

Application under s.42 Town and Country Planning (Scotland) Act 1997

By

Bluebell Wind Farm Limited

In respect of

Conditions attached to Planning Permission

21/02985/FUL dated 30 January 2023 in respect of

**the construction and operation of Lochluichart Wind Farm Extension II
Redesign at Land 1.9km southwest of Aultguish Inn, Garve, IV23 2PQ**

1. Introduction

- 1.1 This is the supporting statement in connection with an application (“the Application”) by Bluebell Wind Limited (“the Applicant”) under s.42 of the Town and Country Planning (Scotland) Act 1997 (“the 1997 Act”).
- 1.2 On 30 January 2023 the Highland Council (“the Council”) granted planning permission (“the Permission”) under reference 21/02985/FUL for the construction and operation of Lochluichart Wind Farm Extension II Redesign at Land 1.9km southwest of Aultguish Inn, Garve, IV23 2PQ (“the Proposed Development”).
- 1.3 This Application is to vary Condition 27 of the Permission. The purpose of the amendment to Condition 27 is to secure an extension of the period for implementation of the permission by a further five years, from the date of the grant of the new planning consent.
- 1.4 An application under s.42 is an application to develop land without compliance with conditions previously attached. Section 42(2) states that the planning authority shall consider only the question of the conditions subject to which planning permission should be granted, and that the planning authority may decide that planning permission should be granted subject to conditions differing from those subject to which the previous permission was granted.
- 1.5 This statement sets out the background to the Application, and addresses the specific amendment sought by the Applicant. The statement identifies relevant policy considerations that must be taken into account in the determination of this Application and concludes that the Application should be supported. The Applicant suggests proposed wording for the varied condition below.

2. Background to and reason for the Application

- 2.1 The Applicant has made progress with discharging the pre-commencement conditions. Table 1-1 within the Supporting Environmental Information Report (SEIR) accompanying this Application details the progress made in respect of the conditions. The Applicant is committed to continuing to progress these with the Council.
- 2.2 The Applicant recognises the need to give a firm date by which construction will have commenced and is seeking a five year extension to the period for implementation of the permission. The Planning Statement accompanying this Application sets out the

reasons why five years is an appropriate implementation period (section 2.2.13 onwards).

- 2.3 The Applicant's intention is to deliver the Proposed Development by the 30th January 2028. However this is dependant upon the delivery of the grid connection tie in to the 33 kV overhead line (OHL) connection to Corriemoillie Substation – currently being progressed by SSEN, and subject to section 37 consent being approved. The extension of the time period for implementation by a further five years as sought by this Application allows sufficient and realistic flexibility such that the delivery timescales should be achievable even if further grid delivery slippage occurs.
- 2.4 The Planning Statement summarises the benefits of the Proposed Development in terms of its renewable generation and emissions savings in the context of the current climate emergency, demonstrating that the Proposed Development would help attain the very challenging 'net zero' targets and contribute to improving security of supply. It notes that NPF4 Policy 11 (Energy) requires decision makers to give significant weight to a development's contribution to targets when considering the impacts of a proposal. Decision makers therefore have to apply significant weight to the energy policy objectives articulated above, in the planning balance. The delivery of Proposed Development to meet net zero is key.
- 2.5 Without this Application being granted as sought, the benefits of the Proposed Development towards these targets will be lost.
- 2.6 An up-to-date OS plan is enclosed with this Application.

Local Development Plan

- 2.7 The Application is to be considered in accordance with the 1997 Act. Section 25 of the 1997 Act states that *"(W)here, in making any determination under the planning Acts, regard is to be had to the development plan, the determination is, unless material considerations indicate otherwise (a) to be made in accordance with that plan..."*
- 2.8 The application was approved by the Council's Committee, following the Officer's recommendation. The Report to Committee (DOC2) assessed the Proposed Development against the Development Plan (as applicable at the time) and considered that be in accordance with the Development Plan, national policy and to be acceptable in terms of all other applicable material considerations. As confirmed

in the accompanying Planning Statement, this remains to be the case under the current Development Plan.

- 2.9 The relevant question is therefore whether the proposed amendment would result in the Development continuing to be acceptable in planning terms. It is submitted that it would, because the proposed amendments would not lead to any physical changes to the Development, which development was already found to be acceptable by the Council.

Legislation

Town and Country Planning (Scotland) Act 1997

- 2.10 Section 37(1) of the 1997 Act states that planning authorities may grant permission subject to conditions they think fit. Section 41(1)(a) identifies the nature of conditions that may be imposed and states that conditions may be imposed *“for regulating the development or use of any land under the control of the Applicant or requiring the carrying out of works on any such land, so far as appears to the planning authority to be expedient for the purposes of or in connection with the development authorised by the permission”*.
- 2.11 S.25 of the 1997 Act requires the application to be assessed against the development plan and material considerations.

Town and Country Planning (Environmental Impact Assessment) (Scotland) Regulations 2017

- 2.12 The Proposed Development is EIA development.
- 2.13 An Environmental Impact Assessment Report (“EIAR”) (DOC3) accompanied the application in 2021. Further Environmental Information (“FEI”) (DOC5) was thereafter submitted in 2022 in response to feedback from statutory consultees.
- 2.14 This Application is supported by Supporting Environmental Information (“SEIR”) dated October 2025. While this Application does not propose any physical changes to the Development, there has been a passage of time since the earlier assessments were undertaken. The SEIR confirms which parts of the EIAR and subsequent FEI remain extant and provides updated information where required.

- 2.15 These documents together comprise the Environmental Impact Assessment Report required to be submitted in accordance with the Town and Country (Environmental Impact Assessment) (Scotland) Regulations 2017. The SEIR confirms that the environmental information contained within the EIAR and FEI remain extant, on the basis that there will be no changes to the physical characteristics of the Development, and therefore no additional or increased significant environmental impacts arising as a consequence of the Proposed Development. The environmental information submitted is, therefore, sufficient to allow proper consideration of the likely significant effects of the Development on the environment.
- 2.16 An updated Planning Statement is also submitted in order to address significant updates to planning and energy policy. In particular, the updated Planning Statement addresses the National Planning Framework 4 adopted in February 2023 and the Highland Wide Local Development Plan (HwLDP) adopted in April 2012 (DOC6). The updated Planning Statement confirms that the Proposed Development is consistent with all relevant Development Plan policy when considered as a whole and would result in the safeguarding and delivery of key renewable generation for delivery to grid to meet net zero.

Case Law

- 2.17 In *Newbury DC v. Secretary of State for the Environment* [1981] A.C. 578 (DOC10), it was established that a planning condition must have a valid planning purpose, must fairly and reasonably relate to the development, and not be so unreasonable that no reasonable planning authority could have imposed it.
- 2.18 A key test emerges from the cases of *Bernard Wheatcroft Ltd v Secretary of State for the Environment* [1982] 43 P. & C.R. 233 (“Wheatcroft”) (DOC11) and *Walker v Aberdeen City Council* [1998] S.L.T. 427 (“Walker”) (DOC12). The test is essentially one of “character” and whether the proposed amendment substantially alters the character of the development. For example, the judge noted in *Walker* that the test:
- “is whether the amended or revised application is for a development which in substance different from that to which the original application related. I prefer the phrase “in substance different” to the phrase “substantially different.”*
- 2.19 Similarly, in *Wheatcroft* the judge concluded:

“The true test is, I feel sure, that accepted by both counsel: is the effect of the conditional planning permission to allow development that is in substance not that which was applied for?”

- 2.20 This position has recently been tested in respect of S.73 of the Town and County Planning Act 1990 in respect of the English judgments of *Test Valley Borough Council v Fiske* [2024] EWCA Civ 1541 (DOC13) and *Armstrong v Secretary of State for Levelling Up, Housing and Communities* [2023] EWHC 176 (Admin) (DOC14). These recent cases provide further guidance on the scope of amendments under S.73, which is also relevant when considering the scope of amendments sought by way of a S.42 application under the 1997 Act.
- 2.21 In the judgment of *Armstrong v Secretary of State for Levelling Up, Housing and Communities* the conclusion was reached that there is no prohibition against a fundamental variation of the planning permission, provided there is no conflict with the description of the permitted development. The matter was thereafter considered further in *Test Valley Borough Council v Fiske* finding that conditions imposed under section 73 would be unlawful if they were inconsistent in a *material way* with the operative part of the original permission.
- 2.22 As demonstrated in this Application, the proposed variation has a valid purpose and are fair and reasonable in the circumstances. There are no physical changes resulting from the proposed amendment. The Application would not therefore lead to any change in the ‘substance and character’ of the Development. The variation as sought is not in conflict with the description of the development as permitted, nor is it inconsistent with the operative part of the permission. The s.42 application to make the change proposed is entirely competent.

Circular 4/1998 - The Use of Conditions in Planning Permissions

- 2.23 Circular 4/1998 (DOC9) sets out Scottish Government policy on the use of conditions in planning permissions. It states that planning conditions should only be imposed where they meet all of the following 6 tests. That is, that they are:
- necessary
 - relevant to planning
 - relevant to the development to be permitted
 - enforceable

- precise
- reasonable in all other respects.

3. Applicant's Proposed Variations to Planning Condition 27

- 3.1 The Applicant's proposed change is to amend the condition to extend the commencement date for an additional five years, from the date of the grant of the new planning permission subject to this Application. The proposed amended condition would therefore read:

"The development to which this planning permission relates must commence no later than five years from the date of this decision notice. If development has not commenced within this period, then this planning permission shall lapse."

- 3.2 The development permitted subject to the proposed conditions would be acceptable in planning terms. The proposed amendment would meet each of the six policy tests. As noted, the reason for this Application is due to grid connection tie in dates. By granting this Application, the same development programme as previously envisaged would continue to apply but would simply commence later in order to align with grid connection dates. The proposed amended condition would be reasonable in all respects.
- 3.3 All other conditions to which the Permission is subject will remain and continue to control the development.

4. Conclusions

- 4.1 The proposed variation would lead to a development which is in substance and character identical to that consented. The only changes proposed are to extend the period for implementing the Permission.
- 4.2 It is respectfully submitted that the variation should be approved and planning permission issued subject to the amended condition 27, together with the other conditions imposed on the Permission.

ANNEX A

List of supporting documents

Doc No.	Title
1	Application Documents
DOC 1	Lochluichart Extension II Wind Farm Planning Permission 21/02985/FUL (January 2023)
DOC 2	The Highland Council, Committee Report (25 January 2023)
DOC 3	Environmental Impact Assessment (2021)
DOC 4	Planning Statement (2021)
DOC 5	Further Environmental Information (FEI) (April 2022)
DOC 6	Highland Wide Local Development Plan (adopted 5 April 2012)
DOC 7	Highland Council, Onshore Wind Energy Supplementary Guidance (November 2016) and Addendum (December 2017)
DOC 8	Scottish Government, National Planning Framework 4 (adopted 13 February 2023)
DOC 9	Planning Circular 4/1998, The use of conditions in planning permissions
DOC 10	Newbury DC v. Secretary of State for the Environment [1981] A.C. 578
DOC 11	Bernard Wheatcroft Ltd v Secretary of State for the Environment [1982] 43 P. & C.R. 233
DOC 12	Walker v Aberdeen City Council [1998] S.L.T. 427
DOC 13	Test Valley Borough Council v Fiske [2024] EWCA Civ 1541
DOC 14	Armstrong v Secretary of State for Levelling Up, Housing and Communities [2023] EWHC 176 (Admin)