



Appendix 6

Moorshield Wind Farm

Aviation Letter by Wright, Johnston & Mackenzie

Moorshield Wind Farm Limited

BY EMAIL ONLY: derek.scott@eastrenfrewshire.gov.uk Our ref. W.03262.00001/FZG
Your ref.
Date: 10 January 2022

Dear Sirs

Moorshield Wind Farm Ltd
Proposed Moorshield Wind Farm, planning application reference 2020/0217/TP

We act for Moorshield Wind Farm Ltd in respect of the above application.

Background

Our purpose in writing to you is to summarise the position in relation the various aviation consultation responses received in relation to the above application, and then to set out our client's position on the objection by Glasgow Prestwick Airport, and to propose a way forward to enable you to determine the application.

Summary of aviation consultation responses

1. The MOD has no objection (letter dated 27th May 2020), to the scheme subject to the inclusion of conditions on aviation lighting and specific detail on turbine grid coordinates, date of commencement and end of construction and height of equipment.
2. NATS (En Route) plc objected to the proposal on 14th May 2020 due to the impact on Lowther Hill, Glasgow and Cumbernauld radar. This objection can be mitigated by a Single Cell Blanking Contract between NATS and the applicant. The contract has been prepared and is due to be signed by the end of 2021. Once this has occurred NATS (En Route) plc will remove their objection to the project subject to the inclusion of 2 suspensive conditions:-
 1. *No turbine shall be erected until a Primary Radar Mitigation Scheme (PRMS) agreed with the Operator has been submitted to and approved in writing by the planning authority in order to mitigate the impact of the development on the Primary Radar Installation at i) Lowther Hill, ii) Glasgow Airport and iii) Cumbernauld and associated air traffic management operations.*

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2. *No turbine shall be erected unless and until the approved Primary Radar Mitigation Scheme has been implemented and the development shall thereafter be operated fully in accordance with such approved Scheme.*

3. Glasgow Airport have raised no objection to the project on 16th July 2021, subject to the inclusion of 3 suspensive conditions:-

1. *That, prior to the commencement of development, a Radar Mitigation Scheme setting out measures to be taken to prevent the impairment of the performance of aerodrome navigation aids and the efficiency of air traffic control services at Glasgow Airport must be submitted to, and approved in writing by, the planning authority, in consultation with Glasgow Airport Limited.*

Reason: In the interests of aviation safety

2. *The turbines must be erected in accordance with the approved Radar Mitigation Scheme.*

Reason: In the interests of aviation safety

3. *The development must be operated at all times fully in accordance with the approved Radar Mitigation Scheme.*

Reason: In the interests of aviation safety

4. Glasgow Prestwick Airport (“GPA”) objected to the scheme on 10th June 2020 on the basis that

“all 3 of our turbines associated with the proposed Shieldhill Windfarm would be within line of site (LOS) of their primary radars and as such without effective and managed mitigation would generate unacceptable clutter on our radar displays.

Whilst we recognise the turbines would be wholly contained within the Controlled Airspace associated with Glasgow Airport they are close to the flight path of aircraft routing for approaches to Glasgow Prestwick Airport’s (GPA) Runway 21, particularly with relation to RNAV approaches.

Furthermore the clutter associated with these proposed turbines would be in an area where regular transfer of control and co-ordination of aircraft between Glasgow ATC and Prestwick ATC takes place. This clutter would make this process more difficult as aircraft are expected to be “transferred clean” i.e. with no conflicting aircraft. This would be very difficult to achieve with significant clutter on either Air Traffic Units radar displays.

Consequently GPA must object to this proposed development on the grounds of aviation safety until an acceptable radar mitigation scheme is in place and maintained for the life of the windfarm”.

We can therefore confirm that all aviation concerns have been addressed with the exception of that from GPA. We now turn to discuss the GPA objection in more detail.

We must say that GPA’s position that it must object “until an acceptable radar mitigation scheme is in place and maintained for the life of the windfarm” is unreasonable and not based on any evidential basis and its refusal to agree to the use of a suspensive condition as a means of overcoming its objection is misconceived and appears to be motivated by commercial considerations rather than a sound understanding of planning law and policy.

Need for mitigation and the use of suspensive conditions

The expert advice from our clients' consultants Cyrrus is that GPA's objection is not founded on any reasonable evidential basis. GPA accepts that Glasgow Airport controls the airspace above the site. The advice from our client's experts is that in those circumstances there is no basis for GPA to have raised an objection to the proposed development. We attach a copy of the report prepared by Cyrrus and would refer in particular to the conclusions set out in 4.1 – 4.12

It is clear from the Cyrrus Report that there is in fact no unacceptable impact on GPA which requires mitigation and therefore no basis for their objection. That is our clients' position. We set out below the process by which you could present your recommendation on the application to committee notwithstanding the GPA objection. Nevertheless, even if you do not agree that there is no unacceptable impact to be mitigated or consider that there is some doubt in relation to the issue, our clients would in those circumstances be prepared to accept the imposition of an appropriately worded suspensive condition to deal with GPA's objection. Before discussing the appropriate process to be followed in this case we summarise below the legal and policy position in relation to the use of suspensive conditions as a means of dealing with aviation objections.

Legal and policy position

The legal position governing the use of suspensive conditions was considered in *British Railways Board v Secretary of State for the Environment* [1994] J.P.L. 32. Whilst previously there was authority for the proposition that in order to be a valid suspensive condition there had to be a reasonable prospect of the condition being purified, the principle is now that if the negative condition is appropriate in light of sound planning principles, the fact that it appears to have no reasonable prospects of being implemented does not mean the grant of planning permission subject to such a condition is unlawful.

The absence of a requirement to impose such a test does not mean that a decision maker should never do so. There may be circumstances in which such a test could be appropriate. In the Corlic Hill wind farm decision the Reporter noted:-

154. I agree with Glasgow Airport Limited's interpretation that, although there is no obligation to apply the reasonable prospects test, it might be appropriate for a decision maker to consider that issue, if justified by the facts of a particular case. This is consistent with circular 4/1998 on the use of planning conditions. This advises that the British Railways Board decision introduced a "less restrictive view in the use of negative conditions" but does not absolutely rule out the consideration of what effect such a condition would have on the prospects of implementation.

155. For a development type such as wind energy generation, where cumulative effects with other, similar, developments are often an important issue, it may be necessary to consider the effect of a suspensive condition on the prospects for implementation. If a wind energy project is permitted but is then unable to be implemented because no mitigation solution can be found, it might prevent other wind energy proposals from proceeding due to the potential for unacceptable cumulative effects (for example landscape or visual effects) with the consented scheme. This could restrict the delivery of acceptable renewable energy proposals, which would be contrary to Scottish Government policy.

As far as policy is concerned, Circular 4/1998 deals with suspensive conditions at paragraphs 27 and 28 of Appendix A. It reiterates that, whilst an authority requires to have regard to all relevant factors affecting a planning application and whether it should be granted with or without a condition, there is no longer any legal requirement to satisfy a reasonable prospects test in respect of any negative condition that might be imposed.

It is clear from the Reporter's reasoning in the Corlic Hill decision, that 'all relevant factors' includes evidence of a mitigation solution having been identified, and the likely cumulative impacts of granting consent subject to a suspensive condition.

In February 2012 the Scottish Government published guidance on the use of suspensive conditions to deal with aviation objections.

The guidance states

"Given the complexities involved in achieving the agreements and technical arrangements required to mitigate the effects of wind turbines on radar, planning authorities should recognise that the existence of a theoretical or potential technical mitigation will not represent a solution to an aviation objection if it cannot be realised. It is recognised that planning authorities are under no obligation to apply a "reasonable prospect" test before applying negative conditions. However, the use of such conditions where there is no identified mitigation to deal with an aviation objection, could have an impact on the likelihood of other developments being consented owing to cumulative effects related to both radar and landscape. Planning authorities should consider the views of relevant consultees on the matter and, where applicable, evidence confirming the technical existence of mitigation already identified in theory. Evidence of the likelihood of a technical solution being realised within a reasonable timeframe will therefore be a relevant consideration in deciding whether or not to give consent with negative conditions to address aviation issues.

...Developers should engage with air navigation service providers from the earliest possible stage in order to establish if radar issues exist which should be considered in the submission of a planning application and, where there are issues, should initiate the process of identifying or developing a solution.

The Scottish Government recognises the advantages, in terms of meeting published renewable energy targets, of maximising the potential generated power released by the available mitigation where this is an option. However, it should be noted that the availability of a mitigation solution does not over-ride other planning considerations, including spatial planning factors. Planning authorities should balance all the material considerations in the normal manner in coming to a view on a proposed development."

It should be borne in mind that the guidance is just that – guidance, and not policy. Current policy remains Circular 4/1998. Nevertheless, the guidance will be a significant material consideration in the determination of applications for planning permission where a suspensive condition is being proposed to deal with aviation objections.

The issue of the appropriateness of a suspensive condition and the interpretation of the Scottish Government guidance was considered in an Appeal decision in relation to the proposed wind farm at Corlic Hill, Inverclyde (PPA-280-2022) in which the Reporter, David Bullya, considered in some detail the legal and policy position in relation to the use of suspensive conditions as a means of resolving aviation objections. In that case there was an objection from Glasgow Airport on the basis of the impact on its PSR and separate objection from NATS in relation to the Lowther Hill PSR.

In the Corlic Hill decision it is clear that the Reporter placed weight on the existence of a number of potential mitigation solutions which might be capable of mitigating the impact of the proposed Inverclyde Wind Farm. Included amongst those possibilities was the (then) emerging wind farm resilient Terma radar which was, at the time of the Inquiry, being trialled by Glasgow Airport. The Reporter did not consider it was necessary for the Appellant to have a fully worked up mitigation solution, particularly given the evidence that Glasgow Airport was in the process of procuring a new radar which might offer a solution (paragraph 174 of the decision).

For Moorshield Wind Farm, the advice from the aviation consultants is that the Proposed Development is unlikely to have an impact on the Instrument Flight Procedures applicable to Glasgow Prestwick Airport. Nevertheless, even if there is such an impact on the Primary

Surveillance Radar and Instrument Flight Procedures, it is clear that the Terma solution which is currently installed at Glasgow Prestwick Airport is highly likely to provide an acceptable mitigation in this case. There is considerably more certainty as to the availability of a solution in relation to the proposed Moorshield wind farm than there was in relation to the proposed Corlic Hill wind farm.

Therefore, it is clear that there is an established and proven technology which is in place, and which is therefore more than theoretical. There is a high likelihood of the solution being capable of mitigating any impact on GPA's infrastructure. The evidence clearly points to a high likelihood of a solution being available well within the lifetime of a planning permission for the proposed development.

We suggest that the form of condition proposed by Glasgow Airport could be adapted to deal with the GPA objection, as follows

1. *That, prior to the commencement of development, a Radar Mitigation Scheme setting out measures to be taken to prevent the impairment of the performance of aerodrome navigation aids and the efficiency of air traffic control services at Glasgow Prestwick Airport must be submitted to, and approved in writing by, the planning authority, in consultation with Glasgow Prestwick Airport Limited.*

Reason: In the interests of aviation safety

2. *The turbines must be erected in accordance with the approved Radar Mitigation Scheme.*

Reason: In the interests of aviation safety

3. *The development must be operated at all times fully in accordance with the approved Radar Mitigation Scheme.*

Reason: In the interests of aviation safety

We confirm that our clients would be content with such a condition.

The use of an appropriate suspensive condition would prevent any development taking place until such time as an appropriate mitigation scheme is agreed and implemented.

The refusal by GPA to agree to the use of suspensive conditions and the requirement to enter in to a windfarm mitigation scheme ("WMS") has recently been challenged in a number of public inquiries including in relation to the proposed Clauchrie Wind Farm and the proposed Sanquhar 2 Wind Farm.

In this case our clients' position is that there is no impact requiring mitigation. However if the view is taken that there is such an impact requiring mitigation then our clients do not take issue with the need for a WMS secured by way of a condition. Their point is simply that there is clearly no requirement for a WMS to be negotiated and agreed before it would be appropriate to issue a consent subject to suspensive conditions.

The reasonableness of the approach we have proposed is underscored by the fact that Glasgow Airport, as the operator having responsibility for the airspace over the proposed wind farm, has not requested that any mitigation scheme be agreed prior to withdrawing its objection and instead has proposed an entirely appropriate suspensive condition as a means of overcoming its objection.

Appropriate procedure to allow the application to be determined

As you know the Town and Country Planning (Safeguarded Aerodromes, Technical Sites and Military Explosives Storage Areas) (Scotland) Direction 2003 imposes a requirement to consult with the owner or operator of a relevant aerodrome (which includes Glasgow Prestwick and Glasgow Airport) where development is proposed in the neighbourhood of the aerodrome. Paragraph 5 provides that where the planning authority proposes to grant permission for the development against the advice of the consultee, or to grant permission without imposing conditions which have been requested by the consultees, it shall notify the Scottish Ministers and in addition the CAA, the relevant consultee, and the Secretary of State for Defence (as the case may be).

The Direction then provides that the planning authority may not then grant planning permission during the period of 28 days after notification, and during that time the Scottish Ministers may call-in the application.

Therefore in the present case, should you be minded to recommend approval of the application without the need to mitigate Glasgow Prestwick Airport Radar or subject to an appropriately worded suspensive condition such as that required by Glasgow Airport as a means of dealing with the objection from Glasgow Prestwick, and should Members accept that recommendation, it would be open to them to resolve that they were minded to grant permission subject to the specified conditions, and subject to notification to the Scottish Ministers who would have the option of calling in the application. If Ministers did not exercise the right of call in then the Members could then issue consent.

Conclusion

The proposed Moorshield Wind Farm is a small three-turbine development which did not previously attract an objection from Glasgow Prestwick Airport when it was submitted as the larger scale 6 turbine Soame Wind Farm on the same area of ground. The circumstances of the proposed development are such that it is unlikely to give rise to any significant impact on GPA's infrastructure and therefore no mitigation would be required. In the event that it does, the advice is that the Terma solution which is already in place is highly likely to be capable of mitigating the impact of the proposed development.

Against that background we respectfully suggest that if considered necessary to deal with any impact on GPA's infrastructure, a suspensive planning condition would therefore be lawful and appropriate in terms of national policy. It would also be entirely in line with the reasoning of the Reporter in the Corlic Hill appeal. The appropriateness of such a condition does not turn on the question of whether a commercial agreement has been entered in to by our respective clients. The absence of such an agreement does not in any way undermine the case that it is highly likely that a solution can be identified to mitigate any impact on GPA's infrastructure and that such a solution would be capable of being deployed during the life of any planning permission granted.

We consider that such an approach would be justified in the specific circumstances of this case and would not create any precedent for future developments which would require to be addressed on case-by-case basis. It would also be in line with the Scottish Government's ambition as set out in the Onshore Wind Policy Statement draft (para 3.2.6) that the installation of mitigation measures should be bound by a fair and transparent process.

Our clients are happy to accept the conditions being proposed by Glasgow Airport and NATS. The absence of any agreement by GPA to this course of action is not a barrier to this procedure being followed, it simply requires notification to take place before planning permission can be granted.

Yours faithfully

A handwritten signature in black ink, appearing to read 'Fraser Gillies', followed by a long, sweeping horizontal flourish.

Fraser Gillies
For Wright, Johnston & Mackenzie LLP

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