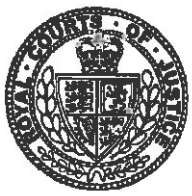

Neutral Citation Number: [2012] EWHC 1102 (Admin)

CO/1096/2012

IN THE HIGH COURT OF JUSTICE
QUEENS BENCH DIVISION
ADMINISTRATIVE COURT

Date: 26 April 2012

Before:
HIS HONOUR JUDGE WAKSMAN QC
(sitting as a Judge of the High Court)

BARBARA BURRIDGE

Claimant

- and -

BRECKLAND DISTRICT COUNCIL

Defendant

- and –

GREENSHOOTS ENERGY LTD

Interested Party

Zack Simons (instructed by Richard Buxton, Solicitors) for the Claimant
John Hobson QC and Ned Helme (instructed by Michael Horn, Solicitor to the Defendant) for the Defendant
Alex Goodman (instructed by Metcalfe, Copeman and Pettefar, Solcitors, for the Interested Party)

Hearing date: 19 April 2012

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

INTRODUCTION

1. The Claimant, Mrs Burridge, seeks permission to challenge by way of judicial review two related grants of planning permission made by the Defendant local planning authority ("LPA"), Breckland District Council ("the Council") on 9 November 2011 in favour of the Interested Party, Greenshoots Energy Limited ("Greenshoots"). I have heard these applications on a "rolled-up" basis. The case has in fact been fully argued out and considered on the merits. To reflect that, I formally grant permission.

2. The principal challenge is that the Council was required to, but did not, undertake a screening opinion in respect of the subject matter of both permissions, in breach of Regulation 7 of the Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999 ("the Regulations").

BACKGROUND

3. These permissions concerned Greenshoots' proposal to construct an Anaerobic Digester ("AD") and combined heat and power plant ("CHP"). The AD would be supplied with cattle slurry, chicken litter and maize which it would convert into "biogas" consisting of methane and some carbon dioxide. The biogas would be fed into the CHP which would convert it into heat and electricity. The electricity so generated would be supplied to the National Grid. The original version of application numbered 1372 ("1372") which led to one of the two planning permissions now under challenge, had both the AD and CHP at the same site. This can be seen on the plans at 1/128 and 2/190, from which the relatively small size of the CHP compared with the rest of the plant, can be observed.

4. It is not in dispute that 1372 was a "Schedule 2 application" within the meaning of the Regulations. This is because it was an application for a development which fell within the description set out at paragraph 3 (a) of Schedule 2. Paragraph 3, so far as material for present purposes, reads:

"Column 1 Description of development	*Column 2 Applicable thresholds and criteria..*
3. Energy industry	
(a) Industrial installations for the production of electricity, steam and hot water…	The area of the development exceeds 0.5 hectare
(b) Industrial installations for carrying gas, steam and hot water;"	The area of the works exceeds 1 hectare

5. A screening opinion is defined in the Regulations as a "written statement of the opinion of the relevant planning authority as to whether development is EIA development". A Schedule 2 development would be such a development if it was "likely to have significant effects on the environment by virtue of factors such as its nature, size or location." By Regulation 4 (5), in considering that question, the LPA must take into account such of the selection criteria in Schedule 3 as are relevant to the application. The latter includes under paragraph 1 (b) "the cumulation with other development".

6. If the development is EIA development, the applicant must provide an environmental statement which would be available to the public who in turn would have a right to be consulted. See Regulations 13 and 14. By Regulation 3 (2) an LPA shall not grant planning permission unless it has taken environmental information into account. That information includes the environmental statement together with any further information and representations made about the environmental effects of the development.

7. The Council here made a screening opinion, to the effect that the development the subject of 1372 was not likely to have significant effects on the environment. It was contained in a detailed three-page document dated 25 March 2011. There was, and is, no challenge on any ground to the adequacy or validity of that screening opinion.

8. Subsequently, however, 1372 was amended. This was because Greenshoots decided to relocate the CHP elsewhere, in part because of some objections from the local parish council. Accordingly it was removed from that application site and in its place were put some small items of plant now required because the biogas generated by the AD would now be processed elsewhere. The new plant is described in a report from Greenshoots' planning consultants dated 21 June 2011 "the June Report" as being an electric cooling system, a small gas transmission pump and a small biogas or duel fuel boiler. The overall footprint of 1372 would be about the same.

9. A new application, numbered 0445 ("0445") was made in respect of the new location of the CHP which was to be at the site of Crown Milling, Edge Green, Kenninghall, where there was existing industrial activity namely an animal feed mill and poultry hatchery. In the same application Greenshoots also sought permission for an underground pipeline from the AD to the CHP, 1.1km in length. The route of that pipeline and the relative locations of the AD and CHP can be seen in the plans at 3/564-565. See also the Google Earth image provided to me which also indicates the location of the Claimant's house. A computer-generated photograph of the proposed CHO *in situ* at Crown Milling can be seen at 3/489-490.

10. The Design and Access Statement ("DAS") for 0445 said at paragraph 1.4 that "this proposal is not a stand alone project but depends on the gas to fuel it being generated by the facility currently seeking Planning Approval under ..1372..". At paragraph 3.8 the DAS said that the gas pipeline would have no impact after construction on noise, odour, landscape or transport and it was not contended otherwise before me.

11. The Planning Officer produced an updated report for 1372 and a new report for 0445, in both cases recommending approval. No further screening opinion was undertaken for 1372 and none was produced at all for 0445. The Planning Committee considered both applications together and resolved to grant permission at a meeting on 31 October 2011.

THE ISSUES

12. The principal challenge ("Ground 1") concerns the lack of further screening opinions. As refined in the course of argument, this ground contains the following strands:

    (1) First, there should have been a screening opinion for 0445, standing on its own. This is because it constituted Schedule 2 development;

    (2) Second even if that is not correct, when considering (a) whether 0445 fell within Schedule 2 and (b) whether it was likely to have significant effects on the environment, it should have been considered together with 1372 as amended;

    (3) Third, and conversely, the fact of the change to 1372 combined with the new 0445 meant that 1372 should have attracted a further screening opinion, considering the combined environmental effects of it and 0445;

    (4) However, it is not said that simply because 1372 was itself amended to exclude the CHP a further screening opinion was required;

    (5) But since the Council failed to obtain a further screening opinion for any of the reasons given in sub-paragraphs (1)-(3) above both planning permissions fall to be quashed.

13. Ground 2 alleges, independently of Ground 1, that the Council gave no consideration to the environmental effects of the digestate which is a by-product of the AD process, to be used as fertilizer over the adjoining fields.

14. Ground 3 alleges that no adequate noise assessment was placed before the Council in respect of the amended 1372 such that the permission granted here was unlawful because a material consideration had not been addressed.

Ground 1

Is 0445 itself Schedule 2 Development?

15. According to paragraph 5 of the witness statement of Nicholas Moys the Council's case officer for these applications, he did not consider at the time that 0445 would result in any significant effects but he also considered that it was not within Schedule 2 anyway due to its small scale. As to that, it is not suggested that the CHP could have fallen within paragraph 3 (a) of Schedule 2. That must be right given its small size. But the Claimant contends that the pipeline part of 0445 was an installation to carry gas where the area of works exceeded 1 hectare, falling within paragraph 3 (b). This was on the basis that the planning application and permission showed red lines either side of the pipe itself about 10m across and arithmetically if the pipe was 1.1km long the total area would clearly exceed 1 hectare. This point is misconceived. The red lines are there to demarcate room for manoeuvre as to the precise route under the fields which the pipe was permitted to take. Once completed those boundaries would be irrelevant. And the pipe-laying work would itself not span 10m across the pipe's route. It would simply involve excavating a trench to carry the pipe which itself would have a diameter of only 20cm. On that footing paragraph 3 (b) was simply not engaged.

When considering whether 0445 fell within Schedule 2 was the Council obliged to combine it with 1372?

16. On the face of it, there is no basis for this contention. Regulation 7 provides as follows:

> **"7.— Application made to a local planning authority without an environmental statement**
> (1) Where it appears to the relevant planning authority that—
> (a) an application which is before them for determination is a Schedule 1 application or Schedule 2 application; and
> (b) the development in question—
> (i) has not been the subject of a screening opinion or screening direction; or
> (ii) in the case of a subsequent application, was the subject of a screening opinion or direction before planning permission was granted to the effect that it is not EIA development; and
> (c) the application is not accompanied by a statement referred to by the applicant as an environmental statement for the purposes of these Regulations,
> paragraphs (3) and (4) of regulation 5 shall apply as if the receipt or lodging of the application were a request made under regulation 5(1)..."

17. The "application before it" is 0445. Whatever may be said about the meaning of "development in question" (see below) that expression is not relevant here because it deals with the subsequent question of likely effect which arises only if the development is within Schedule 2.

18. The Claimant however relied on paragraph 46 of *Circular 02/99: Environmental impact assessment* which states as follows:

> **"46.** However, in judging whether the effects of a development are likely to be significant, local planning authorities should always have regard to the possible cumulative effects with any existing or approved development. There are occasions where the existence of other development may be particularly relevant in determining whether significant effects are likely, or even where more than one application for development should be considered together to determine whether or not EIA is required.
>
> **Multiple applications**
> For the purposes of determining whether EIA is required, a particular planning application should not be considered in isolation if, in reality, it is properly to be regarded as an integral part of an inevitably more substantial development In such cases, the need for EIA (including the applicability of any indicative thresholds) must be considered in respect of the total development. This is not to say that all applications which form part of some wider scheme must be considered together. In this context, it will be important to establish whether each of the proposed developments could proceed independently and whether the aims of the Regulations and Directive are being frustrated by the submission of multiple planning applications."

19. In my judgment the whole of that section is concerned not with whether an application falls within Schedule 2 but rather, if it does whether there are likely to be significant environmental effects (consistent with Regulation 4 (5) and paragraph 1 (b) of Schedule 3). The reference to considering more than one application together in the first part of paragraph 46 is clearly in that same context. The section within paragraph 46 entitled *Multiple Applications* draws heavily upon the judgment of Simon Brown J (as he then was) in *R v Swales Borough Council ex parte Royal Society for the Protection of Birds* [1991] 1 PLR 6 at p16 which makes perfectly clear in sub-paragraphs 1-3 that while the question of whether a development falls within Schedule 2 must be decided strictly in relation to the development the subject of the relevant application, the question of likely environmental effect can be considered more widely

and may include reference to other applications which are part of some wider scheme. I would only add that the reference in this part of paragraph 46 to "indicative thresholds" refers not to the Schedule 2 thresholds but to the different criteria set out in Annex A to the Circular.

20. The Claimant further suggests that Regulation 7 (1) should be construed so as to encompass this cumulative position because of the spectre of an application which has been deliberately split into different applications on the basis that if none of the constituent parts fall within Schedule 2 then there would be no screening opinion required for the project as a whole even though, taken together, they may fall within Schedule 2. However, first, the fact still remains that this would run against the express wording of this regulation (and as interpreted by Simon Brown J) and second if the applications were abusively split up in this way it would be open to the Secretary of State to direct that the development the subject of one or more of those applications should be regarded as EIA development even though the development itself is not within the relevant part of Schedule 2 (ie the minimum area requirements). See Regulation 4 (8) and paragraph 77 (b) of the Circular which states that the LPA can bring such matter to the attention of the Secretary of State. This is somewhat hypothetical in the case before me since it is not suggested, nor could it be, that the project here has been deliberately "salami-sliced" into two applications. The latter has occurred purely because of the relocation of the CHP.

21. While the claim before me is based here exclusively on an alleged breach of Regulation 7, Mr Simons also called in aid the broad aims and purpose of the underlying Directive 85/337 to support his wider interpretation of Regulation 7. He referred in this regard to the judgment of the ECJ in *Ecologistas en Accion v Ayuntamiento de Madrid* [2009] PTSR 458 which stated at paragraph 44 that "..the purpose of the amended Directive cannot be circumvented by the splitting of projects and the failure to take into account the cumulative effect of several projects must not mean in practice that they will all escape the obligation to carry out an assessment when, taken together, they are likely to have significant effects on the environment.." But that is accommodated by the power of the Secretary of State referred to in paragraph 20 above. It is no reason not to give Regulation 7 its clear meaning.

22. Accordingly, 0445 cannot on any basis fall within the description in paragraph 3 of Schedule 2. Therefore, the question of a screening opinion simply does not arise in relation to that application.

Did the change to 1372, combined with the new 0445, require a further screening opinion in respect of 1372 which should consider the environmental effects of both?

23. This requires a careful reading and application of Regulation 7. The "application which is before" the LPA for determination here is 1372. And it has appeared to them (already) that this is a Schedule 2 application ie for planning permission for a Schedule 2 development. But before a screening opinion is required it must also appear to the LPA that "the development in question" has <u>not</u> been the subject of a screening opinion – see paragraph 1 (b) of Regulation 7.

24. There has been some dispute over the meaning of "development in question". Mr Simons for the Claimant suggests that it must refer not only to that encompassed by the instant application but any related development, whether or not itself within Schedule 2, so that here, "development in question" meant 1372 taken with 0445. I disagree. Given the context and the fact that the definition of a Schedule 2 application refers itself to a Schedule 2 development, "development in question" can only mean the development which is the subject of that application. That is the development in issue as a result of such application ie here, 1372.

25. And since there has already been a screening opinion in respect of that development, the requirement in paragraph 1 (b) cannot be met. Regulation 7 did not therefore require another screening opinion.

26. I would agree that had there been a material change to the development which was the subject of any particular application after the screening opinion, it could be said that "the development in question" now to be considered was not the same as the development which had been screened so that the LPA could conclude that there had been no screening opinion in respect of the current "the development in question". But the Claimant makes no such argument in respect of application 1372 itself (for obvious reasons) and in fact, had there been a material change, the LPA is likely to have ordered the making of a fresh application. But none of that obliges the LPA to consider not merely a change to the subject of the instant application but also to the existence of a quite separate application.

27. I accept that if 1372 had always been in its amended form and 0445 was made at the same time, because the original plan was for split facilities, on making a screening opinion on 1372, it would have been open to the LPA then to consider whether it should take into account another application – like 0445. And paragraph 46 of the Guidance suggests that it should do so in the case of certain multiple applications. If it could be said that 1372 was part of a more substantial development, which encompassed 0445 and there was a concern that the aims of the Regulation would be frustrated if their environmental impact was not assessed together then the cumulative effects should be considered within the screening opinion. In my judgment that was not this case. While (obviously) both applications were functionally inter-dependent it does not follow that for the purposes of paragraph 46 they were part of the same substantial development. After all they were not both on the same site being some considerable distance away from each other. Relative geographical position must have a bearing on the question. For example if they were located 10km apart with a longer pipeline, I cannot see how the "more substantial development" criterion could apply at all, although according to Mr Simons, it still would. Moreover, and critically here, there could be no concern that these were "multiple applications" which were frustrating the aims of the Regulations.

28. If that is the position had there been two applications at the outset, it must be all the more so in the more confined situation existing where a screening opinion had already been done when the elements were combined. I make this point because while, on my analysis above, "development in question" relates only to the instant application so that no further screening opinion was required, it cannot realistically be argued that

had the amended position been that from the outset, there would have been a need to consider both applications together from an environmental effects point of view.

29. Indeed there has been no suggestion, even now, as to how a consideration of the combined environmental effects of 1372 and 0445 could have revealed some hitherto unidentified but material environmental impact. The only specific matter pointed to by Mr Simons was a letter from Natural England in respect of 0445 stating that there might be a biodiversity impact but this does not appear to have been a real issue at this site. I note also that the original Ground 2 which relied on the same letter has not been sought to be advanced before me. See the written observations of Frances Patterson QC, sitting as a High Court Judge, on 29 March 2012, and paragraph 25 of the Council's Summary Grounds of Resistance.

30. In truth a combined consideration would mean no more than looking at the environmental effects of 1372 (again, but this time without CHP) and then looking separately at the effects of 0445. I cannot see how this could have led to a different conclusion than that reached by the screening opinion on the original 1372.

Further Matters

31. It is important to note here in detail what Mr Moys said in his witness statement about all of this:

> "5. On receipt of the later planning application for the CHP Plant at Crown Milling 3PL/2011/0445/F, and the associated amendments to application 3PL/2010/1372/F, I can confirm that I gave consideration to whether further screening was necessary. I concluded that further formal screening was not necessary. In this context, I was of the opinion that the proposed removal of the CHP plant and its replacement by small-scale equipment could not reasonably be expected to result in any increased or different environmental impacts. Similarly I considered that the proposal to relocate the CHP Plant from its originally proposed site in a relatively quiet and isolated rural location to a nearby site within a substantial complex of buildings used as commercial feed mill could not reasonably be expected to result in additional or increased environmental effects beyond those considered in the original Screening Opinion. Due to their scale and nature, I considered that neither the proposed new underground pipeline nor the new equipment adjacent to the AD plant would result in any significant effects. In addition I considered that the development proposed under application 3PL/2011/0445/F was not Schedule 2 development on account of its small scale.
>
> 6. Had I produced a formal written Screening Opinion at the time on behalf of the Council (or indeed subsequently) it would have concluded that neither application 3PL/2010/1372/F in its amended form nor 3PL/2011/0445/F nor indeed a combination of the two could have constituted EIA Development."

32. For the reasons given above, I do not consider that the Council was in fact obliged to consider, in relation to 1372, whether its amendment and the emergence of 0445 meant that a further screening opinion was necessary on the grounds of some material change to 1372. But lest that be wrong and there was some duty to do so, it is clear that the Council complied with it because it did give such consideration. Mr Moys says so and there is no reason for me not to accept that. There was no obligation on the Council to disclose any such consideration at the time. Nor is this a case of "retrospective justification" as Mr Simons contends. As to the consideration itself, in my judgment it could only be impeached if it was *Wednesbury* unreasonable in some way. Mr Simons challenges its adequacy because paragraph 5 of the statement makes no reference to reconsideration of noise, air or biodiversity. But there was no need to.

He plainly considered overall whether the position could be significantly different by reference to the effects considered in the original (unchallenged) opinion and no real potential point of difference has even been suggested by the Claimant.

33. In this context Mr Simons also argues that more than a *Wednesbury* level of review would be involved because the Council's approach involved an error of law – namely as to the proper meaning of "development in question"; but on my interpretation of the phrase there was no such error. Accordingly the observations of Buxton LJ in the case of *R (on the application of Goodman) v Lewisham* [2003] Env. LR 28 at paragraph 13 are not in point.

34. Yet further, it is clear from Mr Moys' evidence and in any event it is obvious, that if for some reason a further screening opinion was required, its result would be the same. Once more, the Claimant has given no reason why it even might have been different. I do not accept that it is not incumbent on a Claimant to give any reason as to why the outcome at least may have been different. It is not enough simply to say that something might have been thrown up in a further opinion. Nor is there any reason to doubt Mr Moys' evidence in this regard. It is reflected in for example his assessment of the lack of landscape impact of the CHP at its new location – see his report for 0445 at 3/434.

35. As to this, Mr Simons argues that it is impermissible to hypothesise about the result of any further screening opinion had it for some reason been necessary. He invokes the judgment of Lord Hoffman in *Berkeley v Secretary of State for the Environment and Another* [2001] 2 A.C. 603 at p615G-616D. It is correct that he states there that where an EIA was required based upon the production of an environmental statement, where none had been produced, it is not open to the LPA to argue that even if it had and there was an EIA, planning permission would still have been granted. This was because of the importance of public consultation in respect of the environmental statement "however misguided or wrongheaded its views may be" and the fact that this was a directly enforceable right under the Directive. However that is not the issue here. Rather it is (at most) the issue as to the outcome of the screening opinion had one been necessary. If it can be demonstrated that the screening opinion would inevitably have been negative, then the opportunity for public consultation on the environmental statement would never have arisen because the latter would not have been required. At this prior stage the decision is one for the LPA alone. The differences between the two situations is reflected in Lord Hoffman's observations at p 615B in relation to the LPA's decision as to (a) whether a development was within Schedule 2 and if so (b) whether it was likely to have significant environmental effects. If it was not arguable that on either count it was, or did, any omission by the LPA can be disregarded. Since it is not arguable that any further screening opinion would have come to a different result here, any failing on the part of the Council in this regard may also be disregarded.

36. For the sake of completeness I should add that the points made by Mr Moys in his evidence were in substance made, albeit more briefly, in the Council's letter of 19 January 2012 ("the January Letter") responding to the Claimant's pre-action protocol letter of 20 December 2011.

Conclusions on Ground 1

37. For all the reasons given above I reject Ground 1.

Ground 2

38. This can be disposed of swiftly. Information about the digestate was contained in the DAS for the original 1372 dated December 2010– see for example paragraphs 2.5 and 3.12. Nothing changed over the question of digestate between the original and the changed 1372. In truth the allegation is that the screening opinion should have made express reference to the environmental consequences of the digestate, although it is presented as an element that would have to be considered in any further screening opinion. But since the Claimant has disavowed any challenge to the existing screening opinion (which would be far too late now in any event) I can see no discernible unlawfulness on the part of the Council. Moreover, Mr Moys has stated in paragraph 4 of his witness statement dated 18 April 2012 that he took this feature into account when screening. It is common ground that the reasons for any negative screening opinion do not have to be given at the time as long as the conclusion of that opinion is stated in writing at the time. See *Mellor v Secretary of State for Communities and Local Government* [2010] PTSR 880 at paragraphs 56-61. Accordingly I accept paragraph 4 as a further statement of the reasons and what was considered at the time. See also paragraph (iii) of the January Letter.

Ground 3

39. This is a short point related to noise and independent of the other Grounds. A noise assessment was done in respect of the original 1372. When it was changed, the June Report indicated that without the CHP the 1372 development would be quieter. This was in particular because according to the original noise report "predicted noise levels are dominated by noise from the CHP unit." The Claimant argues that the Council had no proper material before it on which to assess the revised application because while the June Report identified the additional plant which would come on site instead of the CHP there was no assessment of the noise which it would make so that in theory at least the revised development might somehow generate more noise that the original. In fact in my judgment it is implicit in this report that any noise from that plant would clearly be less than that generated by the CHP which is why it says that the site will be quieter without it. And Mr Moys, when writing his report for the amended 1372 was entitled to take that view as he clearly did – see 2/453. Moreover, once more, the Claimant has not adduced any evidence or made any specific suggestion as to why it might be that the replacement equipment might somehow cause the site to be noisier than before.

Discretion

40. In the light of my findings above it is unnecessary for me to consider the further submissions of Greenshoots based upon delay overall in bringing the claim and financial prejudice.

Conclusion

41. It follows that this claim must be dismissed. I am grateful to all Counsel for their comprehensive and helpful submissions.