertainty for the operator as to be unreasonable when judged against the tests of DoE Circular 11/95.

And finally:

In the circumstances described here, it would be unreasonable to attempt to control OAM through use of a condition and wrong to conclude that permission should therefore be refused. Whilst not an ideal solution, reliance on the statutory nuisance regime offers the best recourse available to local residents, should OAM be found to occur.

A further similar discussion took place earlier in 2012 during an appeal at Wooley Hill for four turbines where the Inspector concluded:

'none of these aspects, compounded by the lack of understanding on excess amplitude modulation, provide good reason for the imposition of a condition as a matter of routine or precaution. To my mind, on the basis of the evidence before me, the test of necessity has not been fully met'.

The Inspector also states that the condition would be unreasonable, as there is no agreed methodology for measuring excess amplitude modulation, based on convincing research and therefore it would be unreasonable to impose a condition on such an uncertain basis.

The Inspector concludes the discussion on EAM by stating:

'In conclusion, despite the findings of the Inspector in the Den Brook case, the evidence presented to me does not provide convincing justification that an excess amplitude modulation condition would be necessary. In addition, such a condition, if imposed, would be unreasonable given the current limited knowledge and understanding of excess amplitude modulation and a lack of consensus beyond the guidance of ETSU-R-97.'

Clearly there is a current trend of appeal Inspectors having misgivings about relying on Statutory Noise Nuisance as being the most reliable route open to Local Authorities, but they consider that this is the best means currently available, and not through a planning condition.

In terms of the revised condition 22 meeting the Circular 11/95 tests of a condition, the following is considered pertinent:

i) necessity – there has been no evidence provided to ascertain that EAM will occur at the site. It has been stated that there is foreseeable risk due to the wind shear element, layout, and height of the turbines. However, there is no agreement over what causes EAM and as the Inspector stated in the Cotton Farm decision such factors are also exhibited at other wind farms where EAM has not been identified. The same concern was expressed at Langford and both Inspectors ruled that there is no evident reason why the appeal sites should be particularly prone to EAM. The assertions were not supported by evidence and the same could be said for the site the subject of this application. However the applicants in offering a reworded condition are accepting the Committee's stance about the need for precautionary measures against the possible incidence of EAM in this instance. Therefore it is an important consideration that the applicant has effectively conceded that a condition is needed.

ii) relevant to planning – condition 22 would meet this test in terms of being relevant to a material planning issue.

iii) relevant to the development permitted – condition 22 would meet this test in terms of being relevant to the development permitted.

iv) enforceable – Concerns have been expressed by the applicant that there is no consensus on a robust assessment methodology for detecting EAM, and therefore it is not possible to draft a condition which includes a robust and tested means of determining the presence of EAM. This has been supported at appeal, with the appeal decisions referred to in this report all concluding that if the condition was imposed it would be unreasonable given the current limited knowledge and understanding of EAM.

The Inspector in the Langford appeal decision stated *'I also have doubts as to whether the condition would meet the Circular tests of enforceability and precision in that, despite what the Council's acoustic witness said about being able to identify EAM and distinguish it from other noise, this would appear to depend so heavily upon individual judgment as to render the approach unsafe'*.

Given the rewording of the condition and the reference to the Environmental Management Plan, the applicants are content that robust mechanisms exist to enforce the condition if required, in

much the same way as the other noise related conditions routinely imposed on wind turbine permissions.

The revised condition is linked to the investigation procedure set out in the EMP. There remains a small amount of wording in this document that could undermine the robustness of the condition, namely that the need to employ an independent consultant is dependent on agreement between the Council and the operator (albeit that agreement should not be unreasonably withheld) also that EAM is to be defined by agreed current best practice and there is a lack of consensus at present as to what constitutes best practice. The procedure however obligates the operator to continue to take action until any EAM related issues are demonstrated to be resolved and as such there is a clear incentive for the operator to take action as early as possible to mitigate a problem should it arise.

v) precise – The applicant argued that as there is currently no agreed robust assessment methodology for detecting EAM, the original condition would not meet the test of precision as it would not be clear as to how to proceed in identifying EAM and measuring it. Given the recent appeal decisions and in particular that stated within the Langford appeal decision, it is considered that the condition would struggle to meet the tests of precision given the uncertainty over the methodology for identifying and measuring EAM and the subjectivity this introduces. The reworded condition remains imprecise in terms of the methodology for detecting EAM in the event of a complaint and also in terms of how exactly EAM will be mitigated against if necessary. However this is an inevitable result of the lack of agreement amongst experts in the field as to the causes of EAM and that the human response to it will vary from cases to case.

vi) unreasonable – the appeal decisions that have been discussed in this report clearly emphasise that an EAM condition would be unreasonable due to the uncertainty in methodology for measuring EAM and the lack of agreement over the causes of EAM and therefore the predictability of it occurring at any given site. Given the recent appeal decisions and the evidence presented within this application by the applicant it is considered that to continue to impose condition 22 would be unreasonable. However the fact that the applicant is willing to accept the proposed revised condition to deal with EAM arguably means that it would not be unreasonable to impose it.

Summary of legal advice

Further to the above a senior barrister was previously requested to advise on the validity of the original condition to control EAM and his conclusions are summarised below:-

- Agrees with the conclusion in this report that original condition 22 fails to meet four of the tests in circular 11/95 and that an appeal against refusal of an application to remove the condition by the Council would likely to be successful. The provisions of the Human Rights Act or localism agenda do not present a case for retaining the condition.
- That the condition previously suggested by Sadberge Parish Council including requirements for the turbines to temporarily cease operation would not meet the tests in the aforementioned Circular.
- Where a similar condition has been upheld in the Courts previously (Den Brook), this case was not considering whether the condition met the requirements of the Circular.
- If the EMP was drafted in similar terms to condition 22 it would suffer the same problems in terms of compliance with the Circular.

- Unable to offer an alternative condition likely to meet all the tests in the Circular and be supported by an Inspector.

Other matters

A letter of objection was received on grounds of aviation safety, however whether the development is acceptable in principle on these grounds is not subject to consideration as part of this application. The condition requiring an appropriate mitigation scheme in the interests of aviation safety will remain in place regardless of the outcome of this application.

Conclusion

Taking into account the findings of various planning appeal inspectors in recent wind farm cases and the advice of an independent acoustic consultant and senior barrister, it is considered that the original wording for Condition 22 would fail to meet all the tests set out in Circular 11/95.

The inclusion of an EAM condition with the original permission took into account earlier technical advice and was considered to be reasonable by officers and Members at the time. The legal and technical position has moved on with the acoustic consultant stating there is less certainty about the causes of EAM, and many Inspector appeal decisions rejecting the validity of the condition. The findings and advice clearly indicate that in spite of potential issues with EAM this would not justify the refusal of planning permission.

The proposed revised wording for condition 22 arguably meets more of the tests set out in Circular 11/95 for example around necessity and reasonableness although continues to be imprecise and, for the reasons set out above, this could cause the condition to be unenforceable. Furthermore it is uncertain that the wording of the revised condition provides fully robust assurance that an EAM related problem would be solved should it emerge. However it is important to note the following points:-

- That in light of the above assessment it is not considered possible to devise a more suitable planning condition to address EAM
- The developer has effectively agreed to be bound by a planning condition which subject to evidence ultimately gives the Local Planning Authority the power to require them to take action if the wind farm is causing noise harmful to living conditions of local residents.
- The proposed wording is considered to be more effective than the original in that there would be a shorter investigation period and therefore potentially more responsive mitigation; it allows for the timing of complaints to be correlated with any marked fluctuation in noise levels; it allows for flexibility in terms of the investigation methodology in accordance with any changes in best practice.

It is important to emphasise that occurrences of EAM appear to be rare and may not be a feature at all at the Moorhouse site.

SECTION 17 OF THE CRIME AND DISORDER ACT 1998

The contents of this report have been considered in the context of the requirements placed on the Council by Section 17 of the Crime and Disorder Act 1998, namely the duty on the Council to exercise its functions with due regard to the likely effect of the exercise of those functions on,

and the need to do all that it reasonably can to prevent crime and disorder in its area. It is not considered that the contents of this report have any such effect.

RECOMMENDATION

Taking the above into account that planning permission be granted with conditions attached as to planning permission 11/00160/FUL but, on the balance of considerations, with a revised condition number 22 as follows:

In the event of a complaint from a resident local to the consented wind farm relating to noise and, in the opinion of the LPA, there is clear evidence* that this is a consequence of the level or characteristics of noise attributable to the operation of the said wind farm such that harm to living conditions is being caused to the aforementioned complainant, the operator shall within 2 weeks (unless otherwise agreed in writing with the LPA) of the LPA communicating its aforementioned opinion submit measures to be agreed in advance with the LPA to address either before or at the time of their occurrence the characteristics identified as causing the said harm. Such measures will include a timescale for their implementation and measures to monitor and demonstrate their effectiveness. Thereafter the wind farm shall be operated in accordance with any such measures agreed under the terms of this condition.

***Such evidence will have been gathered in accordance with the procedures set down in the current EMP agreed under the terms of this consent.**

Reason: In order to protect residential amenity.

Summary of reasons for approval

In keeping with planning permission 11/00160/FUL with the exception that the up to date national policy position, as reflected in the National Planning Policy Framework is referred to.