

Local acceptance and wind energy – the role of the legal framework



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Outline



- How does the legal framework safeguard local concerns?
 - **Public law** v private law (e.g. nuisance)
 - Public law re. "siting" of wind energy projects
 - ✦ Land use planning and environmental regulation
 - ✦ "Pro-active" policy measures
 - Compensation, co-ownership & community benefit schemes
- How does the legal framework affect local acceptance?
 - Some preliminary observations...
 - ✦ Trust and fairness in public decision-making?
 - ✦ Do the "pro-active" policy measures actually work?
- **NB: Focus on onshore turbines!**

Local concerns ...



- Visual interference
- Noise
- Health
- Property values
- Recreational values
- Cultural values
- Landscape values
- Nature and biodiversity



Collective v individual concerns

How are such concerns safeguarded?

Public law re. "siting" of wind turbines -



- **Land use and environmental regulation**
 - Land use planning
 - Environmental assessment
 - Noise regulations etc.
 - Public participation & appeals
 - Substantive v procedural rules!
- **"Pro-active" policy measures (2008 RE Act)**
 - Compensation scheme
 - Co-ownership scheme
 - Community benefit scheme
 - (Guarantee scheme for local associations)

Land use planning system - DK



- **Strategic planning v. project planning**
 - Strategic designation of (potential) wind turbine areas
 - ✦ Balancing of general interests, e.g.
 - Wind resources, landscape, infrastructure, dwellings etc.
 - ✦ Municipal plans (prior to 2007: regional plans)
 - Expected number and size (for each area)
 - ✦ Public participation & appeals
 - Project plans for wind energy projects
 - ✦ Balancing of more specific (local) interests
 - Landscape, visual interference, noise, neighbours etc.
 - ✦ Local plans (and possibly municipal plan supplements)
 - Precise siting, number and height (min. + max.)
 - Conditions re. flickering in local plans (or EIA permit)
 - ✦ Public participation & appeals
- **Is strategic planning being undermined by ad hoc project planning?**
 - What is the appropriate level of authority?

Land use planning – specific wind energy rules (DK)



- **Wind turbine circular – 9295/2009, e.g.**
 - Safeguarding neighbours, nature, landscape, cultural heritage and agricultural interests
 - Neighbours, e.g.
 - ✦ Min. distance to dwellings: 4x total height
 - Landscape, e.g.
 - ✦ Less than 28x total height to existing or planned turbines assess "cumulative" effect and argue that "insignificant"!
 - ✦ Max. 150 m (exemptions for test turbines (MIM))
- **NB: Substantive elements!**
- **NB: To be replaced by statutory order!**

Varde case



- **Nature and Environment Appeals Board Decision of 15 September 2014 – appeals by neighbours**
- **Local plan (and SEA/EIA) for 10 new 150 m turbines in a designated area located 650 m and 1,7 km from existing wind parks. According to the SEA/EIA the interplay with existing turbines would be "messy" from several sites. NMKN: not justified that "insignificant" effect. EIA had not assessed potential effects on ground- and surface water (lowering of groundwater level) or the potential effects on birch mouse – any damage to breeding and resting places should be avoided. The plans (and SEA/EIA) were declared invalid!**
- **Construction works were initiated in 2013 and a new plan + EIA/SEA is expected to be elaborated while possibly decommissioning existing turbines...!**

Varde case



Environmental assessment



- **Strategic environmental assessment of plans (EU SEA Directive)**
 - Strategic planning v project planning
 - What level of detail in strategic planning?
 - Public participation and appeals
 - Procedural rules
- **Environmental impact assessment of projects (EU EIA Directive)**
 - EU: screening (Annex II) – DK: mandatory (Annex I: above 80 m or more than three turbines)
 - DK: EIA report is presented by the authority!
 - Fairly detailed assessment requirements
 - Health effects or general noise standards?
 - Public participation and appeals
 - Procedural rules
- **Natura 2000, Annex IV and birds (EU Habitats & Birds Directives)**
 - Detailed assessment requirements
 - NB: Substantive elements
 - ✦ Ascertain that no adverse effects on the integrity of N2000 sites
 - ✦ No deterioration or destruction of breeding sites or resting places (Annex IV species)
 - ✦ NB: Mitigation measures (v. compensatory measures)

Sønderborg case



- Nature and Environment Appeals Board decision of 30 June 2014 – appeals by neighbours.
- Strategic municipal plan supplement on potential wind turbine areas. NMKN: Too short public consultation period regarding the final designation of 8 areas (as opposed to the proposed 18 areas). The SEA did not – even at an overall level – assess potential effects, but only included general statements re. nature and environment. Other authorities affected by the plan had not been consulted. The strategic plan was declared invalid!

Noise regulations - DK



- **Statutory Order 1284/2011**
 - Noise standards
 - ✦ Outdoor areas at dwellings (max. 15 m)
 - Max. 44 dB at 8 m/s
 - Max. 42 dB at 6 m/s
 - ✦ "Noise sensitive areas"
 - Max. 39 dB at 8 m/s
 - Max. 37 dB at 6 m/s
 - ✦ Indoor areas (dwellings and noise sensitive areas)
 - Max 20 dB low frequency noise
 - Notification of new turbines and supervision
- **EIA permit**
 - Individual noise limits or conditions?
 - E.g. "compliance with current noise standards at any time.."?"

Public participation and appeals



- **1998 Aarhus Convention (and EU Directives)!**
- **Public participation ("the public concerned") – art. 6**
 - Adequate, timely and effective information and participation (projects with potential significant impact)
 - DK: Land use planning, SEA and EIA
- **Access to justice ("sufficient interest") – art. 9**
 - access to .. a court of law and/or another independent and impartial body ... to challenge the substantive and procedural legality of any decision, act or omission subject to the provisions of article 6
 - access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment
 - shall provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive!
 - DK: Administrative appeal bodies (NMKN + EKN)

Pro-active policy measures - DK



- **2008 Renewable Energy Act "local acceptance schemes"**
 - Compensation scheme
 - Co-ownership scheme
 - Community benefit scheme
 - (Guarantee scheme for local associations)

Compensation scheme



- **Developers shall compensate the financial loss of property owners when more than 1 % decrease of property value (dwellings)**
- **Procedure:**
 - **Public meeting (developer) – during planning/EIA process**
 - ✦ **Information letter to residents within 6xtotal height**
 - **Submission of claims by neighbours**
 - ✦ **No fee (up to 6xtotal height) – otherwise refundable fee**
 - **Agreement with developer *or* decision by "Valuation Authority"**
 - ✦ **Average compensation 2010-12: EUR 13,500**
 - ✦ **No appeals of decision, but ..**
 - **Civil law suits between developer and neighbour(s) is an option!**
 - ✦ **9 reported district court cases – three appealed to the High Court**
 - ✦ **4 of 9 court cases resulted in higher compensation!**

Co-ownership scheme



- **Developers shall offer min. 20 % shares to local citizens**
- **Tender procedure**
 - After final approval – before grid connection
 - Permanent residents within 4,5 km (priority right to 50 shares) or the municipality
 - Near-shore: residents in municipalities with a shoreline within 16 km

Community benefit scheme – “green scheme”



- **A fixed amount “allocated” to the relevant municipalities**
 - approx. EUR 12,000/MW (grid connected)
- **The municipalities may apply Energinet.dk for funding to:**
 - Construction work to enhance scenic or recreational values
 - Cultural and information activities
 - Eg. bicycle paths, nature restoration projects, renovating sport facilities, renewables in public buildings
 - Municipal and local association activities only
- **Limited use so far?**
 - Available funding (30 Sept. 2014) : EUR 13,2 mio (22 mio)
 - Expenditure (30 Sept. 2014) : EUR 2,3 mio (5,8 mio)
 - Local variations!

Some preliminary observations..



- **Trust and fairness in public decision-making**
 - Is the system, e.g. planning/EIA, comprehensible?
 - Is there a clear distinction between authority and developer?
 - Are the substantive rules adequate, e.g. noise?
 - Appropriate participation procedures
 - Appeals – difficult to avoid!
 - ✦ Substantive v procedural rules
 - ✦ Extensive public regulation (and procedural rights) provides ample opportunities for appeals
 - ✦ Important that the authorities get it all right!
- **Pro-active policy measures**
 - Do the schemes actually promote local acceptance?
 - Positive or negative signals ...?
 - DK compensation scheme – contested!
- **Counterproductive legislation?**