

Investigation of the power of local planning authorities in Wales to vary the boundaries of Strategic Search Areas for wind power development

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Summary

This review seeks to answer a seemingly simple question: *can Local Planning Authorities (LPAs) vary the boundaries of the Strategic Search Areas (SSAs) for onshore wind power in Technical Advice Note (TAN) 8 [TAN-8, 2005].*

The power of an LPA to vary the boundaries of SSAs is essentially a matter of responsibility, as defined within the relationship between the whole body of planning policy. There is a reference to varying the boundaries of SSAs is contained within an annex to TAN-8 [TAN-8, Annex D, para. 1.3]. However, annexes to a TAN do not form part of the TAN guidance from the Welsh Assembly Government (WAG) – they are intended to provide additional detail and interpretation. And in the case of TAN-8, it is clear that the annex was written before the the TAN-8 advice was finalised because the powers envisaged in Annex D are not specified within the text of the TAN.

The SSA boundaries are defined within the maps that form part of the TAN-8 guidance. As such, and given that no over-riding power to vary the boundaries is specified within the TAN-8 guidance, the “broad brush” boundaries of the TAN-8 maps are arguably not open to revision. However, given that the boundaries of the SSAs on the maps are relatively wide – almost a kilometre – it is arguable that the precise boundary of the SSA can be varied within the scope of the broad boundary given on the TAN-8 map.

Furthermore, TAN-8 clearly provides an over-allocation of land in order to provide certainty that the Wales target of 800MW of wind capacity by 2010 will be met

The TAN guidance is itself subservient to the guidance given in Planning Policy Wales (PPW) [PPW, 2002]. PPW was amended with respect to renewable energy by a Ministerial Interim Planning Policy Statement (MIPPS) [MIPPS, 2005]. The SSAs policy is defined in the MIPPS, and refined in TAN-8. However the MIPPS provides no power to vary the SSA boundaries, and instead limits the responsibility of LPAs to planning the precise locations for wind development within the SSAs

Finally, the targets for wind power in TAN-8 only relate to the capacity to be provided until 2010. The guidance is silent in planning for the provision of wind capacity beyond the 800MW on-shore target identified in the MIPPS and TAN. Therefore it cannot be argued that the imperative policy of TAN-8 can be used to support the development of wind power capacity beyond the 2010 target.

Consequently I believe that any attempt by an LPA to modify the boundaries of an SSA from that identified in the maps that accompany TAN-8 would be *ultra vires* (beyond the powers of the planning authority). Should this take place I would advice those aggrieved to seek legal advice on the advisability of launching a judicial review of such a decision.

Relationship of planning documents

The relationship of policy documents within the planning system is hierarchical and can be summarised as:

- ◆ The highest level is primary legislation – the Acts of Parliament;
- ◆ Next comes the secondary legislation – the statutory instruments that enact the Acts;
- ◆ Next come the strategic guidance documents – in Wales, this is *Planning Policy Wales* (PPW) and the Wales spatial strategy;
- ◆ Next come the topic specific guidance documents – in Wales this is made up of the Technical Advice Notes (TANs);
- ◆ Finally comes the other advice issued by the Welsh Assembly government, in the form of ministerial statements and circulars.

Unless specified otherwise, a lower echelon policy document cannot over-ride a higher policy document unless this power is specifically granted (for example, the power granted to ministers to amend primary legislation using secondary legislation).

In Wales the relationship is specified in PPW:

Planning Policy Wales (PPW) sets out the land use planning policies of the Welsh Assembly Government (the Assembly Government). It is supplemented by a series of Technical Advice Notes (TANs, listed in the Annex). Procedural advice is given in National Assembly for Wales/Welsh Office circulars. PPW, the TANs and circulars together comprise national planning policy which should be taken into account by local planning authorities in Wales in the preparation of unitary development plans (UDPs).

[paragraph 1.1.1, PPW, 2002]

In addition to this, at the local level we have a variety of statutory and non-statutory guidance:

- ◆ For planning policy and development control local statutory guidance is provided by the Unitary Development Plan (UDP) for the area.
- ◆ The content of the UDP can be further refined using Supplementary Planning Guidance (SPG) – however this is non-statutory guidance, since unlike the UDP it is developed through a non-statutory process, cannot constrain or redefine the objectives of national policy documents.
- ◆ Finally, other policies and strategies of the local authority are relevant in planning as “material considerations” for the purposes of determining planning applications only – for processes directed through national policy (such as refining the boundaries of the SSAs) the powers of the LPA are constrained by the drafting of the national policy guidance.

Taking this together with the extract from PPW above, we can see that the *content* of either a UDP or SPG cannot over-ride national policy documents (even though, in making a determination for a planning application, the LPA can decide on the basis of “material consideration” what weight should be given to each document). Consequently, since local revisions to SSA boundaries will be carried out through the UDPs/SPG process, the competence of the LPA is entirely dependent upon the drafting of national planning policy. Although when making planning determinations certain “material considerations” can over-ride the content of a UDP or policy advice, no such process exists to over-ride the content of national policy documents on the setting of SSA boundaries (because these boundaries are specified in a higher level policy document).

The SSAs Policy

In order to provide greater certainty on the provision of wind power in Wales the Welsh Assembly Government (WAG) has directed that the target for wind power in Wales – 800 mega-Watts (MW) – will be met through the provision of large Strategic Search Areas (SSAs) for wind development.

As with “land banks” for minerals provision, these require LPAs to identify sufficient land within defined areas to accommodate sufficient sites to meet the target for wind power in Wales.

To provide additional certainty, the land identified for the SSAs is sufficient to accommodate 1,120MW of wind power development, 40% in excess of the 800MW target. However, this 1,120MW is itself on-third less than the amount of wind energy that was considered achievable within the consultants reports commissioned by the WAG as part of their preparation work for TAN-8 [paragraph 2.5, TAN-8, 2005]. The level of “overloading” within the SSAs, the excess of potential capacity over the required development capacity, is therefore around 210%!

Given the level of over-provision within the SSAs policy the likelihood that additional land will be needed development is minute, and as clearly stated in TAN-8:

The SSA boundaries are at a “broad brush” scale. Not all of the land within the SSAs may be technically, economically and/or environmentally suitable for major wind power proposals; however the boundaries are seen as encompassing sufficient suitable land, in one or more sites, to deliver the Assembly Government’s energy policy aspirations.

[paragraph 2.4, TAN-8, 2005]

The interpretation of the TAN is clear. The Welsh on-shore, 800MW wind energy target will be met solely from a small number of large-scale developments within the SSAs:

In order to meet the 2010 renewable energy target, the Assembly Government’s energy policy is that 800MW of renewables capacity should be provided from strategic onshore wind energy development – mostly in the form of a small number of large wind farms.

[paragraph 12.8.6, MIPPS, 2005]

This position was recently upheld in the the recent Mynydd y Gwrhyd planning appeal [PIW, 2006].

As no specific direction exist for the attainment of targets post-2010 within MIPPS/TAN-8, the LPAs, in drafting boundaries for the SSAs, need only take account of the targets set for each SSA [Table 1, TAN-8, 2005] rather than looking to provide a level of development beyond the 2010 target.

Varying the SSA boundaries

The over-provision of land in the SSAs compared to the scale of development required means that the area of the SSAs will not need extending. For this reason the role of the LPA, through the development of UDPs or interim Supplementary Planning Guidance (SPG), is to refine the precise boundary of the SSAs from their current “broad brush” extent to a defined boundary on the map.

The drafting of TAN-8, on its own, does leave some uncertainty regarding development within and outside the SSA – in particular with regard to paragraph 2.4:

It is a matter for local planning authorities to undertake local refinement within each of the SSAs in order to guide and optimise development within each of the areas. If there is robust evidence that land outside (but close to) the SSA is suitably unconstrained local planning authorities might wish to consider the possibility of development of wind farms in these areas as well. (emphasis added)

[paragraph 2.4, TAN-8, 2005]

However, if we read this paragraph in context with the over-riding policy of PPW (as amended by MIPPS) the issue of boundary revision by LPAs can be resolved:

Local development plans should, where relevant, provide policies to clarify in the SSAs where large wind energy developments are likely to be permitted, for example by identifying local micro-siting criteria or identifying specific preferred locations. In defining such locations or criteria it will be important to ensure that

the required generating capacity is capable of being delivered by 2010. Policies for renewable energy in areas outside SSAs should feature in local development plans. Where justified, policies that restrict onshore wind energy developments outside SSAs to those up to 25MW in urban/industrial brownfield sites, and less than 5MW elsewhere, are acceptable.

[paragraph 2.9.3, MIPPS, 2005]

The “possibility” of development outside of the SSAs in TAN-8 cannot be considered an implicit directive to extend the boundary of the SSAs. The wording of TAN-8 is consistent with the MIPPS since the policy in PPW is for development of large facilities within the SSAs and other smaller development elsewhere. Development of sites outside of the SSAs is permitted, although these would have to be much smaller in scale, and would not contribute to meeting the overall target set in PPW/MIPPS. Also, if we consider the need for the cumulative analysis of visual impacts, it would make sense to consider the potential for development near to the SSA alongside the refinement process for the main SSA area.

If we consider that wording of Annex D, it would indicate that the boundary-setting process for the SSAs does not indicate large scale revision, and instead only envisages small-scale modifications to the broad brush boundaries on the TAN-8 maps:

It is anticipated, however, that the Final TAN 8 will allow the local planning authorities to make minor adjustments to the SSA boundaries when translated into their local planning documents. This will facilitate the inclusion of development on the margins of SSAs where local conditions recommend.

[paragraph 1.3, Annex D, TAN-8, 2005]

The problems of allowing LPAs to vary the size of the SSAs is also highlighted in Annex D:

The purpose of the local planning exercise is to achieve a finer grain of development allocation within the SSA, taking into account landscape, visual and cumulative impacts. It is not intended for use in the negotiation of the SSA capacities indicated in the Final TAN 8; since this would risk the achievement of renewable energy target delivery.

[paragraph 1.2, Annex D, TAN-8, 2005]

Some developers have pushed for the extension of the boundaries for the SSA's on the basis that some of the TAN-8 maps are annotated to indicate that extensions to the identified areas are possible. However, no such extensions are provided for within the main text of TAN-8 (i.e., the text of TAN-8 not including the annexes). Nor is such provision specifically stated in the MIPPS in order to resolve the inconsistency which would then arise between the direction in the MIPPS that the LPAs primary responsibility is the setting of the development criteria within the identified boundaries of the SSAs, and the indication on the TAN-8 maps that certain extensions are possible.

In citing Annex D, we do have to consider it's place in the hierarchy of planning documentation. Annex D is additional to TAN-8 – it is not part of the WAG's planning policy, but provides additional information. To reinforce this, the wording of paragraph 1.3, that, “*It is anticipated, however, that the Final TAN 8 will allow the local planning authorities to make minor adjustments*”, also indicates that it must have been prepared separately, and before, the final draft of the main body of the planning policy document was complete.

For this reason the only resolution to the relationship of Annex D, to TAN-8, to the MIPPS, is that no specific power to vary the boundaries of the SSAs exists since:

- ◆ the main revisions envisaged by MIPPS, the superior policy document, relate to the internal layout of the SSAs, not their total extent;
- ◆ to this end the boundaries are broad brush in order to give a small amount of flexibility in the area allocated for development; and
- ◆ ample land was provided for, through MIPPS and the main body of TAN-8, to secure the

planning objective (800MW of on-shore wind development in Wales), and consequently there is no need for any additional land allocation.

This was the interpretation derived at the recent planning appeal for the Mynydd y Gwrhyd wind farm site [PIW, 2006].

The only possible argument that the LPA could advance for extending the boundaries of the SSA from those identified in the TAN-8 maps would be if the allocated area was insufficient to provide the target for development. Again, if we take SSA-G (Brechfa) as an example, the final report on the capacity of SSA-G [Arup, 2006] identified four areas with sufficient land to meet the target – within less than half of the area within the TAN-8 boundary. Consequently not only is it not possible to argue that the existing boundaries must be moved to meet capacity, but in fact the boundaries are set so conservatively that they are likely to meet most of the next tranche of development to meet the 2020 target.

Conclusions

For the reasons outlined, to answer the question as to whether or not LPAs can redraft the boundaries of the SSAs I believe that:

1. It is arguable that the LPA have no power to carry out any significant revision of the SSA boundaries, beyond the “broad brush” line identified in the TAN-8 SSA maps [paragraph 2.9.3, MIPPS, 2005].
2. The extent to which the setting of the SSA boundary is determined by the “broad brush boundary” set by the WAG in TAN-8, and as a higher level policy document it is not open to LPAs to modify these boundaries within local UDPs/SPG [paragraph 2.9.3, MIPPS, 2005].
3. The evaluation studies of the SSAs that have been carried out indicate that the areas identified for the SSAs on the TAN-8 maps are sufficient to meet the required targets set in PPW/MIPPS [e.g., Arup, 2006].
4. The only direction that could be construed from policy (as opposed to Annex D of TAN-8 which is background information, not policy) is the last sentence of paragraph 2.4 of TAN-8. In order to remain consistent with the over-riding policy objectives of MIPPS the only way in which this can be read is that development in the SSA should be considered alongside other potential development in the area. There would be no correlation with the “top down” policy expressed in MIPPS if TAN-8 allowed the LPAs to redraft the SSA boundaries.

If an LPA were to significantly redraft an SSA boundary, beyond the “broad brush” line identified in the maps that accompany TAN-8, then I would argue that this was *ultra vires* (beyond their power to act), and that an aggrieved person should seek legal advice to see if it was possible bring a judicial review of the LPAs actions.

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References

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