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## ADVICE NOTE

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### INTRODUCTION

- 1 We are instructed by Endurance Energy Limited (“**Endurance**”) in relation to an application given reference S62A/2024/0045 (“**Application**”) to the Secretary of State for Housing, Communities and Local Government (the “**Secretary of State**”) on behalf of the Uttlesford District Council (“**Council**”) under Section 62A Town and Country Planning Act 1990 (“**1990 Act**”)
- 2 The Application is for the following form of development on land at Wickham Hall Estate, Bishops Stortford, Uttlesford, CM23 1JG (the “**Site**”):  
  
*Erection of a Solar Photovoltaic Farm with supporting infrastructure and battery storage, inverters and transformers, fencing, landscaping works and connecting cable* (the “**Proposed Development**”)
- 3 The Application is to be determined by the Secretary of State and a hearing is scheduled to take place on Thursday 29 August 2024.
- 4 Planning permission has previously been granted for another solar farm within the local authority area of East Hertfordshire<sup>1</sup>. This was for the “*erection of a solar photovoltaic farm with an output capacity not to exceed 49.9MW of energy, with supporting infrastructure and battery storage, inverters and transformers, fencing and landscaping works*” (the “**EHDC Development**”).
- 5 There is also another ongoing and as yet undetermined planning application in respect of a temporary access. This temporary access has already been approved in the context of the EHDC Development and it is also proposed to be used for the purpose of enabling construction of the Proposed Development<sup>2</sup>. The application is also within East Hertfordshire and is for the “*temporary installation of a construction access from Old Hadham Road to Wickham Hall Estate*” (the “**Temporary Access Application**”).

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<sup>1</sup> Planning Reference: 3/21/2601/FUL (East Hertfordshire District Council)

<sup>2</sup> Planning Reference: 3/24/1119/FUL (East Hertfordshire District Council)

- 6 We understand that the inspector appointed by the Secretary of State (the “Inspector”) has requested the following information from Endurance by way of email dated Monday 12 August 2024 in respect of the Application:
- *Could the Applicant confirm whether or not the overall threshold for their proposal and the recently approved adjacent East Herts solar approval combined would be that relevant to applications under the TCPA (that is <50mw), and in doing so that they are content that the TCPA remains the appropriate route for permission to be considered under?*
  - *Conversely, if the adjacent East Herts scheme is completely separate from the proposal in this case (using different access, cable connections, etc for example).*
- 7 This Advice Note considers the Inspector’s questions outlined above and advises Endurance in respect of the same, particularly whether the Proposed Development and EHDC Development should be considered separately.

## **LEGAL FRAMEWORK**

- 8 The Planning Act 2008 ("**2008 Act**") governs whether a development is a Nationally Significant Infrastructure Project ("**NSIP**").
- 9 The 1990 Act, conversely, concerns control over "development" which is defined as the *carrying out of building, engineering, mining or other operations in, on, over or under land, or the making of any material change in the use of any buildings or other land* except where the context requires otherwise<sup>3</sup>.
- 10 Section 57 of the 1990 Act qualifies this as follows:
- (1) Subject to the following provisions of this section, planning permission is required for the carrying out of any development of land.*
- (1A) Subsection (1) is subject to section 33(1) of the Planning Act 2008.*
- 11 Under section 33(1)(a) of the 2008 Act, there is an exclusion of the requirement for planning permission in instances where development warrants development consent to be granted. Under the 2008 Act regime, development consent is required "*to the extent that that development is or forms part of a nationally significant infrastructure project*"<sup>4</sup>.
- 12 Where a development is considered to be an NSIP, it is not for the local planning authority (or Secretary of State on a s.62A application) to determine the application. The application will alternatively be considered under the 2008 Act, whereby a development consent order is required instead of the grant of planning permission under the 1990 Act<sup>5</sup>.
- 13 The 2008 Act dictates that an NSIP is to mean a "*project which consists of the construction or extension of a generating station*"<sup>6</sup>.
- 14 In order to be a qualifying generating station, the development must accord with the following criteria under section 15(2) of the 2008 Act:

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<sup>3</sup> Section 55 of the Act

<sup>4</sup> Section 31 of the 2008 Act

<sup>5</sup> Ibid

<sup>6</sup> Section 14(1)(a) of the 2008 Act (the field of *energy* is captured by section 14(6)(a) of the 2008 Act.)

(a) *it is in England;*

(b) *it is not an offshore generating station; and*

(c) *its capacity is more than 50 megawatts.*

15 The relevant statutory capacity threshold for a development to be an NSIP is therefore no more than 50 megawatts (the “**Statutory Capacity Threshold**”)<sup>7</sup>.

16 *Generating station* is to be given the meaning ascribed to it in the Electricity Act 1989 (“**EA 1989**”). Whilst such definition is only defined in instances where it is “wholly or mainly driven by water”, it is to include “*all structures and works for holding and channelling water for the generation of electricity by that station*”<sup>8</sup>.

17 Section 36(1) of the EA 1989 illustrates the correct interpretation of the term “extension” in this context, which is to be in relation to a generating station:

*“the use by the person operating the station of any land or area of waters (wherever situated) for a purpose directly related to the generation of electricity by that station and extend shall be construed accordingly”*

18 The case of *Durham County Council and Hartlepool Borough Council* has recently grappled with the linkage (or not) of two separate solar farms and whether such schemes should be considered in combination to comprise an NSIP<sup>9</sup>.

19 The Court in their judgement placed emphasis on the analysis within the case of *Redcar*<sup>10</sup> to conclude that the associated cables and substation cannot be considered to be part of the “generating station”<sup>11</sup>. The “generating station” is the building in which the electricity is generated<sup>12</sup>. The ancillary facilities are instead simply the means by which the electricity is distributed, not generated.

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<sup>7</sup> As recently confirmed in *R (Galloway) v Durham County Council* [2024] EWHC 367 (Admin)

<sup>8</sup> Section 64(1) of the EA 1989

<sup>9</sup> *Durham County Council and Hartlepool Borough Council v Secretary of State for Levelling Up, Housing and Communities* [2023] EWHC 1394 (Admin)

<sup>10</sup> *R (Redcar and Cleveland Borough Council) v Secretary of State for Business, Enterprise and Regulatory Reform* [2008] EWHC 1847

<sup>11</sup> *Durham County Council and Hartlepool Borough Council v Secretary of State for Levelling Up, Housing and Communities* [2023] EWHC 1394 (Admin), 44

<sup>12</sup> *R (Redcar and Cleveland Borough Council) v Secretary of State for Business, Enterprise and Regulatory Reform* [2008] EWHC 1847

- 20 In this case, Chamberlain J also identified several criteria which assist in determining whether separate generating stations are to constitute an extension of another. As contained within paragraph 47 of the judgement, they can be summarised as follows:
1. Have the two projects (generating stations) been developed separately at different times?
  2. Do the projects have separate distribution and connection agreements and are separately metered?
  3. Could the projects operate independently of each other (both in contractual terms and in terms of physical infrastructure)?
  4. Would there be separate sub-stations for each project?
  5. Would the sub-station be part of the apparatus for generating electricity?
  6. Does the ancillary apparatus serve as a means to connect the two projects?
- 21 An assessment of the above factors is therefore critical in determining whether the Proposed Development and EHDC Development should be considered as a single project or otherwise together when considering the Statutory Capacity Threshold.

## **ANALYSIS**

22 Turning to the Proposed Development, we consider that this should not be assessed in conjunction with the EHDC Development. We outline our analysis below.

23 Whilst the Proposed Development and EHDC Development would share the construction access subject to the Temporary Access Application, this does not constitute an *extension* of the scheme.

24 The primary factor to consider here is whether any connection or extension is primarily concerned with the *generation of electricity*. Applying the factors from *Durham County Council and Hartlepool Borough Council* below, no such purpose exists:

*Have the two projects (generating stations) been developed separately at different times?*

24.1 The Proposed Development and EHDC Development are expected to be developed out separately and at different times. Whilst Endurance cannot confirm which will be built out first, our instructions are that one scheme will be built out in 2025 and 2026. The other will be built out later in 2027 and 2028.

24.2 The reason for this is that these timescales are to fit in with the grid connection dates which we are instructed have been provided by UK Power Networks.

Do the projects have separate distribution and connection agreements and are separately metered?

24.3 Endurance have confirmed to us that the Proposed Development and EHDC Development are subject to separate connection agreements. These are both between (1) Wickham Hall Solar Battery Limited and (2) UK Power Networks.

24.4 The two connection agreements correspond with the two separate grid connections for the Proposed Development and EHDC Development. This illustrates the lack of connectivity between the two schemes. It is important to note that the Proposed Development and EHDC Development would also be separately metered.

Could the projects operate independently of each other (both in contractual terms and in terms of physical infrastructure)?

24.5 Endurance have confirmed to us that this is both practically and feasibly achievable.

Would there be separate sub-stations for each project?

24.6 Our instructions are that the generating stations of the Proposed Development and EHDC Development will operate via separate sub-stations.

Would the sub-station be part of the apparatus for generating electricity?

24.7 Our instructions are that each (separate) sub-station will be adopted by UK Power Networks in due course.

24.8 In our view, this evidences, in accordance with the judgment in *Redcar*, that their purpose is to transmit and distribute electricity. The sub-stations are not concerned with generating electricity and therefore will independently serve the respective generating stations on the Proposed Development and EHDC Development.

24.9 Given the response to the query above (i.e. that there will be two separate sub-stations) this factor relating to the sub-station being part of the apparatus for generating electricity is not considered relevant.

Does the ancillary apparatus serve as a means to connect the two projects?

24.10 The Proposed Development and EHDC Development will share a trench in which the separate high voltage cables serving each of the developments will be housed. However, for the reasons set out below this is not because of any interconnectivity between the two projects, but is rather because such arrangement is more efficient once the two projects are developed.

24.11 Endurance have confirmed to us that this is the more practical approach given the distance between the respective substations and the land on which the generating stations are to be housed. It is noted that this distance is in excess of 2km.

24.12 The Design and Access Statement<sup>13</sup> submitted by Endurance expressly notes that *“the cable route [for the Proposed Development] will follow the alignment of the construction access to the Uttlesford boundary where it will intersect with the route of a separate cable that shall be provided to connect the scheme permitted in East Hertfordshire” [the EHDC Development]. The two cables shall thence run in parallel across the land within the Wickham Estate”<sup>14</sup>.*

24.13 Aside from the sharing of a construction access and operational access for practical reasons, the shared trench is the only point of shared infrastructure between the Proposed Development and EHDC Development and even here there will be separate cables in the trench associated with each development.

24.14 There is no other sharing or connectivity of infrastructure between the projects from the point that electricity is generated on the respective sites to the point that the energy is transmitted to the wider distribution network operated by UK Power Networks.

25 Owing to the above, we are of the clear view that the EHDC Development and Proposed Development should not be considered cumulatively for the purposes of considering the Statutory Capacity Threshold.

26 The two projects should be analysed singularly and the Statutory Capacity Threshold is therefore not exceeded in this case.

## **CONCLUSION**

27 This Advice Note has demonstrated that the Proposed Development and EHDC Development are separate schemes. The Proposed Development is therefore to be determined under the 1990 Act.

28 This conclusion is formulated on the basis of the analysis at paragraph 24 above which is rooted in the legal framework from both statute and case law. In this case the projects should not be considered as connected or an *extension* of one another.

29 As recently confirmed in the case of *Galloway*, if the Proposed Development were a solar farm with a capacity over the Statutory Capacity Threshold, it would need to be

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<sup>13</sup> Design and Access Statement, May 2024, DLP Planning

<sup>14</sup> Ibid, page 21



**Endurance Energy Limited**

Land at Wickham Hall Estate, Bishops Stortford, Uttlesford  
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determined as an NSIP under the 2008 Act<sup>15</sup>. As we have concluded above, the Statutory Capacity Threshold is not met as the capacity of the EHDC Development should not be taken into account when determining the Application.

- 30 We are therefore firmly of the view that the Proposed Development should not be considered cumulatively or in combination with the EHDC Development and therefore the Statutory Capacity Threshold is not met and this is not an NSIP under the 2008 Act. The Application should be determined under the 1990 Act.

**HOWES PERCIVAL LLP**

**16 August 2024**

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<sup>15</sup> *R (Galloway) v Durham County Council* [2024] EWHC 367 (Admin)