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PARTICIPATION IN ENVIRONMENTAL DECISION-MAKING: REFLECTING ON PLANNING AND COMMUNITY BENEFITS FOR MAJOR WIND FARMS

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Abstract:

The notion of public participation in environmental decision-making remains ambiguous and unsettled. This article critically reflects on the conceptual nature of participation, focusing on wind energy developments. It points to an overlooked, but conceptually significant, distinction between models of engagement directed to “participation” and those aimed at “public acceptance”. By simply offering a shadow of participation, models of public acceptance are problematic and make the normative and substantive justification of the decision inevitably more fragile. Analysing two major wind projects in England and Wales and their underlying legal and policy framework, the article explores the role of mitigation measures and the under-researched potential for developer-led community benefits to provide participatory space. In the light of logic of acceptance, it suggests that the participatory orientation of mitigation measures within planning law should be acknowledged and strengthened, while the potential for community benefits to constitute alternative fora for community participation should be explored.

Keywords: public participation, acceptance, mitigation, community benefits, planning, wind energy.

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1. Introduction

Citizens' participation in environmental decision-making is often considered a condition for the democratic legitimacy of decisions,¹ as well as an important opportunity to improve quality and effectiveness of those decisions.² Yet the space for such participation is repeatedly confronted by technical risk assessment, cost-benefit analysis and the idea that the public lacks expertise and misunderstands science.³ Even when legislation embeds enforceable rights to participate, the wider legal and policy context often tends to constrain the ability to influence, by limiting the considerations to be taken into account in the decision-making process, and used in turn to justify the decision.⁴ These tensions make the notion of public participation deeply ambiguous and pose challenges to its practice.

Against this background (Section 2), this article reflects upon the conceptual nature of public participation in environmental decision-making, focusing on wind energy developments in England and Wales. First, it points to an overlooked, but conceptually significant, distinction between models of engagement directed to "participation" and those aimed at "public acceptance". While in participatory models, all options are open and participants are able to influence outcomes, in acceptance models, engagement is rhetorically

¹ Robert A Dahl, *Polyarchy: Participation and Opposition* (Yale University Press 1971); Seyla Benhabib (ed), *Democracy and Difference: Contesting the Boundaries of the Political* (Princeton University Press 1996).

² Frans Coenen, Dave Huitema, Laurence J. O'Toole (eds), *Participation and the Quality of Environmental Decision Making* (Springer 1998); Mary O'Brien, *Making Better Environmental Decisions: An Alternative to Risk Assessment* (MIT Press 2000).

³ Brian Wynne, 'May the Sheep Safely Graze? A Reflexive View of the Expert-Lay Public Divide', in Scott Lash, Bronislaw Szerszynski, Brian Wynne (eds), *Risk, Environment and Modernity: Towards a New Ecology* (Sage 2004).

⁴ Maria Lee, 'The Legal Institutionalisation of Public Participation in the EU Governance of Technology' in Roger Brownsword, Eloise Scotford and Karen Yeung (eds), *Oxford Handbook on the Law and Regulation of Technology* (OUP forthcoming 2016) (on decisions on chemicals, GMOs and wind farms).

sought, but the ability to influence is restricted (Section 3). In participatory models, the nature of the engagement is presented as a deliberative, consensus-based public dialogue aimed at reaching better-quality decisions through the transformation of individual rationalities. Conversely, in acceptance models, participation is framed as mere validation of decisions already made and as a way to enhance social awareness and support to accelerate implementation and facilitate compliance. Although deliberative participation is complex and contested,⁵ I argue that, by simply offering a shadow of participation, models of public acceptance are problematic and make the normative and substantive justification of the decision inevitably more fragile. The two models are not being promoted side by side as a choice. Instead, their contours are nuanced, in that a participatory model is generally promoted in law and policy, but we often end up with an acceptance model, as suggested by the case studies discussed below.

The article then turns to participation in decision-making for major wind farms in England and Wales as an example of the tensions between these models. National policy on major wind energy infrastructure in England and Wales has been criticised for the limited space it provides for public participation in the authorisation process.⁶ Whilst the policy ground has shifted enormously, a strong policy preference for increased wind energy capacity (both onshore and offshore) in the recent past suggested that local community concerns about development were a hurdle to be overcome, rather than one deserving meaningful

⁵ Melissa Leach and Ian Scoones, 'Science and Citizenship in a Global Context' in Melissa Leach, Ian Scoones, Bryan Wynne (eds) *Science and Citizens - Globalization and the Challenge of Engagement* (Zed Books 2005). See also Andrew Dobson, *Green Political Thought* (4th edn, Routledge 2007).

⁶ Claire Haggett, 'Planning and Persuasion': Public Engagement in Renewable Energy Decision-Making' in Patrick Devine-Wright (ed), *Renewable Energy and the Public: From NIMBY to Participation* (Earthscan 2011); Maria Lee et al, 'Public Participation and Climate Change Infrastructure' (2013) 25 (1) *Journal of Environmental Law* 33.

engagement. The decision as to whether to grant consent to major wind farm developments could fairly uncontroversially be described as a public acceptance model. Beyond the consent decisions, I argue that opportunities for the public to influence decisions on mitigation measures and community benefits associated with major wind developments are equally limited. This might be symptomatic of a deeper inclination toward public acceptance rather than participation. While the concept and practice of mitigation of impact is relatively familiar to lawyers in the context of impact assessment and planning conditions, the notion and role of developer-led community benefits are more difficult to pin down. They are ‘some form of additional, positive provisions for the area and people affected by major development’, including both financial and material contributions.⁷ The article explores the ways in which participation is framed in the Planning Act 2008;⁸ the National Policy Statements (NPSs) on energy; and the Community Benefits Guidance for wind energy for England and Wales (Section 4).⁹ To complement the analysis, Section 5 concentrates on the

⁷ Gillian Bristow, Richard Cowell, Max Munday, ‘Windfalls for Whom? The Evolving Notion of ‘Community’ in Community Benefit Provisions from Wind Farms’ (2012) 43 *Geoforum* 1108, 1108.

⁸ The Planning (Wales) Act 2015(c.4) which received Royal Assent on 6 July 2015 will not be discussed here as the projects I am concerned with received consent in 2014 under the Planning Act 2008.

⁹ Existing planning guidance for England or planning policy and advice issued by the Welsh Assembly Government relevant to renewables (e.g. DCLG, *National Planning Policy Framework* (“NPPF”) 2012; Welsh Assembly Government, *Planning Policy Wales, Technical Advice Note 8 – Planning for Renewable Energy* (July 2005).; Chief Planning Officers (CPOs) – publication of planning policy Wales edition 4, February 2011-letter) will not be systematically analysed here. This is because, although these are relevant to the decision, ‘[w]hether an application conforms to the guidance or the targets will not, in itself, be a reason for approving or rejecting the application.’(DECC, *National Policy Statement – Renewable Energy Infrastructure* (“EN-3”) (2011) para 2.2.1). However, this ‘devolution-neutral’ approach has been criticised in the consultation on the NPSs (see Wales Environment Link, *Response to DECC consultation on National Policy Statements for Energy*, NPS EN1-6, February 2010).

reports of the examining authority within the Planning Inspectorate, and the community benefits decisions, for the *Burbo Bank Extension Offshore Wind Project* in England and the *Clocaenog Forest Wind Project* in Wales. In the light of logic of acceptance and its impact on law, the article suggests that the role of mitigation measures in catalysing participatory dialogue should be acknowledged and strengthened, while the potential for community benefits to constitute alternative fora for public participation should be explored (Section 6).

Acknowledging that onshore wind farms ‘often fail to win public support’,¹⁰ in 2015 the current government decided ‘to give local communities the final say on windfarm applications’.¹¹ This has been implemented by removing onshore wind farms above 50 megawatts from the list of National Significant Infrastructure Projects (NSIPs), and therefore exempting them from obtaining development consent by the Secretary of State.¹² Removing these projects from the NSIPs list will transfer consenting powers for all onshore wind farms, including large developments, to local planning authorities. At first glance, this adjustment represents an important step to sidestep public acceptance approaches in decision-making. However, it is primarily concerned with transferring decision-making to a local level, without fundamentally engaging with the conceptual nature of participation and the ways in which the public can influence decisions at that level.

It is in the light of this policy shift and its (apparent) participatory justification that a serious reflection on the conceptual nature of public participation in environmental decision-making, within and outside planning, is timely and interesting. Although the new policy

¹⁰ The Conservative Party Manifesto 2015, 59.

¹¹ HM Queen’s speech 2015, 30.

¹² Infrastructure Planning (Onshore Wind Generating Stations) Order 2016 (S.I. 306/2016). See also Onshore Wind Generating Stations (Exemption) (England and Wales) Order (S.I. 21/2016), which removes onshore wind generating stations from the list of developments that require consent of Secretary of State under S 36 of the Electricity Act 1989.

context inevitably makes this article partially backward looking, the consideration of mitigation measures and community benefits offers an interesting perspective from which to explore the conceptual nature of participation and the notion of acceptance in environmental decision-making. This clarification is important for legal scholars regardless (or even precisely because) of policy changes.

2. Public Participation in Environmental Decision-Making

The rationales for public participation in environmental decision-making are multiple and nuanced, generally based upon overlapping justifications.¹³ A turn to participatory procedures is inherent in the quest for democratic legitimacy of decision-making processes and their outcomes.¹⁴ People have the right to be informed and participate in shaping decisions that will affect their world. Participatory processes can take different forms depending on the underlying theoretical model of democracy in which they are situated: from voting and aggregation of individual preferences in constitutional democracies,¹⁵ to consultation processes and cost-benefit analysis in liberal systems;¹⁶ to dialogue and communication of

¹³ Barry Barton, 'Underlying Concepts and Theoretical Values in Public Participation in Resources Development' in Donald M. Zillman, Alastair Lucas, and George (Rock) Pring (eds) *Human Rights in Natural Resource Development - Public Participation in the Sustainable Development of Mining and Energy Resources* (OUP 2002) 77-122; Andrew Stirling, 'Analysis, Participation and Power: Justification and Closure in Participatory Multi-Criteria Analysis' (2006) 23 (1) *Land Use Policy* 95.

¹⁴ Robert S Summers, 'Evaluating and Improving Legal Processes A Plea for Process Values' (1974) 60 *Cornell Law Review* 1.

¹⁵ James Buchanan and Gordon Tullock, *The Calculus of Consent: Logical Foundations of Constitutional Democracy* (Liberty Fund 1962).

¹⁶ Cass R Sunstein, 'The Cost-Benefit State' (1996) Coase-Sandor Institute for Law & Economics Working Paper No. 39.

rational arguments and transformation of participants' views in deliberative models.¹⁷ Across these models, the nature and impact of participation vary deeply, affecting the way in which law and regulation embrace calls for democratization.¹⁸ According to deliberative democracy theories, the legitimacy of a decision derives from the process of reaching consensus through 'debate and discussion aimed at producing reasonable, well-informed opinion in which participants are willing to revise preferences in light of discussion, new information, and claims made by fellow participants'.¹⁹ The notion of deliberative participation resonates powerfully within environmental law and governance.²⁰ Although occasionally contested,²¹ proceduralization of environmental regulation has been extensively discussed as an attractive mechanism to enable participation, regulatory flexibility and responsiveness.²²

¹⁷ Deliberative democracy theories are complex and diverse, mostly as modulations of Habermas's critical theory and Rawls's liberal theory. For a collection of perspectives: Bohman and Rehg (eds), *Deliberative Democracy – Essays on Reason and Politics* (MIT Press, 1997); John S Dryzek, *Deliberative Democracy and Beyond: Liberals, Critics and Contestation* (OUP 1990).

¹⁸ Sherry R Arnstein, 'A Ladder of Citizen Participation' (1969) 35(4) *Journal of American Institute of Planners* 216 (on the graduations in the citizens' ability to affect the outcome of the decision-making through participation).

¹⁹ Simone Chambers, 'Deliberative Democracy Theory' (2003) 6 *Annual Review of Political Science* 307, 309.

²⁰ Graham Smith, *Deliberative Democracy and the Environment* (Routledge 2003); John R Parkins and Ross E Mitchell, 'Public Participation as Public Debate: A Deliberative Turn in Natural Resource Management' (2005) 18 *Society and Natural Resources* 529.

²¹ Robert Goodin, *Green Political Theory* (Polity Press 1992). Cft Dobson (n 5) and Brian Doherty and Marius de Geus (eds), *Democracy and Green Political Thought: Sustainability, Rights, and Citizenship* (Routledge 1996).

²² Karl-Heinz Ladeur, 'Coping with Uncertainty: Ecological Risks and the Proceduralization of Environmental Law' in Gunther Teubner, Lindsay Farmer, Declan Murphy (eds), *Environmental Law and Ecological Responsibility: the Concept and Practice of Ecological Self-Organisation* (Wiley-Blackwell 1994) 325; Joanne Scott, 'Flexibility, "Proceduralization", and Environmental Governance in the EU' in Gráinne de Búrca and

But public participation is as much about the substantive quality of a decision, as it is concerned with democratising the process. As knowledge is dispersed, contingent and constructed,²³ decisions based on wider values and experience tend to be qualitatively superior in terms of environmental performance and protection.²⁴ Indeed, the judgement about the substantive quality of a participatory decision – and consequential success or failure of regulation – is ultimately normative.²⁵ However, procedural and substantive justifications for public participation appear inevitably interlinked and mutually reinforcing. In an environmental law context, Steele argues that, even in a deliberative perspective that emphasises the legitimizing function of a public debate, public participation presents a substantive, problem-solving capacity.²⁶ Dryzek’s discussion of ‘democratic pragmatism’ frames participation as a way to improve the substantive outcome of the decision through interactive problem-solving, as well as the democratization of environmental administration.²⁷ As I argue in the next section, procedural and substantive rationales determine the nature of participation as a deliberative public dialogue through participatory models of engagement.

Joanne Scott (eds), *Constitutional Change in the EU: From Uniformity to Flexibility* (Hart Publishing 2000) 259; Julia Black, ‘Proceduralizing Regulation - Part I’ (2000) 20 (4) *Oxford Journal of Legal Studies* 597; and her ‘Proceduralizing Regulation- Part II’ (2001) 21 (1) *Oxford Journal of Legal Studies* 33.

²³ Sheila Jasanoff (ed), *States of Knowledge – the Co-Production of Science and Social Order* (Routledge 2004).

²⁴ Alan Irwin, *Citizen Science: A Study of People, Expertise and Sustainable Development* (Routledge 1995).

²⁵ Jenny Steele, ‘Participation and Deliberation in Environmental Law: Exploring a Problem-solving Approach’ (2001) 21(3) *Oxford Journal of Legal Studies* 415. See also Robert Baldwin and Julia Black, ‘Really Responsive Regulation’ (2008) 71(1) *Modern Law Review* 59.

²⁶ Steele *id.*

²⁷ John S. Dryzek, *The Politics of the Earth* (OUP 2008).

Procedural and substantive grounds for participation are complemented by instrumental and legal compliance approaches. According to an instrumental rationale, public participation is presented, sometimes uncritically, as a way to enhance trust and accountability.²⁸ From this perspective, participation constitutes a principle of good governance and agency practice.²⁹ It is viewed as a tool to restrain executive power and catalyse transparency, while at the same time creating a sense of ownership of the outcome.³⁰ Although important, this rationale is more likely to frame participation within the boundary of established agency practices and policy objectives. This renders the influence of multiple knowledge and alternative rationalities in the final decisions more difficult, which might favour the emergence of public acceptance models.

Inevitably each of these rationales operates against the backdrop of compliance with legal obligations.³¹ National, European and international law institutionalise individuals' right to be informed, participate (mainly through consultation) and seek judicial redress with respect to environmental decision-making.³² Public participation is an essential requirement for the

²⁸ Dan Bloomfield et al, 'Deliberation and Inclusion: Vehicles for Increasing Trust in UK Public Governance?' (2001) 19 (4) *Environmental and Planning C- Government and Policy* 501. Cft Elizabeth Fisher, 'Drowning by Numbers: Standard Setting in Risk Regulation and the Pursuit of Accountable Administration' (2000) 20 (1) *Oxford Journal of Legal Studies* 109.

²⁹ European Commission, 'European Governance - A White Paper' COM (2001) 428 final; Thomas Dietz and Paul C. Stern (eds) *Public Participation in Environmental Assessment and Decision Making* (National Research Council 2008).

³⁰ E.g. Royal Commission on Environmental Pollution (RCEP), 23rd Report - Environmental Planning (2002) Chapter 5.

³¹ Lee et al (n 6).

³² E.g. UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus, adopted 1998, entered into force 2001) 38 ILM 517 (1999) arts 4, 6,

legality of a decision related to environmental plans and programmes, as well as to projects likely to have an impact on the environment, such as major wind farms.³³ As this article shows, the role of law in enabling participation is certainly important, but occasionally marginalised by the wider legal context and policy objectives. This is partially because simply acknowledging a broad commitment to participation does not capture the incongruences and persistent myths entrenched in its practice.³⁴ Although it would be naïve to dismiss the role of scientific expertise in environmental regulation, the space for expressing concerns is constantly challenged (and repeatedly discredited) by embedded risk assessment paradigms, cost-benefits analysis and ‘deficit models’, which hold that the lay public lacks expertise and misunderstands scientific facts, making their values and rationalities ill-suited to justify decisions.³⁵ These techno-scientific rationalities often squeeze out socio-cultural values from the realm of what counts as ‘good reason’ for a decision.³⁶

7, 8 and 9. For a critical analysis, Maria Lee and Carolyn Abbott, ‘The Usual Suspects? Public Participation under the Aarhus Convention’ (2003) 66(1) *Modern Law Review* 80.

³³ Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment [2001] O J L 197 (SEA Directive), art 6; Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment (codification) [2011] O J L 26/1, as amended by Directive 2014/52/EU O J L 124/1 (EIA Directive) art 6.

³⁴ Brian Wynne, ‘Public Engagement as a Means of Restoring Public Trust in Science - Hitting the Notes but Missing the Music?’ (2006) 9 *Community Genetics* 211 (critiquing the presumptions and misunderstanding of public concerns in science-based policy).

³⁵ Frank Fischer, *Citizens, Experts and the Environment* (Duke University Press 2000). Cft Cass R Sunstein, *Risk and Reason: Safety, Law and the Environment* (CUP 2002).

³⁶ Sheila Jasanoff, *Design on Nature – Science and Democracy in Europe and the United States* (Princeton University Press 2007); Maria Lee, ‘Beyond Safety? The Broadening Scope of Risk Regulation’ (2009) 62(1) *Current Legal Problems* 242.

This prioritisation of arguments based on risk, scientific expertise and quantitative assessments dismisses the important contribution of citizen's multiple knowledges and non-economic values.³⁷ This has become evident in many areas of environmental regulation and new technologies (e.g. GMOs, nanotechnologies, chemicals), including more recently climate change technologies, such as wind energy.³⁸ Both an instrumental rationale, and an overemphasis on legal compliance as a bureaucratic hurdle to be overcome, have the potential to provide the setting for a public acceptance model of engagement.

3. "Public Acceptance" Models of Engagement

I am particularly concerned here with an overlooked, and yet profoundly significant, difference between "public participation" and the more ambiguous idea of "public acceptance" in decision-making. While the legal literature hardly engages with the notion of social acceptance,³⁹ a vast social science scholarship uses this term to refer to the response of

³⁷ Sheila Jasanoff, 'Technologies of Humility – Citizen Participation in Governing Science' (2003) 41(3) *Minerva* 223; Michael J Sandell, *What Money Can't Buy – The Moral Limits of Markets* (Penguin 2013).

³⁸ Lee et al (n 6).

³⁹ E.g. Neil Popovic, 'The Right to Participate in Decisions That Affect the Environment' (1993) 10(2) *Pace Environmental Law Review* 683 considers the enhancement of public acceptance as one of the functions of participation (cited by Jonas Ebbesson, 'The Notion of Public Participation in International Environmental Law' (1998) 8(1) *Yearbook of International Environmental Law* 51, 62). Although the legal literature on Social Licence to Operate might have some resonance here, its focus on firms' responses to society demands and expectations distinguishes it from my model of acceptance in environmental decision-making. (See Gary Lynch-Wood and David Williamson, 'The Social Licence as a Form of Regulation for Small and Medium Enterprises' (2007) 34 (3) *Journal of Law and Society* 321).

local communities to technological development.⁴⁰ Generally, a technology is said to be socially ‘acceptable’ if ‘it conforms well with social values and norms to be placed on the table as a viable alternative to other technologies.’⁴¹ In a regulatory context, the nuance between discourses on “participation” and “acceptance” becomes significant, as it points to a possible distinction between two models of public engagement in decision-making: a model that pursues participatory, deliberative process and outcomes, and a model that encompasses a more limited policy objective to achieve public acceptance of the decision.⁴² While both models acknowledge the importance of citizens’ engagement in the process, they fundamentally differ in terms of their conceptual nature of participation and the objectives of such engagement. I refer to the participatory model as based on a procedural and substantive rationale of participation, and then discuss the acceptance model in terms of an instrumental and legal compliance approach to public engagement in the decision-making.

In a participatory model, citizens’ views and knowledges are valued for their merit and their ability to sustain the debate on the common good, at least as a legitimate and

⁴⁰ E.g. Rolf Wüstenhagen, Maarten Wolsink, Mary Jean Burer, ‘Social Acceptance of Renewable Energy Innovation: An Introduction to the Concept’ (2007) 35 (5) *Energy Policy* 2683 (distinguishing between socio-political, community and market acceptability).

⁴¹ Amy K Wolfe et al, ‘A Framework for Analysing Dialogue Over the Acceptability of Controversial Technologies’ (2002) 27(1) *Science, Technology, & Human Values* 134.

⁴² Depending on what we mean by acceptance, it is conceivable that a public acceptance model might be deliberative. See Rob Flynn and Paul Bellaby (eds), *Risk and the Public Acceptance of New Technologies* (Palgrave Macmillan 2007) 17; Mhairi Aitken, ‘Wind Power Planning Controversies and the Construction of ‘Expert’ and ‘Lay’ Knowledges (2009) 18 (1) *Science as Culture* 47. However, my model of acceptance lacks of deliberative character.

complementary response to technocratic arguments.⁴³ A participatory model operates through a process of engagement where multiple options are still open for discussion and citizens have a real opportunity to influence. This model tends to encourage deliberative, consensus-based public dialogue aimed at reaching better-quality decisions through the value of individual rationalities, while also democratizing the process (substantive and procedural rationales).⁴⁴ In her account of participation in regulatory processes, Black notes how proceduralization of participation could take two forms: bargaining and compromise, characteristic of liberal democracy ('thin proceduralization') or mutuality, consensus and inter-subjective understanding of deliberative democracy ('thick proceduralization').⁴⁵ She argues that deliberative forms of proceduralization enable fuller participation, and should be strengthened.⁴⁶ This normative theory of participation builds on the distinction between people as consumers motivated by individual interests, and people as citizens driven by values.⁴⁷ The tension between these overlapping stimuli is not new in calling into question the nature of participation in environmental law or in planning.⁴⁸ But, although the debate between interests and values is crucial for the purposes of the argument here, both approaches share the idea that individuals and groups— either as citizens or as consumers - should and will, to different extents, be able to influence decisions.

⁴³ Fischer (n 35). On the notion of 'multiple knowledges', Margherita Pieraccini, 'Rethinking Participation in Environmental Decision-Making: Epistemologies of Marine Conservation in South-East England' (2015) 27 (1) *Journal of Environmental Law* 45.

⁴⁴ See n 17.

⁴⁵ Black, Part I (n 22)

⁴⁶ Black, Part II (Ibid). Building on this analysis, Pieraccini (n 43) and Steele (n 25).

⁴⁷ Mark Sagoff, *The Economy of the Earth - Philosophy, Law, and the Environment* (2nd edn, CUP 2008).

⁴⁸ E.g. RCEP, 21st Report – Setting Environmental Standards (1998) on interests and values; RCEP (n 30) emphasising the importance of deliberative processes (para 5.17).

In contrast, a public acceptance model implicitly views the lay public as a barrier, irrational, scientifically ignorant and emotional.⁴⁹ This model uses a form of engagement where the ability to consider alternatives is limited by a top-down decision-making process. In this sense, public acceptance models align with the idea that the decision has already been taken and people will need to ‘accept’ it, in the light of pre-framed policy objectives and expert knowledge.⁵⁰ This approach effectively implies a focus on providing a way to publicly validate and support policy decisions and regulatory choices that have already been made, rather than a consensus-based public dialogue.⁵¹ Following this interpretation, achieving public acceptance in decision-making entails a mere contextual discourse about facts, rather than a deliberative discourse on alternatives and conflicting values. Acceptance-based models prioritise public awareness, education and social persuasion about facts and overarching policy objectives. What distinguishes this approach from models of participation (either liberal or deliberative) is that, although engagement is sought for transparency and accountability reasons, there is restricted space for individual rationalities and motives to count (instrumental rationale). Since decisions have already been made, there is little opportunity for people to influence. Here, public engagement effectively results in a mere shadow of participation. This model follows Dryzek’s conceptualisation of administrative rationalism as ‘the problem-solving discourse which emphasises the role of experts rather

⁴⁹ Wynne (n 3).

⁵⁰ Haggett (n 6).

⁵¹ Frank Fischer, *Reframing Public Policy: Discursive Politics and Deliberative Practices* (OUP 2003) 191-200. In a scale of participation in public policy, public acceptance models stop at Fischer’s first step of ‘validation’ of problems, rather than engaging in a more fundamental discourse on societal contexts and values, which requires further deliberative steps.

than the citizens or producer/consumer in social problem-solving, and which stresses the relationships of hierarchy rather than equality or competition.⁵²

A public acceptance model is problematic and inevitably more fragile than participatory models. It is problematic because, despite the institutionalisation of procedural rights to participate in environmental decision-making (legal compliance rationale), this notion tends to mislead the public with respect to what is really open for debate and the extent to which they can influence a decision by exercising that right. Lee et al have made this point with respect to participation in major wind energy projects, arguing that ‘[i]t should in any event at least be made clear to those invited to participate in decision making that only the ‘how’ is open to debate, not the ‘whether’, along with an explanation of why that is the case.’⁵³ In this sense, by seeing legal compliance as a mere bureaucratic hurdle, the role of law could be marginalised by other objectives (e.g. climate change mitigation, energy security). Acceptance is also more fragile because, by closing-down the decision-making process to multiple knowledge and wider rationalities, the procedural and substantive legitimacy of the decision appears weaker.

The ways in which participation is dealt with in the legal and policy framework for mitigation measures within planning and community benefits for wind offers a good perspective to explore these two models of engagement, as explained in the next section.

4. Public Participation and Major Wind Infrastructure in England and Wales

The UK climate change and energy strategy is based on three objectives: 80 percent greenhouse gas emission reduction by 2050; energy security; and competitiveness, cost-

⁵² Dryzek (n 27) 73.

⁵³ Lee et al (n 6), 61.

efficiency and affordability of energy supply.⁵⁴ To meet its national and European targets, 15 percent of total energy consumption (transport, electricity and heat) is to come from renewable sources by 2020.⁵⁵ In this scenario, the Committee on Climate Change argues that wind energy technologies represent one of the most promising options for decarbonising electricity generation, together with carbon capture and storage and nuclear.⁵⁶ The Overarching National Policy Statements for Energy (NPS EN-1) embraces this approach stating that ‘[t]he need for new renewable electricity generation projects is [...] urgent’.⁵⁷ The specific National Policy Statement on Renewable Energy Infrastructure (NPS EN-3) reiterates this emphasis.⁵⁸ While this approach could be praised for its ambition and commitment to the national and international climate change agenda, it implies real challenges when it comes to public participation. This section explores how the nature of participation is framed in the decision-making on wind energy infrastructure in England and Wales. Following a brief introduction on the legal requirements for participation in the development consent process, it specifically focuses on public participation in decisions on mitigation measures related to the development. It then looks into the guidance documents on

⁵⁴ Committee on Climate Change (CCC), *Building a Low-Carbon Economy: the UK’s Contribution to Tackling Climate Change* (TSO, London 2008); CCC, *The Fourth Carbon Budget: Reducing Emissions through the 2020s* (London 2010); HM Government, *The Carbon Plan: Delivering our Low Carbon Future* (HMG, London, 2011).

⁵⁵ HM Government, *The UK Renewable Energy Strategy* (2009). See also DECC, *The Energy White Paper: Meeting the Challenge* (May 2007); DECC, *The UK Low Carbon Transition Plan, National Strategy for Climate and Energy* (July 2009); DECC, *Planning Our Electric Future: a White Paper for Secure, Affordable and Low Carbon Electricity* (July 2011).

⁵⁶ CCC, *Progress in Preparing for Climate Change – 2015 Report to Parliament* (June 2015) 88. See also CCC, *The Renewable Energy Review* (May 2011).

⁵⁷ DECC, *National Policy Statement- Overarching Energy* (“EN-1”) (2011) paras 3.4.5. and 2.3.2.

⁵⁸ DECC (n 9) para 1.3.1.

community benefits for wind developments, as an underutilised space for participation outside the planning and Environmental Impact Assessment (EIA) setting.

Although decision-making on onshore wind has now returned to the ‘ordinary’ local planning system, the projects that I am concerned with here were decided as Nationally Significant Infrastructure Projects (NSIPs) and therefore required development consent by the Secretary of State (SoS) under the Planning Act 2008.⁵⁹ The NPS EN-1 and EN-3 set the policy context for evaluating the application, and the Examining Authority (EA) within the National Infrastructure Directorate of the Planning Inspectorate is required to give substantial weight to the contribution of the project to the NPSs objectives.⁶⁰ The Act contains provisions requiring public participation in the authorisation process. In the pre-examination phase, the applicant has an obligation to consult a number of statutory consultees, including local authorities, any relevant person with a right or interest in the land, and the local community.⁶¹ The local authority is to be consulted on the draft Statement Of Community Consultation (SOCC), which constitutes the main document informing the consultation process with people living in the vicinity of the land where the project will be sited.⁶² The applicant must take into account the responses and publish the proposal, as well as the SOCC.⁶³ In the examination phase, interested parties can make representations to the EA.⁶⁴ During this phase the local authority can submit a Local Impact Report and interested parties are entitled to comment on it.⁶⁵ A report of the examination is then produced, including non-

⁵⁹ Planning Act 2008 (c.29) (as amended by the Localism Act 2011 and the Infrastructure Act 2015) Pt 3.

⁶⁰ DECC (n 9) para 3.1.4.

⁶¹ Planning Act 2008, ss 42 and 43.

⁶² *Ibid.* s 47.

⁶³ *Ibid.* s 49.

⁶⁴ *Ibid.* s 88, 90 and 93.

⁶⁵ *Ibid.* s 56 and 60.

binding recommendations for the SoS as to whether the project should be authorised. The development consent is ultimately granted by the SoS by order, having regard for any local impact report and any other matters that the SoS thinks are important and relevant to the decision.⁶⁶ The SoS should decide based on the NPSs, except when this would represent a breach of legal obligations, or if he/she is satisfied that the adverse impact of the development would outweigh the benefits.⁶⁷

Consultation with the relevant public in the decision-making process on major wind projects is also a legal requirement under EIA legislation. Under that framework, the developer must provide information on the environmental effects of the proposed project.⁶⁸ This information and a non-technical summary must be made available to the public within a reasonable time in order to provide them with opportunities to express their opinions before the development consent is granted.⁶⁹ The results of such consultation and all information provided must be taken into account in the decision-making process, together with the reasons and proposed mitigation measures.⁷⁰

In analysing the relationship between policy objectives and participation in the approval for major wind projects, Lee et al. have argued that, by substantially framing the discretion of the decision-makers within the boundaries of the NPSs and their explicit prioritisation of major wind energy infrastructure, this approach effectively limits the ability of the public to influence decisions.⁷¹ In the light of the more compelling national priority for decarbonisation

⁶⁶ Ibid. s 104.

⁶⁷ Ibid. s 105.

⁶⁸ DECC (n 57) para 4.2.2.

⁶⁹ EIA Directive, art 6.

⁷⁰ Ibid. arts 6(2), 8 and 9.

⁷¹ Lee et al (n 6); Yvonne Rydin, Maria Lee and Simon Lock, 'Public Engagement in Decision-Making on Major Wind Energy Projects' (2015) 27 (1) *Journal of Environmental Law* 139.

and energy security, issues related to landscape and visual impact (LVI), noise and ‘place-based values’⁷² are not in themselves legitimate reasons for turning down the application, except in special circumstances.⁷³ This limited scope for participation might reflect a model of engagement that emphasises public acceptance over public influence. Importantly, this acceptance model can emerge not only in decisions as to whether or not to grant development consent, but also in decisions about distribution of impacts and benefits, through mitigation measures and community benefits.

4.1. Participation in Mitigation Measures

The development of wind energy infrastructure entails significant, and sometimes inevitable, impacts, especially when developed in rural areas.⁷⁴ These include seascape, landscape and visual effects; noise; environmental impact (including on habitat and biodiversity); and alterations to the cultural heritage and place-based values. The assessment of mitigation measures is therefore a fundamental aspect of the decision-making process for wind NSIPs.⁷⁵ These are measures aimed ‘to avoid, prevent or reduce and, if possible, offset likely

⁷² i.e. ‘the values that members of the public assign to places, [such as] an appreciation for beauty, a desire for stability, or a basic concern for the well-being of the natural world.’ (Olivia Woolley ‘Trouble on the Horizon? Addressing Place-based Values in Planning for Offshore Wind Energy’ (2010) 22(2) *Journal of Environmental Law* 223, 226).

⁷³ DECC (n 57) paras 5.9.10 and 5.11.13. See also n 67.

⁷⁴ In the UK, opposition to onshore wind energy infrastructure has moved some of the developments offshore, but some of the issues remain. See Woolley (n 72); Claire Haggett, ‘Over the Sea and Far Away? A Consideration of the Planning, Politics, and Public Perception of Offshore Wind Farms’ (2008) 10 (3) *Journal of Environmental Policy and Planning* 289; Karen N Scott, ‘Tilting at Offshore Windmills: Regulating Wind Farm Development Within the Renewable Energy Zone’ (2006) 18 (1) *Journal of Environmental Law* 87.

⁷⁵ For a focused analysis, Rydin et al (n 71).

significant adverse effects on the environment'.⁷⁶ Mitigation can include avoidance (e.g. avoiding certain areas), moderation (e.g. noise barriers), rescue (e.g. transfer of species), repair (e.g. reinstatement of plants and animals) and compensation for environmental loss (e.g. donating or creating substitute habitat areas, or shadow projects⁷⁷).⁷⁸ Opportunities for the public concerned and the interested authorities to express opinions on the design and provision of mitigation are provided within the EIA procedure, as well as in the broader authorisation process. In planning terms, mitigation measures are material considerations for the decision. They can be imposed by the planning authority as planning conditions to grant development consent and/or negotiated as planning obligations in the form of new roads, upgraded infrastructure or improved amenities.⁷⁹ In many cases, though, the ability of the public to effectively engage in this area is challenged by the highly technical character of the information and the reliance of decision-makers on expert advice.⁸⁰

But even if they constitute material considerations in planning terms, mitigation of LVI, noise, place-based values or historic heritage concerns associated with wind farms carry little weight vis-à-vis the benefits of the development, unless there is evidence of significant

⁷⁶ EIA Directive, art 5(c).

⁷⁷ E.g. Reg 66 of the Conservation of Habitats and Species Regulations 2010 requires 'the appropriate authority [to] secure that any necessary compensatory measures are taken to ensure that the overall coherence of Natura 2000 is protected'.

⁷⁸ Jane Holder, *Environmental Assessment: The Regulation of Decision Making* (OUP 2004). However the question of whether compensation is strictly mitigation is complicated. See Richard Cowell, 'Stretching the Limits: Environmental Compensation, Habitat Creation and Sustainable Development' (1997) 22 (3) *Transactions of the Institute of British Geographers* 292.

⁷⁹ On mitigation as planning obligation, s 106 Town and Country Planning Act 1990 c.8. See also s 174 Planning Act, (regulating planning obligations for NSIPs).

⁸⁰ With respect to wind NSIPs, Rydin et al (n 71).

harm.⁸¹ The NPS EN-1 and EN-3 provide primary guidance on the appropriate mitigation measures associated with individual impacts of new energy infrastructure and renewable energy projects, respectively. Overall, the authority must consider ‘how the accumulation of, and interrelationship between, effects might affect the environment, economy or community as a whole, even though they may be acceptable when considered on an individual basis with mitigation measures in place.’⁸² But mitigation is not always possible and the NPSs recognise that very little can be done to mitigate the LVI from wind farms.⁸³ In light of the benefits of (and need for) the project, it is not surprising that the inability to mitigate impacts on landscape and visual amenities has been viewed under the NPSs context as an insufficient ground to refuse consent.⁸⁴

Where mitigation is possible, mitigating mechanisms include good design in terms of siting, use of appropriate technologies (eg. noise mitigating equipment) and reduction of scale. But the judgement on their suitability is still to be made within the boundaries of the policy presumption for an increase in renewable energy capacity. With respect to mitigation of scale, for instance, their adequacy is to be evaluated against their effects on the electricity generating output of the wind turbines. As the Clocaenog Forest Wind Project example will

⁸¹ On ‘materiality’ and ‘weight’, Lord Hoffman in *Tesco Stores Ltd v Secretary of State for the Environment* [1995] 1 WLR 759 clarified that ‘[t]he former is a question of law and the latter is a question of planning judgement, which is entirely a matter for the planning authority. [...] The fact that the law regards something as a material consideration therefore involves no view about the part, if any, which it should play in the decision-making process.’ [para 56].

⁸² DECC (n 57) para 4.2.6.

⁸³ *Ibid.* paras 1.7.2 and 5.9.15.

⁸⁴ DECC (n 9) para 2.6.208 referring to offshore developments. In only one case development consent for a wind NSIP was refused as the SLVI of proposed project was judged ‘of such a scale that they outweigh the policy imperative’. Secretary of State Decision Letter – Proposed Navitus Bay Wind Park (11 September 2015), para 54.

show (section 5), any reduction in scale will compromise the project's energy output, and may therefore 'not be feasible'.⁸⁵ Looking at the early decisions of the EA on major wind farms, Rydin, Lee and Lock found that mitigation measures are scrupulously sought in order to balance people's concerns with the need for development to proceed.⁸⁶ But, although the public is technically engaged in the examination phase where mitigation measures can be proposed, in reality the space to adopt amendments or additional measures to give voice to the most difficult objections remains restricted, leaving hardly any scope for the public to influence decisions on how the project may be implemented, due to the importance of overarching national policy objectives or technical assessments of impact. The EA's consideration of mitigation measures is still subject to a strong presumption in favour of the development. This presumption is not only that the development will go ahead, but also that it will go ahead in a way that maximises its generating capacity. This means that the room for influencing alternative designs and amendments to the original plan is limited. In this context then community engagement in decision-making on mitigation measures might be implicitly viewed as simple validation and acceptance of the project as it stands, rather than an opportunity to promote dialogue about alternatives.

As I explain in section 6, this emphasis on public acceptance models of engagement in decisions on mitigation ultimately frustrates the participatory orientation of mitigation measures within planning. From this perspective, the purpose of the planning system is to 'assert the national interest over unwilling local host communities' rather than support participation.⁸⁷ This is not new in the context of land use planning where '[b]oth context and

⁸⁵ DECC (n 9) para 2.7.51.

⁸⁶ Rydin et al (n 71) 142.

⁸⁷ John Barry and Geraint Ellis, 'Beyond Consensus? Agonism, Contestation, Republicanism and a Low Carbon Future' in Devine-Wright (n 6) 29. See also Dave Toke and Peter Strachan, 'Ecological Modernisation and Wind Power in the UK' (2006) 16 (3) *European Environment* 155.

law place the emphasis on the ideology of public interest rather than, and at the expenses of, the ideology of public participation'.⁸⁸ But, as people and their participatory rights cannot be openly avoided, the tension between rhetoric of participation and a limited ability to influence remains unresolved.⁸⁹

4.2. Community Benefits Guidance

In parallel with the discussion about mitigation in planning, community benefits schemes provide an interesting perspective from which to explore the conceptual nature of participation and its relationship with models of acceptance. The negotiating process between the developer and the local community is separate from, but normally runs in parallel to, the authorisation process. In general terms, community benefits are goodwill contributions of various kinds made by a developer of infrastructure to the hosting local community. However the concept of community benefits for wind projects has been described as an example of 'constructive ambiguity', where flexibility is built in to enable the instrument to serve a variety of purposes and interests.⁹⁰ At the core of the notion of community benefits for wind projects is the recognition that the imbalance between the national benefits or corporate gains and the local burden associated with the project must be re-adjusted at the expense of the

⁸⁸ Patrick McAuslan, *The Ideologies of Planning Law* (Pergamon Press 1980) 265.

⁸⁹ DECC (n 106). More generally House of Commons - Public Administration Select Committee, *Public Engagement in Policy-Making* Second Report of Session 2013-14 (HC 75, 3 June 2013).

⁹⁰ Richard Cowell, Gillian Bristow and Max Munday, 'Acceptance, Acceptability and Environmental Justice: The Role of Community Benefits in Wind Energy Development' (2011) 54(4) *Journal of Environmental Planning and Management* 539, 549.

developer.⁹¹ Community benefits therefore respond to the idea of re-localising benefits and sharing rewards in line with the localisation of impacts. This ‘re-localisation of benefits’ rationale overlaps with claims of ‘being good neighbours’⁹² and paying compensation for the impact of the project.⁹³ But community benefits are far from straightforward. The definition of community and the risk of the provision of benefits being perceived by the community as bribery remain problematic.⁹⁴ On the one side, the bribery argument is particularly difficult because it disengages the community from a deliberative dialogue about costs and benefits, leading it to reject the development sometimes on ideological grounds. On the other side, this framing misunderstands the participatory potential of community benefits and might, ultimately, embed a logic of acceptance.

⁹¹ Derek Bell et al, ‘Re-visiting the ‘Social Gap’: Public Opinion and Relations of Power in the Local Politics of Wind Energy’ (2013) 22 (3) *Environmental Politics* 115. See also Louise Gallagher, Susana Ferreira and Frank Convery, ‘Host Community Attitudes Towards Solid Waste Landfill Infrastructure: Comprehension Before Compensation’ (2008) 51 (2) *Journal of Environmental Planning and Management* 233.

⁹² Noel Cass, Gordon Walker and Patrick Devine-Wright, ‘Good Neighbours, Public Relations and Bribes: The Politics and Perceptions of Community Benefit Provision in Renewable Energy Development in the UK’ (2010) 12 (3) *Journal of Environmental Policy & Planning* 255.

⁹³ DTI, *Delivering Community Benefits From Wind Energy Development: A Toolkit* - Centre for Sustainable Energy (2007). I do not discuss financial compensation here, but see Rydin (n 71). See also Planning Inspectorate, *Dogger Bank Creyke Beck Offshore Wind Farm Examining Authority’s Report of Findings and Conclusions and Recommendation to the Secretary of State for Energy and Climate Change* (17 November 2014) specifically addressing compensation claims.

⁹⁴ On the definition of community, Bristow et al (n 7) 116 argue that developers in Wales have traditionally tended to channel benefits to those in the immediate vicinity of the development (‘community of place’) as opposed to a geographically wider community of affected constituencies (‘community of interest’). On ‘bribery’ claims, Cass et al (n 92).

Developer-led community benefits have no formal legal basis. The legitimacy of these measures is largely grounded in policy documents, which also address public participation and acceptance.⁹⁵ The Department of Energy and Climate Change (DECC) 2014 *Guidance on Community Benefits for Onshore Wind Developments* sets the principles and engagement best practices for designing and managing community benefits for wind developments in England.⁹⁶ According to the Guidance, community benefits can take a variety of forms, including: funds; benefits in-kind (e.g. in-kind works, direct funding of projects, one-off funding for local energy discount schemes or any other non-necessary site specific benefits); shared ownership schemes, where a community has a financial stake in the project;⁹⁷ socio-economic community benefits (e.g. job creation and training);⁹⁸ and material benefits (e.g. improved infrastructure).⁹⁹ The Guidance clarifies that socio-economic and material benefits are the only types of benefits that can be taken into consideration in the planning process as

⁹⁵ E.g. DTI, *Energy White Paper - Our Energy Future - Creating a Low Carbon Economy* (2003) para 4.36 (stressing that community engagement is crucial ‘in gaining acceptance of new infrastructure’); HM Government (n 55) para 3.34 (stating that, together with community engagement, the government also considers the rolling out of individual projects as a factor to ‘increase the public acceptance of renewable energy projects, such as wind farms’).

⁹⁶ DECC, *Community Benefits from Onshore Wind Developments: Best Practice Guidance for England* (2014) (hereinafter ‘DECC Guidance’).

⁹⁷ Schedule 6 of the Infrastructure Act 2015 provides members of the community the right to buy stakes in local renewable electricity generation facilities. This potentially raises the question of whether these schemes will cease being voluntary benefits.

⁹⁸ While, in some EU Member States, local contracting can be made a condition of the planning authorisation, the current UK procurement framework prevents such an approach (Welsh Assembly Government, *Practice Guidance: Planning Implications of Renewable and Low Carbon Energy Development* (February 2011) para 18.14 (hereinafter ‘Welsh Practice Guidance’).

⁹⁹ DECC Guidance, 8. See also Welsh Practice Guidance, para 18.12.

planning conditions or obligations.¹⁰⁰ As such, they must be necessary, relevant to planning, directly related to the development (including its scale and kind) and reasonable.¹⁰¹ Other forms of benefits ‘are separate from the planning process and are not relevant to the decision, as they are not ‘material’ to the planning process’.¹⁰² In England and Wales, developers have favoured, and increasingly routinized, the provision of community funds, for both onshore and offshore developments.¹⁰³ Despite claiming a broad definition of ‘community’, the Guidance frames it as people living in geographic proximity of the development.¹⁰⁴ The Guidance recommends that the establishment of voluntary community benefits is ‘timely, transparent, constructive, inclusive, fair and unconditional’.¹⁰⁵ Each of these principles bears important challenges. First, the idea that public engagement on community benefits should

¹⁰⁰ On planning conditions, Town and Country Planning Act 1990 c.8, s 70. On planning obligations, (n 79).

¹⁰¹ These tests vary slightly. For the validity of planning conditions, Circular 11/95 – Use of conditions in planning permission. See also *Newbury DC v Secretary of State for the Environment* [1981] AC 578. For the validity of planning obligations, Circular 05/2005: Planning Obligations. See also *R v Plymouth City Council, ex p Plymouth and South Devon Co-operative Society* [1993] JPL 1099 and *Tesco Stores Ltd v Secretary of State for the Environment* (n 81).

¹⁰² DECC Guidance, para 15. The distinction is however not clear cut as the mechanisms can coexist and overlap, leaving some discretion. In this context, S 143 (2)(b) of the Localism Act 2011 allows the local planning authority to take into account ‘any local finance considerations, so far as material to the application’, where there is a direct connection between the intended use of the funds and the development.

¹⁰³ Welsh Practice Guidance, para 18.6.

¹⁰⁴ For a discussion, DTI (n 93) 2009 updated ed. Cft Bristow et al (n 7).

¹⁰⁵ DECC Guidance, 13.

start early in the approval process is relatively well established in policy documents,¹⁰⁶ but has been contested in the literature.¹⁰⁷

Second, despite calls for transparency,¹⁰⁸ information about community benefits remains hard to access. In 2013, the government established a Wind Energy Community Benefits Registry for England, mirroring experiences from Wales and Scotland. As of mid-2016, the Registry only hosts 29 projects, and contains partial information about the benefits and the community engagement process. This seems in line with the point made by Cass et al that ‘despite some attempts at formalization through the production of guidance documents from government [...], little is currently known about the practices of provision and, in particular, about the consequences which then follow for local communities’.¹⁰⁹

Third, the Guidance notably states that ‘[f]air and inclusive engagement principles are supported by academic research pointing out the importance of justice (both procedural and distributional) as a factor that influences social acceptance of wind energy.’¹¹⁰ This reference not only gives a superficial recognition of the complex debate on participation and justice, but also acknowledges that the ultimate goal of participation in the provision of benefits is to achieve social acceptance of the technology more widely.¹¹¹ This connection between

¹⁰⁶ DECC, *Community Engagement for Onshore Wind Developments: Best Practice Guidance for England* (2014); Welsh Practice Guidance, para 18.8, CSE, *The Protocol for Public Engagement with Proposed Wind Energy Developments in Wales* (March 2007).

¹⁰⁷ Cass et al (n 92) arguing that, depending on the timing of the negotiation of the benefits in relation to the planning decision, the benefits could be perceived by the community either as ‘bribery’ or as a form of compensation for damage and associated reparation. Both framings are problematic.

¹⁰⁸ DECC Guidance, 14

¹⁰⁹ Cass et al (n 92), 257-258.

¹¹⁰ DECC Guidance, 13. See also Centre for Sustainable Energy & Garrad Hassan, *Community Benefits from Wind Power: Policy Makers Summary - Report to Renewables Advisory Board and DTI* (2005).

¹¹¹ Cowell, et al (n 90).

provision of benefits and social acceptance of the project is potentially problematic, not only because it is vulnerable to claims of bribery and corruption, but also because it fundamentally shapes the nature and purpose of community participation in the design of the benefits as acceptance.

Finally, even if an individual takes part in the negotiation of benefits, he/she will maintain the right to oppose the development through the planning channels.¹¹² This is necessary to avoid the decision-making process being influenced by external financial conditions unrelated to planning considerations. However, it might accentuate the divide between what is appropriate to discuss in the debate on community benefits and what is not. This approach might artificially isolate the discussion on community benefits within an acceptance model and underestimate their wider political implications.¹¹³

The engagement process is structured in three phases. In the preparation of the benefits, the community should consider ‘how a wind energy development could integrate with the aspirations of the community’ and ‘set out those aspirations in a plan which could inform how community funds in the area might be used’.¹¹⁴ The community itself should also start mobilising and informing people about the projects and how to achieve the community’s aspirations. The developer at this stage must clarify its policy on community benefits, who is engaged and at what level, and provide information about the offer, raising questions about how much the community can say about its terms. In the preparation phase, the broader parameters of the benefits should be discussed, including their forms, geographical area, who should be involved in the negotiation, and how the package might work. This is where a deeper engagement exercise should be undertaken, based on public and open communication.

¹¹² DECC Guidance, 14.

¹¹³ Cowell et al (n 90).

¹¹⁴ DECC Guidance, 20 and 24.

Should the project be approved, the engagement with the community continues in the post-consent phase. Here, the DECC 2014 *Guidance on Engagement for Onshore Wind Developments* supplements the Guidance on community benefits and provides a good example of the relationship between participation and acceptance¹¹⁵ While the *Engagement Guidance* offers best practices and procedures for participation, the ability of the community to influence the substance is less clear. As the scope of community benefits is limited to non-material considerations, unrelated to the authorisation process, concerns with respect to the development are out of question in this forum. As mentioned earlier, this implies that the vision and aspirations of the community can be ‘quantified’ and kept separate from issues directly related to the siting of the infrastructure, such as LVI and place-based values. Engagement is seen as a tool to share technical data on the planning process, impact and distribution of cost and benefits ‘to ultimately help increase social acceptance of the project’.¹¹⁶

The Welsh approach to community benefits for wind energy projects is less structured than the English one. Guidance for best practice, although announced, is yet to be released. In common with the English approach, all policy and industry documents discussing community benefits focus on onshore wind projects, but there is little discussion of community participation. The Welsh government establishes key objectives in this area, including: agree expectations for economic and community benefits in partnership with industry; ensure that the project generates economic benefits for the community; ensure that communities have access to advice, expertise and funding to cooperatively harness appropriate renewable technologies (including wind), and create a mechanism to transparently report the level and

¹¹⁵ DECC (n 106).

¹¹⁶ DECC, *Onshore Wind – Call for Evidence, Part A- Community Engagement and Benefits* (20 September 2012) para 38.

nature of benefits associated with energy developments.¹¹⁷ The latter has been implemented though the establishment of the Welsh Registry of Community Benefits and Engagement.¹¹⁸ The 2005 *Technical Advice Note (TAN) 8* includes minimal information on community benefits for wind developments, but no specific guidance is given to participation within the negotiating process. TAN8 only considers essential that the benefits are ‘negotiated with appropriate and representative persons or bodies’, and ‘channelled through a regulated and properly constituted body or trust (this could include the local authority)’.¹¹⁹ However, there is a strong emphasis on the sustainability and climate integrity of the schemes. TAN8 requires the benefits to be ‘utilised for an agreed range of appropriate uses that would all fall within the definition of sustainable development’ and that ‘at least part of any annual payment benefits should be invested in carbon emissions reduction measures in the local community’.¹²⁰

It is difficult to draw conclusions as to whether the policy guidance of community benefits for onshore wind embeds a model of public acceptance. A lot depends on its application, as the guidance is open to either model. The occasional reference to public acceptance made in the guidance documents might just be an inaccurate terminology within a model of participation. But it might just as well give an insight into a deeper policy attitude, which aims to achieve mere acceptance rather than participation, through the provision of community benefits.

¹¹⁷ Welsh Government, *Energy Wales: A low Carbon Transition* (March 2012) 18. See also Welsh Assembly Government (n 9).

¹¹⁸ Welsh Government, Register of Economic and Community Benefits from Onshore Wind (<<http://gov.wales/topics/environmentcountryside/energy/renewable/wind/register/?lang=en>> accessed 27 April 2016).

¹¹⁹ Welsh Assembly Government, (n 9) Annex B, para 2.3.

¹²⁰ Id.

Without over claiming their analytical role, the two case studies discussed in the next section help thinking about the conceptual nature of participation and the issue of acceptance in the context of mitigation measures and community benefits.

5. Case Studies

The responses of local communities to the development of renewable technologies and the pathways for engagement follow complex dynamics.¹²¹ These incorporate ‘aspects of individual expectation and belief, social processes of interaction and exchange, concerns about decision-making process and fairness, dimensions of technology design and project formulation, and aspects of place, community and history’.¹²² Most of these rationalities have emerged in the authorisation process for the wind NSIPs that I analyse in this section: the *Burbo Bank Extension Offshore Wind Farm* in English territorial waters, and the *Clocaenog Forest Wind Farm* in North Wales. The choice of projects was based on simple criteria of diversity in administrative (England and Wales) and geographic (offshore and onshore) location. It is not suggested here that these case studies allow one to draw conclusions on the presence and implementation of the two models of engagement presented above. However they provide interesting insights on the limited scope for participation and the issue of acceptance, in the context of both mitigating measures and community benefits. These insights will be useful for further investigations and conceptualisations of the models in environmental decision-making

¹²¹ Melissa Leach, Ian Scoones and Andy Stirling, *Dynamic Sustainabilities: Technology, Environment, Social Justice* (Routledge 2010). See also Bell et al (n 91).

¹²² Gordon Walker et al, ‘Symmetries, Expectations, Dynamics and Contexts: A framework For Understanding Public Engagement with Renewable Energy Projects’, in Devine-Wright (n 6) 12-13.

5.1. Burbo Bank Extension Project

The *Burbo Bank Extension* project involves the construction of up to 69 wind turbines and associated offshore infrastructure with a maximum installed capacity of 259 megawatts in the Liverpool Bay.¹²³ It is an extension of an already operational wind farm. During the examination, strong concerns were expressed about its seascape, landscape and visual impact (SLVI), affecting people's experiences of the coastal area.¹²⁴ Interested parties argued that the project would destroy the open space, sea and coastal views and, given existing wind farm developments, 'amount to the victimization of the same people and their communities yet again'.¹²⁵ However, the EA found that, although the rare experiences provided by the coastal area (e.g. 'to walk alone along the beach, to watch shore birds and waders, to take to the sea in a small boat') will be 'significantly changed', this 'does not equate to a finding that the change will occasion unacceptable harm'.¹²⁶ In line with the national policy approach, the EA stated that the adverse impacts were sufficiently low and could be appropriately mitigated, 'so as the proposals' benefits (needed renewable energy) outweigh its harms'.¹²⁷ Indeed, mitigation measures were offered by the developer with respect to impact on ornithology, fish and marine mammals, water quality for shellfish, but they did not address SLVI and place-based values. As part of the consultation on mitigation measures, a resident group, Hoylake Village Life, considered that the provision of a community fund to deliver visual and

¹²³ DONG Energy Burbo Extension, Environmental Statement Volume 2 - Chapter 23: Other Infrastructure and Licenced Activities Document reference: 5.1.2.23 APFP 5(2) (a) (March 2013).

¹²⁴ Planning Inspectorate, *The Planning Act 2008 - Burbo Bank Extension Offshore Wind Farm Examining Authority's Report of Findings and Conclusions and Recommendation to the Secretary of State for Energy and Climate Change*, 26 June 2014, paras 4.7 and 4.12A.

¹²⁵ Ibid, REP-035.

¹²⁶ Ibid, para 4.18.

¹²⁷ Ibid, para 4.19.

environmental enhancement would have mitigated the visual and seascape impact. They requested that the developer fund an aesthetically pleasing physical improvement to the Promenade to counterbalance ‘a “fencing-in” of the horizon when cumulative impact is taken into consideration’.¹²⁸ The developer clarified that they were involved in discussions to that effect, which would progress ‘in their own time and at their own pace’.¹²⁹ Although Hoylake Village Life proposed specific SLVI mitigation measures, the EA dismissed the request, arguing that ‘no clearly articulated mitigation strategy [had] been proposed or requested that would offset the effects of the proposed development and that could be provided for in a planning obligation’.¹³⁰ It noted that the change to the landscape was not different to the one in other areas where mitigation measures had not been required, and it was then not necessary to require any agreement in this sense. Concerns were also expressed with respect to changes in the character of the historic seaside and marine heritage. The EA found that the fact that there was already an existing wind farm meant that the seascape, its location and setting had already been altered and therefore ‘the sensitivity [of the public] to such change [was] reduced’.¹³¹ As a result, it would not cause substantial harm and no mitigation measure was necessary. In this case, the EA and developer’s approach to the provision of mitigation measures is a technical, evidence-based decision. The ability of the community to successfully obtain mitigation measures, especially on SLVI, appears then limited. This is principally explained by the factual impossibility of legitimately demonstrating significance of harm to a community allegedly already used to these types of changes in the landscape. At a conceptual level, this might suggest that community contributions and rationalities cannot

¹²⁸ Ibid, para. 4.121.

¹²⁹ Ibid, para. 4.125.

¹³⁰ Ibid, para 4.138.

¹³¹ Ibid, para 4.164.

legitimately outweigh technical and policy decisions, implicitly framing participation as mere acceptance.

Beyond the planning process, a community fund was established in connection with the Burbo Bank Extension project. This is a 25-year fund providing up to £225,000 each year for the benefits of groups and organisations situated in the area near the coasts in Denbighshire, Flintshire, the Wirral, and Sefton. The fund is provided by the developer, DONG energy, and administered by the national grant-making charity, GrantScape, with the support of a local advisory group composed of a number of councils from the areas that can benefit from the fund. The fund covers a series of projects, including: community building provision and improvements (i.e. Village Halls and Community Centres); environmental and wildlife projects, including projects that create and enhance parks and open spaces; marine and coastal improvement projects; social and community enterprise initiatives, and any other new or existing community project for the benefit of local residents in the funding area.¹³² For the purpose of eligibility to the fund, the relevant community has been identified within 5 km of the coast. A consultation was conducted in December 2014 to allow the local community to participate in the decision on how the fund should be established, funding zones, types of projects and size of grants. The first round of consultation was conducted as an online survey (May-October 2014), while a second was done through a series of local exhibitions organised by the Fund administrator, together with direct engagement with communities. Two observations can be made on the participation opportunities in the decision on this fund. On the one hand, although the consultation is certainly a positive starting point, it appears to channel the areas of participation into pre-defined boundaries. There were only five questions on which members of the community were invited to express their views, and answers had to

¹³² Burbo Bank Extension Community Fund Criteria, available at <<http://www.grantscape.org.uk/fund/burbo-bank-extension-community-fund/criteria/>> accessed 27 April 2016.

be chosen from a limited number of options. On the other hand, the selection of successful projects is prima facie made by the fund administrator on eligibility criteria and then by the advisory group composed by Councils' representatives and the developer. The criteria for assessment are: the level of community support for and involvement in the project; the local community benefits (social, economic and environmental) resulting from the project; the sustainability and legacy of the project; the ability of the applicant to deliver the project and its value for money.¹³³ But these criteria do not seem to have been subject to the consultation. This suggests that the approach to mitigation and community benefits might be more aligned with a model of engagement aimed at achieving acceptance than with a participation model.

5.2. Clocaenog Forest Wind Farm Project

The *Clocaenog Forest Wind Farm* project involves the construction and operation of up to 32 wind turbines, with a capacity of between 64 and 96 megawatts at Clocaenog Forest, in North Wales. The EA report on the proposal is striking in its deference to the NPSs and their presumption in favour of the development. From the outset, the EA report recognised 'an urgent national need established in national policy [...] to deliver new renewable energy generation capacity of the sort proposed for Clocaenog Forest'.¹³⁴ It noted that, 'if a development is in accordance with the NPS, the decision-maker should start with a presumption in favour of that development,'¹³⁵ which could only be outweighed by 'a significant level of harm to interests of acknowledged importance'.¹³⁶ However, the report

¹³³ Fund Criteria (n 132).

¹³⁴ The Planning Inspectorate, *The Planning Act 2008 - the Clocaenog Forest Wind Farm Examining Authority's Report of Findings and Conclusions and Recommendation to the Secretary of State for Energy and Climate Change*, 12 June 2014, para 3.27.

¹³⁵ Ibid.

¹³⁶ Ibid, para 4.17.

reflects the EA's dilemma in accommodating the presumption with the recognition of significant impact of the project and public concerns.

In the report, the multiple impacts on landscape were considered to be 'significant and far ranging'.¹³⁷ However, the EA did not deem them to be unreasonable as the national policy anticipates such impacts 'as a necessary consequence' of large scale wind farm developments.¹³⁸ The visual impact was also judged to be significant, but not sufficient to prevent the development. This is not surprising in light of the general approach to balancing interests. While in some cases mitigation was not required as the impact was not deemed significant; in others it was simply not possible, such as the potential impact upon the 'tranquillity' of the forest. This impossibility is not only due to technical issues, but also to prevailing national policy interests. This is particularly evident in the context of proposed changes to the design of the turbines. Local objections based on LVI focused on the significant height of the turbines (145 m).¹³⁹ Mitigation measures had been proposed by some interested parties that the height of the turbines be reduced to align with other wind farms consented in the area (100-120m). The EA found that 'mitigation in the form of reduction in scale would significantly reduce the contribution of this project and undermine the purpose for which it is proposed'.¹⁴⁰ A similar approach was taken with respect to mitigation of noise of the development. In that case, the EA noted that noise reduction technologies 'would reduce energy output, which seems to be a pointless exercise if the objective is to enable more wind turbines to be constructed.'¹⁴¹ Interestingly, some mitigation measures were agreed through planning obligations in order to mitigate the impact of the development on

¹³⁷ Ibid, para 8.40.

¹³⁸ Ibid, 8.40.

¹³⁹ Ibid, REP WR_002; WR_003; WR_004; WR_008; WR_009; WR_010 and WR_013.

¹⁴⁰ Ibid, para 4.81.

¹⁴¹ Ibid, para 4.137.

TV receptors.¹⁴² Unlike LVI or noise, the EA found that there was actually no evidence that the development would have a significant impact upon TV reception. Yet the developer decided to enter into an agreement to that effect.

A community benefit package for the *Clocaenog Forest Wind Farm* project has been offered by the developer, RWE Innogy. The original proposal consisted of a Community Benefits Fund of up to £480,000 per annum, alongside an Economic Development Trust Fund worth up to £288,000 for each year of the site operation (index linked and subject to final installed capacity). Here the developer employed a private consultant to explore the socio-economic benefits of the proposal, including the potential structure of the package, and then the Rural Development Agency and local authorities were involved to consider ‘how best to continue to involve local communities in the development of the fund’.¹⁴³ But there is no information available on the parameters, scope and eligibility criteria of the fund. It has been indicated that consultation will be conducted, but, compared to the *Burbo Bank Extension* project, no detail has been published thus far.

It is difficult to draw conclusions on whether a model of participation or acceptance was dominant in *Clocaenog*. However the way in which the EA dismissed the proposals made by the community with respect to mitigation measures and alternative design suggests that the ability for the public to influence decisions was limited vis-à-vis predetermined national policy decisions, pointing to a preference for an acceptance approach. More ambiguous is the approach to community engagement in the negotiation of community benefits, where the lack

¹⁴² Completed section 106 agreement between RWE Innogy UK Limited, the Welsh Ministers, Denbighshire County Council and Conwy County Borough Council (11 March 2014).

¹⁴³ RWE Innogy UK, *Local Benefits*, available at <<http://www.rwe.com/web/cms/en/306204/rwe-innogy/sites/wind-onshore/united-kingdom/in-development/local-benefits/>> accessed 27 April 2016.

of information on the details of the benefit package makes the conceptual nature of participation in this context inevitably blurred.

6. The (Persuasive) Role of Planning Law and the Potential Community Benefits

Thus far I have suggested that public acceptance models in environmental decision-making openly challenge the conceptual nature of participation as deliberative, consensus-based public dialogue aimed at reaching better-quality decisions through the value of individual rationalities. But they also tend to shape, or potentially even sideline, the role of law in providing opportunities for such dialogue.¹⁴⁴ This is because proceduralization of participatory rights within models of acceptance is mostly framed as validation of national policy objectives and expert advice, rather than enabling public contributions to be heard by decision-makers.

I argue here that the tension between the participatory requirements under the Planning Act 2008 and the objectives of NPSs, as well as the practice of the Examining Authority, with respect to major wind infrastructure in England and Wales reflect a vision of planning law as persuasion, or indeed acceptance.¹⁴⁵ The model of engagement embedded in the planning framework under which the *Clocaenog Forest Wind Farm* and *Burbo Bank Extension* projects were decided seems to align with the paradigm of ‘decide-announce-defend’.¹⁴⁶ Although the language of acceptance is not always explicit, a virtually unconditioned presumption in favour of development implies that the public must accept these decisions. A

¹⁴⁴ Cft Elizabeth Fisher, *Risk Regulation and Administrative Constitutionalism* (discussing how the debate on risk decision-making might sideline the role of law).

¹⁴⁵ Barry and Ellis (n 87).

¹⁴⁶ Maarten Wolsink, ‘Planning of Renewable Schemes: Deliberative and Fair Decision-Making on Landscape Issues Instead of Reproachful Accusation of Non-Cooperation’, (2007) 35 (5) *Energy Policy* 2692.

‘pro-development bias’ is not a new phenomenon in planning law and raises complex issues, especially from a public participation perspective.¹⁴⁷ As a minimum, it dismisses the importance of place-based values and cultural rationalities, and their role in people’s willingness to support a specific infrastructure development in their local areas.¹⁴⁸ From this perspective, a ‘decide-announce-defend’ pattern is likely to lead to conflicts and public mistrust.¹⁴⁹ Nor does it empower those in favour of the project, who may be discouraged from expressing their support.¹⁵⁰

This approach is problematic, not only on procedural and substantive grounds, but also as it disregards the participatory potential of the planning law system. The planning process is inevitably a multifaceted and complex social process, which ‘carries value and expresses power’.¹⁵¹ Supporting a deliberative approach to planning, Healey notes how this is deeply

¹⁴⁷ See Antonia Layard, ‘Planning and Environment at a Crossroads’ (2002) 14 *Journal of Environmental Law* 401, 402 (referring to the Heathrow’s Terminal 5 case). See also Susan Owens and Richard Cowell, *Land and Limits: Interpreting Sustainability in the Planning Process* (Routledge 2002) (discussing the presumption in favour of development in UK planning in the 1990s).

¹⁴⁸ Patrick Devine-Wright, ‘From Backyards to Places: Public Engagement and the Emplacement of Energy Technologies’ in Devine-Wright (n 6) 66 – 67.

¹⁴⁹ Among many, Gordon Walker, ‘Renewable Energy and the Public’ (1995) 12 *Land Use Policy* (1) 49; Maarten Wolsink, ‘Wind Power and the NIMBY-Myth: Institutional Capacity and the Limited Significance of Public Support’ (2000) 2(10) *Renewable Energy* 49; Claire Haggett and Geoff Vigar, ‘Tilting at Windmills? Understanding Opposition to Wind Farm Applications’ (2004) 73(10) *Town and Country Planning* 288; Susanne Agterbosch et al, ‘The Relative Importance of Social and Institutional Conditions in the Planning of Wind Power Projects’ (2009) 13(2) *Renewable and Sustainable Energy Reviews* 393.

¹⁵⁰ Martin Pasqualetti, ‘Wind Energy Landscapes: Society and Technology in the California Desert’ (2001) 14 *Society and Natural Resources* 689-699, referred in Haggett (n 74) (discussing the difficulties of unwrapping ‘public silence’).

¹⁵¹ Patsy Healey, *Collaborative Planning* (2nd ed. Palgrave Macmillan, 2006) 84.

‘embedded in the specific contexts, through the institutional histories of particular places and the understandings that are brought forward by the various participating groupings, and the processes through which the issues are discussed.’¹⁵² From this perspective, many have recognised the potential of planning in providing a space for dialogue about environment and development.¹⁵³ Among them, Owens and Cowell stress the ability of planning to provide a forum for dialogue in which citizens collectively might choose outcomes that differ substantially from those reflecting the aggregation of preferences in market logic.¹⁵⁴ In this more deliberative framing, planning could be seen as a space for discussion and promotion of different perspectives of the common good.¹⁵⁵ By providing a platform for dialogue across expert knowledge, political power and lay public rationalities, the planning process could constitute a preferred forum for learning and participation.¹⁵⁶ Although participation entails difficult challenges, a vision of planning processes as a tool for persuasion to accept decisions already made denies its original role of ‘deciding whose voice should be heard in determining these issues and, ultimately, whose voice should count’.¹⁵⁷ In light of this debate, it should not be surprising that calls for institutional reform and re-design in various forms have

¹⁵² Ibid, 86.

¹⁵³ See Yvonne Rydin and Mark Pennington, ‘Public Participation and Local Environmental Planning: The Collective Action Problem and the Potential of Social Capital’ (2000) 5 (2) *Local Environment* 153; Owens and Cowell (n 147); Claire Haggett, ‘Public Engagement in Planning for Renewable Energy’ in Simin Davoudi, Jenny Crawford, and Abid Mehmood (eds) *Planning for Climate Change – Strategies for Mitigation and Adaptation for Spatial Planners* (Earthscan 2009).

¹⁵⁴ Owens and Cowell (n 147). For a critique of aggregation of preferences, Sagoff (n 36).

¹⁵⁵ Patrick McAuslan, ‘The Ideologies of Planning Law’ (1979) 2 *Urban Law and Policy* 1.

¹⁵⁶ Richard Cowell and Susan Owens, ‘Governing Space: Planning Reform and the Politics of Sustainability’ (2006) 24(3) *Environment and Planning C-Government and Policy* 403.

¹⁵⁷ Yvonne Rydin, *The Purpose of Planning – Creating Sustainable Towns and Cities* (Policy Press 2011) 10.

emerged.¹⁵⁸ The removal of decision-making on major onshore wind energy projects from central government to local planning authorities could be seen as an example of such institutional re-design. In anticipation of this change, the government indicated that ‘when considering a planning application for wind turbines in their area, councils should only grant permission if: the site is in an area identified as suitable for wind energy as part of a Local or Neighbourhood Plan; and following consultation, the planning impacts identified by affected local communities have been fully addressed and therefore the proposal has their backing’.¹⁵⁹

Yet, if changes in listening and participation are not considered, a shift in the level of decision-making may result in a simple reverse of the outcome, though a shift from a ‘presumption in favour’ to a ‘presumption against’. Localism in decision-making on wind could be welcomed, not only by those in favour of more local control and influence, but also by those opposing wind farm developments altogether. It could ultimately be perceived as a fundamental discharge of responsibility for decision-making from central government to local authorities on a too complex policy dilemma. This makes the question of the nature of participation, and of the models of engagement, preliminary to the question of direction of policy change.

Reflecting on the participatory potential of the planning law system, the discussion on mitigation of impacts would offer an interesting platform for catalysing public participation.

¹⁵⁸ Haggett (n 6); Rydin and Pennington (n 153).

¹⁵⁹ House of Commons: Written Ministerial Statement (HCWS42) - DCLG Written Statement made by Secretary of State for Communities and Local Government (Greg Clark) on 18 Jun 2015. This policy shift on onshore wind energy is accompanied by the government commitment to end new subsidies for onshore wind farms by legislating the closure of the Renewables Obligation across Great Britain for new onshore wind generating stations. (House of Commons: Oral Statement made by Secretary of State for Energy and Climate Change, Amber Rudd, on Monday 22 June 2015 on onshore wind subsidies. See also Queen Speech 2015, at 31).

Through exchange of multiple knowledge and opinions about values and alternatives between all stakeholders involved, the debate on mitigation measures might provide a useful participatory space within the wider decision-making in planning. Acknowledging and strengthening the participatory orientation of mitigation measures within planning would therefore not only valorise different knowledges and perspectives in dealing with the impacts of the project, but also enable the local community to influence ‘how’ the project should be implemented, beyond ‘whether’ it should be carried out. An approach that emphasises the participatory element of decisions on mitigation measures would therefore be appealing to move beyond logic of acceptance, while still addressing the climate change mitigation imperative through climate change infrastructure development.

Calls for greater participation in decision-making might also legitimately lead to the investigation of alternative fora for enabling substantive public influence in the decision-making process on, at least, the distribution of impacts and benefits.¹⁶⁰ This broader approach to participation and its loci might attract the debate on community benefits within the conceptual discussion about the nature of participation and the models of engagement. As discussed in section 4, in acceptance logic, community benefits are – rather uncritically¹⁶¹ - viewed as the primary tool to obtain public support and expedite the planning consent for large scale wind energy infrastructure, rather than a residual opportunity to enable participation on the distribution of costs and benefits associated with the project.¹⁶² The potential for participation in the elaboration of community benefits to shape attitudes towards

¹⁶⁰ Black, part II (n 22) 37 (arguing that advocating for greater participation is a point of departure rather than a conclusion).

¹⁶¹ Cowell et al (n 90).

¹⁶² See HM Government, *The UK Renewable Energy Strategy* (2009).

the development is therefore dismissed.¹⁶³ And yet, the ability to negotiate voluntary community funds could in theory provide a counterbalance, by offering a forum for the negotiation of ways to deal with communities' concerns that have not been (or cannot be) dealt with in the planning system, and allow the 'emplacement' of the project with the social aspirations of the community.¹⁶⁴ In the contingency of the individual projects, proposals for mitigation measures against LVIs and noise that are dismissed by the EA could be dealt with via funding of community benefits to address them, as far as possible. In this event, models of acceptance in planning decisions could be redirected toward more participatory approaches through an ad-hoc dialogue between the developer and the local community as part of the negotiation of benefit packages. But this would be far from straightforward. As shown in the context of the *Clocaenog Forest Wind* project, in many cases there is still insufficient and fragmented information about the elements of the funds agreement and the level of community participation. Moreover, community funds follow a voluntary, ad-hoc process where the type of concerns and expectations are difficult to track in a consistent way. Importantly, the struggle with community benefits is to identify what interests prevail and to what extent people expressing concerns in the planning process are not only able, but also willing, to engage in the design of community benefits. The idea that community benefits could be viewed as bribery is certainly strong and difficult to rebut in many circumstances, leading back to an acceptance model. In these cases, objectors might be kept away from the negotiating process. This raises the question of whether the concerns that could not be taken into account in the planning process can instead be captured in the criteria and parameters for

¹⁶³ Mhairi Aitken, 'Wind Power and Community Benefits: Challenges and Opportunities' (2010) 38 *Energy Policy* 6066; Benjamin JA Walker, Bouke Wiersma, Etienne Bailey, 'Community Benefits, Framing and the Social Acceptance of Offshore Wind Farms: An Experimental Study in England (2014) 3 *Energy Research & Social Science* 46.

¹⁶⁴ Devine-Wright (n 6).

the fund, through participation in the decisions on how the fund is operated and fits with the community's expectations. As the provision of benefits is separate from the planning examination and the opinions expressed there, there is little scope for the fund to engage with opinions raised in that setting. However, community benefits are flexible schemes that could perform a useful function by providing the hosting community with a residual opportunity to effectively re-localise benefits and (re)open the debate about their expectations and values. The eligibility of projects for the creation and enhancement of parks and open spaces, or of marine and coastal improvements in the Burbo Bank Extension Community Fund could, for instance, be interpreted as an implicit response to the concerns expressed by Hoylake Village Life. From this perspective perhaps there is a window to frame community benefits as an alternative, although partial, mechanism for long-term, ad-hoc participation and recursive dialogue, beyond mere acceptance.

7. Conclusions

There is no doubt that the conceptual nature of public participation in environmental decision-making is complex and ambiguous. Although individuals have the right to participate in decisions affecting their world, there is a clear tension between the procedural right to participate and be consulted and the extent to which individual rationalities and values are able to shape public decisions. Indeed as argued by Arnstein 'there is a critical difference between going through the empty ritual of participation and having the real power needed to affect the outcome of the process'.¹⁶⁵

This article has offered a reflection on how this tension might affect the conceptual nature of participation and the models of engagement in environmental decision-making. The

¹⁶⁵ Arnstein (n 18) 2.

notion of participation as deliberative public dialogue and influence clashes fundamentally with a model of public acceptance, whereby participants are simply asked to accept and validate decisions already made. Certainly the dichotomy between deliberative and rationalist-administrative decision-making is not new. However, putting an emphasis on issues of framing the nature of participation as acceptance is a useful perspective to recast the way in which lawyers think about these issues. From this perspective, the case of wind energy infrastructure provides some useful insight into the often implicit prominence of models of engagement based on acceptance. Limits on engagement can be taken for granted in the decision as to whether to grant development consent or not. But the limited opportunities for participation in mitigation measures and community benefits presented in the article might be read as taking an acceptance model of participation still further. However, it has been argued that there is more in the mitigation element of planning law and community benefits than mechanisms to serve an acceptance rationale of public engagement. As they respectively have the significant potential to catalyse participation as collaborative problem-solving and constitute an alternative forum for deliberative public dialogue, they might turn from being an expression of the problem to being the beginning of the solution.

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