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Legal Compensation for Wind Farm Disturbance

Onshore wind farms are the most established large-scale source of renewable energy in the UK. Wind turbine noise is of two sorts, mechanical (deriving from gearboxes, generators, auxiliary equipment etc) and aerodynamic (in flow turbulence at the front of the blade, airfoil turbulence at the trailing edge and tip of the blade). The latter is dominant. Noise can have health effects including sleep disturbance and performance reduction, annoyance responses, and effects on social behaviour.

This paper sets out a review of the legal frameworks for environmental compensation and their potential application in compensating householders for noise and flicker disturbance associated with the operation of wind turbines and for loss of value to privately owned property.

Background

Wind farm noise is assessed throughout the UK for planning purposes by reference to ETSU-R-97 (an industry standard drafted in 1995 by the DTI) and taking account of the latest industry good practice and any guidance on best practice that the government may from time to time publish. ETSU measures prevailing background noise, generates maximum permissible day and night time noise levels, predicts the likely noise emissions at representative properties and drafts conditions requiring that noise levels not be breached. Noise limits will therefore often influence the separation of wind turbines from residential properties.

There is currently no minimum separation distance between wind turbines and houses, although local planning authorities do set their own guidance and are required to consider noise and shadow flicker as part of the criteria in their Development Plans. Scottish Planning Policy (February 2010) includes a recommended distance of 2km. The Scottish Government rejected Petition PE1328 (November 2010) which sought a guaranteed minimum separation distance of 2 km. The Scottish Government’s current consultation draft Scottish Planning Policy (April 2013) proposes that the separation distance will increase to 2.5 km.

In relation to wind energy developments any assessment of the environmental impact of a proposed development normally addresses issues such as ecology, ornithology, noise, cultural heritage, landscape and visual impacts and carbon balance. However, the specific content of an Environmental Statement is determined by the specifics of the particular project.

Planning permissions and electricity consents for wind farm developments in Scotland

Planning applications are made to a local planning authority under the Town and Country Planning (Scotland) Act 1997 (‘the 1997 Act’) if the proposed development has a generation capacity of not more than 50MW. Any application for a proposed development with a generation capacity in excess of 50MW is made pursuant to s 36 of the Electricity Act 1989 to the Scottish Government Energy Consents and Deployment Unit (‘ECDU’). On granting an s 36 consent the Scottish Ministers may direct that planning permission is granted for the proposed development and any ancillary development subject to such conditions (if any) as may be specified in their direction.

Scottish Planning Policy is a relevant consideration in determining an application for planning permission. Scottish Planning Policy provides, at para 186, that:

A range of benefits are often voluntarily provided by developers to communities in the vicinity of renewable energy developments. These can include community trust funds. Such benefit should not be treated as a material consideration unless it meets the tests set out in Circular 3/2012 Planning Obligations and Good Neighbour Agreements.

The Scottish Government’s current (April 2013) consultation draft Scottish Planning Policy states:

Planning authorities should ensure that any requirements for developer contributions are proportionate and consistent with Scottish Government policy on the use of planning obligations set out in Circular 3/2012: Planning Obligations and Good Neighbour Agreements, and do not adversely affect the viability of development (at para 23);

The Scottish Government is committed to ensuring that communities benefit from renewable energy development. It has set a target of 500 MW of renewable energy generating capacity being community or locally-owned by 2020. Benefits may be offered voluntarily by developers to communities likely to be affected by a development. The Scottish Government supports this and encourages all commercial wind farm developers to voluntarily offer community benefits and record these on the Scottish Government’s Register of Community Benefit from Renewables. The rate of community benefit offered will be open to negotiation, but the current benchmark for community benefits in Scotland is £5,000 per MW of installed capacity per year, and opportunities for community investment in schemes, including joint ventures, are also encouraged (at para 222); and

To safeguard the impartiality and transparency of the planning system, benefits may only be material considerations where they meet the two tests outlined in Circular 4/2009: Development Management Procedures, Annex A: Defining a Material Consideration. These are that they:

— serve or relate to a planning purpose (they should therefore relate to the development or use of land), and
— should fairly and reasonably relate to the particular application (at para 224).

Scottish Planning Policy is not a relevant consideration in determining an application for electricity consent under s 36 of the Electricity Act 1989.

Statutory compensation – United Kingdom

There are no specific frameworks that enable payment of compensation to those householders/house owners impacted (whether noise, visual or other impacts) by the development
of wind farms in their vicinity in Scotland. Although other more general frameworks do exist, complainants seeking compensation for proximate wind farms would face overwhelming difficulties in triggering them.

The generic scheme of the Compensation Act 1973, which only applies to projects which result from statutory powers, is of limited relevance here. Similarly, the Land Compensation (Scotland) Act 1973 applies only to ‘public works’, which wind farms are not. The Electricity Act 1989 does set out a scheme (at Sched 3, Part III) for compensation but this relates principally to compulsory acquisition of land, while the 1997 Act does provide for compensation on grounds of blight ‘where the marketability of land is adversely affected by proposals which give rise to the apprehension that such land will be the subject of compulsory acquisition in the foreseeable future’.7 Such a high threshold is wholly unlikely to be satisfied in the case of wind farm noise.

Statutory compensation – Denmark
In 2009 Denmark, uniquely, legislated for a specific statutory scheme to compensate property owners for any loss of value arising from proximity to wind farms. The Law to Promote Renewable Energy 2009 is secondary legislation.8 At Chapter 2§6 it provides that installers of turbines higher than 25 m must compensate property owners for any loss of value if the loss is more than 1 per cent of the property value. A special tribunal (‘Taksationsmyndigheden’) is authorised to make the relevant binding decisions in respect to the compensation.9

The property owner and the person installing the turbines can, however, reach an agreement without involving the authority. ‘Taksationsmyndigheden’ is chaired by a person who is qualified to sit as a judge and an ‘expert’ (the equivalent of a surveyor).

An evaluation of the 551 compensation payments indicates that the average award was 57,000 kroner (c £5,500) per household and that recipients did not feel that the amount of compensation came close to reflecting the actual value of their loss. Being managed by the Ministry for Energy, there are also complaints that the scheme suffers from an inherent conflict of interests and ought to be managed by the Ministry of Justice.10 Evaluations are done independently and on a case-by-case basis, taking into account the distance to the turbines, visual aspect, noise, shade, the character of the property and the market evaluation of the area.11

Voluntary payments
Types of voluntary payments are considered in the following paragraphs.

Community benefit
Although not a form of compensation, ‘community benefit’ in relation to wind farm development is regarded as a gesture by the developer to provide a certain element of financial benefit to the local community. The local community is usually defined within a specific geographical area. This fund does not benefit members of the community as individuals but aims to benefit the community as a whole. Community benefit can be determined/paid in a number of different ways. The developer and the local community work together through the progression of the project; however community benefit is not agreed upon until regulatory approval for the development has been obtained.

Often a community benefit fund is established to provide financing for community initiatives, for example funding a new community hall, or improving sporting facilities in the local area.12 An amount will be paid into this fund periodically and distribution of the fund will be managed either by a third party or a group established by the local community. In some cases the community benefit is spread across different initiatives. At Achany wind farm in Sutherland, an apprentice scheme for local residents has been established with local businesses.13 This initiative provides four apprenticeships for two to three years with a level of funding for up to £12,000 per annum. This is currently a pilot scheme but if successful may continue to be used throughout the lifetime of the wind farm.

While the Scottish Planning Policy (‘SPP’)14 recognises the ubiquity of such benefit payments, it states that they ‘should not be treated as a material consideration [for the obtaining of planning permission] unless it meets the tests set out in Circular 1/2010 Planning Agreements’. In reality every developer is expected to sign up to community benefit. This is evident in the planning policies and guidance of many local authorities in Scotland. For example, Highland Council has established £5,000 per MW as a standard expected payment from the developer15 to a community benefit fund. An amount being paid per MW per annum seems to be the most common method of payment; however it is also possible for a lump sum or variable annual payment. These payments are made annually for the duration of the lifetime of the wind farm.

In Dumfries & Galloway for example any community benefit agreement requires 50 per cent of this money going to local community projects and 50 per cent going into a central fund held and distributed by Dumfries & Galloway Council.16 The aim of the central fund is to provide Dumfries & Galloway-wide community benefits; however details of how this fund is spent are largely unavailable.

In Scotland there has now been a register established which states the amount of money per MW that has been agreed with the local community for each project in Scotland.17 This allows for more transparency within the industry and is designed to assist local communities when negotiating with developers. Although this is a voluntary scheme there are already over 100 renewable energy project community benefit packages registered. The Scottish Government has commissioned a report for the use of local communities in relation to community benefit from renewable energy developments.18 This document also highlights the fact that although there is no legal obligation to establish a community benefit payment, it is the norm and almost every developer will do this.

South of the border it would appear as though the UK Government is likely to adopt a similar strategy to that of Highland Council. The UK Government has been consulting on a standardised amount of community benefit. At the moment £1,000 per MW is regarded as acceptable. However the industry body Renewable UK has agreed to see a five-fold increase to make this £5,000 per MW in line with what is becoming the norm in Scotland.19
One issue which has been experienced in parts of rural Scotland is that communities are beginning to find that due to the amount of money they are receiving they do not actually have projects which fall within the set parameters that they can spend the money on. Therefore it is important that developers and communities work together to achieve an agreement which will successfully benefit the community. Developers typically set up Community Benefit Funds into which they pay funds, often a fixed amount per MW of installed capacity, to be used for the benefit of the local community.

**Goodwill payments**

Some developers make payments to members of local communities who will be impacted by proposed developments as a gesture of goodwill. These gestures are becoming more common as developers seek to gain the support of stakeholders. As electricity costs rise, local communities living close to proposed wind farms increasingly seek a reduction of their electricity bills. It should be noted that these are not payments for disturbance (they are often made before construction) and are made available to a class of people, not nominated individuals.

Recent examples include RES Ltd (Renewable Energy Systems) announcing that they intend to establish a ‘local electricity discount scheme’ at the Meikle Carewe wind farm in Aberdeenshire and Tallentire wind farm in Cumbria. A fund will be established to discount electricity bills of local residents. This will occur regardless of the energy supplier they select. It is anticipated that households will save up to £200 on electricity bills per annum. The same developer is also establishing such schemes in Northern Ireland. This allows individual households to benefit from the development rather than establish an overall fund that can only be used to fund projects which fall within parameters agreed between the local community and the developer. Prior to this local electricity discount initiative there have been similar schemes, however these benefits have only been available where the customer has switched electricity supplier prior to the wind farm commencing operation. Once the customer signs up to a specific tariff which in one example has been the Green Energy UK’s Deep Green Tariff, the customer then receives a lower rate of electricity than with other suppliers.

Another example of goodwill payment mechanisms is in relation to community turbines and ‘virtual turbines’ whereby the local community is afforded the opportunity to invest in the project and have ownership of part of the project. Annual dividends from the profits are then paid back to the shareholders. With ‘virtual turbines’ the community has a stake in the overall project and therefore there are fewer issues than associated with owning one specific turbine. Although this is a benefit to the community, it requires members of the community who wish to invest to provide up-front capital. This therefore limits the number of those who can benefit from such a scheme.

Funds have also been established by developers which are specifically designed to fund energy efficiency measures in the local community. Examples of this include providing free insulation in the homes of people within the local community, free light bulbs and general energy efficiency advice. All of these measures were introduced at the Hadyard Hill wind farm in South Ayrshire. Certain developers have also provided benefits in kind to the local communities by providing local leisure facilities; one of the main examples is at the Whitelee wind farm whereby a visitor centre and café have been built with mountain biking and walking tracks built around the wind farm for public use.

Although these ‘benefits in kind’ are being used by developers and local communities, they are unlikely to be used instead of community benefit payment. As community benefit becomes more standardised across the industry, communities are coming to expect up to £5,000 per MW. Benefits in-kind or goodwill payments will remain an additional option which local communities may try to negotiate. As local communities become more aware of what is available, developers will need to be prepared for their expectations.

**Noise disturbance agreements**

Developers can voluntarily offer compensation to those living in the vicinity of the wind farm and may enter into ‘Noise Disturbance Agreements’ with neighbours. These arrangements, which are relatively common in Scotland, are contractual in nature and as such are not registered or publically available. Such agreements generally provide for compensation to a neighbour to a wind farm and may act as evidence that the neighbour does not object to a development. The effectiveness of such agreements is yet to be tested in Scotland. (If all relevant householders, leaseholders etc sign such an agreement then it may be that the distances set down by the specific local authority can be largely disregarded where no public interest reasons prevent the agreed terms being deemed to be appropriate.)

**Council tax revaluation**

The Valuation Office Agency (in England and Wales)/Scottish Assessors have the capacity to ’re-band’ properties when relevant circumstances change. There are recent press reports of the VOA accepting that a 22-turbine wind farm 650 m from a house decreased the latter’s value and re-banded as a result. In the case of the Drumderrg wind farm in Perthshire (16 turbines, the closest turbine 1,140 m away from the dwelling), Perth & Kinross Council reassessed a proximate dwelling, the council tax banding of which was revised downwards. It should be noted that the press reports are incomplete and other factors may have been relevant to the re-banding decisions. There is also evidence of discretionary local council tax discounting in individual cases where property has been affected by the proximity of electricity-generating wind turbines.

**Nuisance actions and planning**

‘Nuisance’ is of course a means by which lawful occupiers of land can be protected against interferences which inhibit their full use of their land for normal purposes. A balance must be struck between competing interests of the claimant and alleged interferer – the former can make out a nuisance claim only if the latter has unreasonably used its property so as to
damage the interests of the claimant. While authorisation for an activity (such as the grant of planning permission) for a wind farm) may be relevant to a defence, it will not be a bar to a finding of nuisance. In the recent case of Barr v Biffa Waste Services Ltd which related to odours from a waste disposal site, the Court of Appeal did not accept that compliance with regulatory controls such as a permit provided an absolute defence.

This provides some background to the unreported but important English case of Davis v Tinsley. A private nuisance claim was brought by Mr and Mrs Davis of Gray’s Farm, Deeping St Nicholas against the owners and operators of a nearby eight-turbine wind farm, the nearest of which was just over 1,000 m from their home. The starting-point of determining the question of reasonableness was argued by the defendant to be compliance with ETSU and planning conditions. The case came close to determination but settled partway through the High Court trial, on confidential terms. Nevertheless, in the light of the decision in Barr v Biffa Waste Services Ltd, a more general principle of good neighbourliness is likely to be reasonable. But the converse does not follow. Sticking to the rules is an aspect of good neighbourliness but it is far from the whole story – in law as in life.’

In cases of statutory nuisance, the remedies include an abatement notice served by the local authority. Although not compensation as such, this requires the recipient to abate the nuisance and to take such steps or to carry out such works as the authority requires the recipient to do to abate the nuisance. Failure to comply with an abatement notice is a criminal offence. In a similar fashion, when an enforcement notice has been issued, the local planning authority may issue a stop notice requiring that an activity should cease before the period for compliance with the enforcement notice. Such a mechanism was deployed at the Achany wind farm which was issued with a temporary stop notice by the Highland Council in June 2011.

Conclusion
There is no dedicated legislative framework allowing for compensatory payments to be made for loss of amenity, loss of property value or disturbance arising from proximate wind farm developments. That said there are a range of options open to householders affected by such developments although it should be noted that the most promising avenues are non-legal/voluntary rather than legally enforceable statutory or other frameworks which can be held against wind farm operators/developers. While more formal, legally established mechanisms do exist elsewhere – with Denmark being the obvious example – it is not obvious that such processes are superior to negotiated, community-based alternatives.

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