

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

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 constrained by technical risk assessment, cost-benefit analysis

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

2 Frans Coenen, Dave Huitema, Laurence 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).

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 limits the reasons to be taken into account in the decision-making process, and used in turn to justify the decision.⁴ This tends to frustrate the ability of the public to influence. 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 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.

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 engagement.⁷ The decision as to

3 Brian Wynne, ‘May the Sheep Safely Graze? A Reflexive View of the Expert-Lay Public Divide’, in Scott Lash, Bronislaw Szerszynski and 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).

5 Melissa Leach and Ian Scoones, ‘Science and Citizenship in a Global Context’ in Melissa Leach, Ian Scoones and 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 Hagggett, ‘“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 and others, ‘Public Participation and Climate Change Infrastructure’ (2013) 25 JEL 33.

7 Lee and others, *ibid.* See also Yvonne Rydin, Maria Lee and Simon Lock, ‘Public Engagement in Decision-Making on Major Wind Energy Projects’ (2015) 27 JEL 139.

whether to grant consent to major wind farm developments could fairly uncontroversially be described as a public acceptance model. Beyond the consent decisions, the decision-making process on how to mitigate the impact of the development and on the provision of benefits to the affected community could provide participatory space. However, 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 towards 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,⁸ 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.⁹ Section 4 explores the ways in which participation is framed in the Planning Act 2008;¹⁰ the National Policy Statements (NPSs) on energy and the Community Benefits Guidance for wind energy for England and Wales.¹¹ To complement the analysis, section 5 concentrates on the 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 a turn towards a model 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’,¹² in 2015 the current government decided ‘to give local communities the final say on windfarm applications’.¹³ This has been implemented by removing onshore wind farms above 50 megawatts from the list of Nationally Significant Infrastructure Projects (NSIPs), and therefore exempting them from obtaining development

8 *Eg Hereford Waste Watchers Ltd v Hereford Council* [2005] EWHC 191 Admin (clarifying that mitigating measures must be considered to decide whether a process or activity has significant environmental effects); *Belleway Urban Renewal v Gillespie* [2003] EWCA Civ 400 (CA) (on mitigation measures as planning conditions).

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

10 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.

11 Existing planning guidance for England or planning policy and advice issued by the Welsh Assembly Government relevant to renewables (eg Department of Communities and Local Government, *National Planning Policy Framework* (2012); Welsh Assembly Government, *Planning Policy Wales, Technical Advice Note 8 – Planning for Renewable Energy* (July 2005) and Chief Planning Officers letters will not be systematically analysed here. This is because, although these are relevant to the decision, ‘[w]hether an application conforms [with them] will not, in itself, be a reason for approving or rejecting the application.’ (Department for Energy and Climate Change, *National Policy Statement – Renewable Energy Infrastructure* (‘EN-3’) (2011) [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)).

12 Conservative Party, *The Conservative Party manifesto 2015: Strong leadership. A Clear Economic Plan. A Brighter, More Secure Future* (Conservative Party 2015) 59.

13 Cabinet Office and Her Majesty The Queen, *The Queen’s Speech 2015* (London, 27 May 2015) 30.

consent by the Secretary of State.¹⁴ Removing these projects from the NSIPs list will transfer consenting powers for all onshore wind farms, including large developments, to local planning authorities.¹⁵ At first glance, this adjustment represents an important step to reject public acceptance approaches and reaffirm a commitment to public participation. 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. This new legal and policy context of decentralisation of decision-making for major onshore wind farms inevitably makes this article partially backward looking. However, 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, and are generally based upon overlapping justifications.¹⁶ A turn to participatory procedures is inherent in the quest for democratic legitimacy of decision-making processes and their outcomes.¹⁷ 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. Such processes include: voting and aggregation of individual preferences in constitutional democracies;¹⁸ consultation processes and cost-benefit analysis in liberal systems¹⁹ and dialogue and communication of rational arguments and transformation of participants' views in deliberative models.²⁰

14 Infrastructure Planning (Onshore Wind Generating Stations) Order 2016 (SI 306/2016). See also s 78 Energy Act 2016 (c.20).

15 For Wales, consenting powers were subsequently transferred to the Welsh Ministers to align with the Planning (Wales) Act 2015. See Developments of National Significance (Specified Criteria and Prescribed Secondary Consents (Wales) (Amendment) Regulations 2016 (SI 358/2016).

16 Barry Barton, 'Underlying Concepts and Theoretical Values in Public Participation in Resources Development' in Donald 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 *Land Use Policy* 95.

17 Robert Summers, 'Evaluating and Improving Legal Processes A Plea for Process Values' (1974) 60 *Cornell L Rev* 1.

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

19 Cass Sunstein, 'The Cost-Benefit State' (1996) Coase-Sandor Institute for Law & Economics Working Paper No 39. <http://chicagounbound.uchicago.edu/law_and_economics/498/> accessed 29 August 2016.

20 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: James Bohman and William Rehg

Across these models, the nature and impact of participation varies and these variations affect the way in which law and regulation embrace calls for democratization.²¹ According to deliberative democracy theories, the legitimacy of a decision derives from a participatory 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’.²² The notion of deliberative participation resonates powerfully within environmental law and governance.²³ Although occasionally contested,²⁴ proceduralisation of environmental regulation has been extensively discussed as an attractive mechanism to enable participation, regulatory flexibility and responsiveness.²⁵

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,²⁶ decisions based on wider values and experience tend to be qualitatively superior in terms of environmental performance and protection.²⁷ Indeed, the judgement about the substantive quality of a participatory decision—and consequential success or failure of regulation—is ultimately normative.²⁸ 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.²⁹ 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 democratisation of environmental administration.³⁰ As I argue in the

(eds), *Deliberative Democracy – Essays on Reason and Politics* (MIT Press 1997); John Dryzek, *Deliberative Democracy and Beyond: Liberals, Critics and Contestation* (OUP 1990).

- 21 Sherry Arnstein, ‘A Ladder of Citizen Participation’ (1969) 35 *J of American Institute of Planners* 216 (on the graduations in the citizens’ ability to affect the outcome of the decision-making through participation).
- 22 Simone Chambers, ‘Deliberative Democracy Theory’ (2003) 6 *Ann Rev of Political Science* 307, 309.
- 23 Graham Smith, *Deliberative Democracy and the Environment* (Routledge 2003); John Parkins and Ross Mitchell, ‘Public Participation as Public Debate: A Deliberative Turn in Natural Resource Management’ (2005) 18 *Society and Natural Resources* 529.
- 24 Robert Goodin, *Green Political Theory* (Polity Press 1992). cf Dobson (n 5) and Brian Doherty and Marius de Geus (eds), *Democracy and Green Political Thought: Sustainability, Rights, and Citizenship* (Routledge 1996).
- 25 Karl-Heinz Ladeur, ‘Coping with Uncertainty: Ecological Risks and the Proceduralization of Environmental Law’ in Gunther Teubner, Lindsay Farmer and 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 Joanne Scott (eds), *Constitutional Change in the EU: From Uniformity to Flexibility* (Hart Publishing 2000) 259; Julia Black, ‘Proceduralizing Regulation - Part I’ (2000) 20 *OJLS* 597; and Julia Black, ‘Proceduralizing Regulation- Part II’ (2001) 21 *OJLS* 33.
- 26 Sheila Jasanoff (ed), *States of Knowledge – the Co-Production of Science and Social Order* (Routledge 2004).
- 27 Alan Irwin, *Citizen Science: A Study of People, Expertise and Sustainable Development* (Routledge 1995).
- 28 Jenny Steele, ‘Participation and Deliberation in Environmental Law: Exploring a Problem-solving Approach’ (2001) 21 *OJLS* 415. See also Robert Baldwin and Julia Black, ‘Really Responsive Regulation’ (2008) 71 *MLR* 59.
- 29 Steele *ibid*.
- 30 John Dryzek, *The Politics of the Earth* (3rd edn, OUP 2012).

next section, procedural and substantive rationales determine the nature of participation as a deliberative public dialogue through participatory models of engagement.

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.³¹ From this perspective, participation constitutes a principle of good governance and agency practice.³² 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.³³ Although important, this rationale is more likely to frame participation within the boundaries of established agency practices and policy objectives. I argue that this renders the influence of multiple knowledges 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.³⁴ National, European Union (EU) and international law institutionalise individuals' rights to be informed, participate (mainly through consultation) and seek judicial redress with respect to environmental decision-making.³⁵ Public participation is an essential requirement for the 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.³⁶

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 legal right to participate does not capture the incongruences and persistent myths entrenched in its practice and policy context.³⁷ Although it would be naïve to dismiss the role of 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

31 Dan Bloomfield and others, 'Deliberation and Inclusion: Vehicles for Increasing Trust in UK Public Governance?' (2001) 19 *Environ Plan C - Gov Pol* 501. Cf Elizabeth Fisher, 'Drowning by Numbers: Standard Setting in Risk Regulation and the Pursuit of Accountable Administration' (2000) 20 *OJLS* 109.

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

33 Royal Commission on Environmental Pollution (RCEP), 23rd Report - Environmental Planning (Cm 545, London 2002) ch 5.

34 Lee and others (n 6).

35 Eg 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, 7, 8 and 9. For a critical analysis, Maria Lee and Carolyn Abbott, 'The Usual Suspects? Public Participation under the Aarhus Convention' (2003) 66 *MLR* 80.

36 European Parliament and Council Directive 2001/42/EC of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment [2001] *OJ L197/30* (SEA Directive), art 6; European Parliament and Council Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment (codification) [2011] *OJ L26/1*, as amended (EIA Directive) art 6.

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

scientific facts, making their values and rationalities ill-suited to justify decisions.³⁸ These techno-scientific rationalities often squeeze out socio-cultural values from the realm of what counts as a 'good reason' for a decision.³⁹ 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.⁴⁰ This has become evident in many areas of environmental regulation and new technologies (eg genetically modified organisms (GMOs), nanotechnologies, chemicals), including more recently climate change technologies, such as wind energy.⁴¹ 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, as explained next.

3. 'PUBLIC ACCEPTANCE' MODELS OF ENGAGEMENT

I am particularly concerned here with an overlooked, and yet profoundly significant, difference between 'public participation' and the less recognised idea of 'public acceptance' in decision-making. While the legal literature hardly engages with the notion of social acceptance,⁴² a vast social science scholarship uses this term to refer to the response of local communities to technological development.⁴³ 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'.⁴⁴ 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 of achieving public acceptance of the decision.⁴⁵ While both models acknowledge the importance of citizens' engagement in the process, they fundamentally differ in

38 Frank Fischer, *Citizens, Experts and the Environment* (Duke UP 2000). cf Cass Sunstein, *Risk and Reason: Safety, Law and the Environment* (CUP 2002).

39 Sheila Jasanoff, *Designs on Nature – Science and Democracy in Europe and the United States* (Princeton UP 2007); Maria Lee, 'Beyond Safety? The Broadening Scope of Risk Regulation' (2009) 62 CLP 242.

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

41 Lee and others (n 6).

42 Eg Neil Popovic, 'The Right to Participate in Decisions That Affect the Environment' (1993) 10 *Pace Env L Rev* 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 *Ybk of Intl Env L* 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 *JLS* 321).

43 Eg Rolf Wüstenhagen, Maarten Wolsink and Mary Jean Bürer, 'Social Acceptance of Renewable Energy Innovation: An Introduction to the Concept' (2007) 35 *Energy Policy* 2683 (distinguishing between socio-political, community and market acceptability).

44 Amy Wolfe and others, 'A Framework for Analysing Dialogue Over the Acceptability of Controversial Technologies' (2002) 27 *Sci Technol Human Values* 134.

45 Depending on what we mean by acceptance, it is conceivable that a public acceptance model might be liberative. 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

terms of how participation is conceptualised and what is understood as the objectives of such engagement.

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 complementary response to technocratic arguments.⁴⁶ 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 contribution of individual rationalities to the decision-making, while also democratising the process, based on substantive and procedural rationales for participation.⁴⁷ In her account of participation in regulatory processes, Black notes how proceduralization of participation can take two forms: 'bargaining and voting of interest group pluralism', characteristic of liberal democracy ('thin proceduralization') or a process 'oriented towards the mutuality, consensus and intersubjective understanding of deliberative democracy' ('thick proceduralization').⁴⁸ She argues that deliberative forms of proceduralisation enable fuller participation, and should be strengthened.⁴⁹ This normative theory of participation builds on the distinction between people as consumers motivated by individual interests, and people as citizens driven by values.⁵⁰ The tension between these overlapping stimuli is not new and characterises the contested nature of participation in environmental law or in planning.⁵¹ 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.

In contrast, a public acceptance model implicitly views the lay public as a barrier, irrational, scientifically ignorant and emotional.⁵² 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.⁵³ 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.⁵⁴ Following this interpretation, achieving public acceptance in

Construction of "Expert" and "Lay" Knowledges' (2009) 18 *Sci Culture* 47. However, my model of acceptance lacks of deliberative character.

46 Fischer (n 38). On the notion of 'multiple knowledges', Margherita Pieraccini, 'Rethinking Participation in Environmental Decision-Making: Epistemologies of Marine Conservation in South-East England' (2015) 27 *JEL* 45.

47 See Arnstein (n 21).

48 Black, 'Part I' (n 25) 599.

49 Black, 'Part II' (n 25). Building on this analysis, Pieraccini (n 46) and Steele (n 28).

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

51 Eg RCEP, 21st Report – Setting Environmental Standards (Cm 4053, London, 1998) on interests and values; RCEP (n 33) [5.17] emphasising the importance of deliberative processes.

52 Wynne (n 3).

53 Haggett (n 6).

54 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

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 them. 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 than the citizens or producer/consumer in social problem-solving, and which stresses the relationships of hierarchy rather than equality or competition'.⁵⁵

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, 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 and others 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.'⁵⁶ In this sense, by seeing legal compliance as a mere bureaucratic hurdle, the role of law could be marginalised by other objectives (eg climate change mitigation, energy security). Acceptance is also more fragile because, by closing down the decision-making process to 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 energy is a good case study in which 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% greenhouse gas emission reduction by 2050; energy security; and competitiveness, cost-efficiency and affordability of energy supply.⁵⁷ To meet its national and EU targets, 15% of total energy consumption (transport, electricity and heat) is to come from renewable sources by 2020.⁵⁸ In this scenario, the Committee on Climate Change

'validation' of problems, rather than engaging in a more fundamental discourse on societal contexts and values, which requires further deliberative steps.

55 Dryzek (n 30) 75.

56 Lee and others (n 6) 61.

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

58 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*

argues that wind energy technologies represent one of the most promising options for decarbonising electricity generation, together with carbon capture and storage and nuclear energy.⁵⁹ The Overarching National Policy Statement for Energy (NPS EN-1) embraces this approach stating that '[t]he need for new renewable electricity generation projects is [...] urgent.'⁶⁰ The specific National Policy Statement on Renewable Energy Infrastructure (NPS EN-3) reiterates this emphasis.⁶¹ 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 participation in decisions on measures to mitigate the impact of the proposed development. It then looks into the guidance documents on community benefits for wind developments, as an underutilised space for participation outside the authorisation process.

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 from the Secretary of State (SoS) under the Planning Act 2008.⁶² The NPS EN-1 and EN-3 set the policy context for evaluating applications, and the Examining Authority (EA) within the National Infrastructure Directorate of the Planning Inspectorate was required to give substantial weight to the contribution of the project to the NPSs objectives.⁶³ 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.⁶⁴ The local authority is to be consulted on the draft Statement Of Community Consultation (SOCC). A SOCC constitutes the main document informing the consultation process with people living in the vicinity of the land where the project will be sited.⁶⁵ The applicant must take into account the responses and publish the proposal, as well as the SOCC.⁶⁶ In the examination phase, interested parties can make representations to the EA.⁶⁷ During this phase, the local authority can submit a Local Impact Report and interested parties are entitled to comment on it.⁶⁸ A report of the examination is then produced, including non-binding

Climate and Energy (July 2009); and DECC, *Planning Our Electric Future: a White Paper for Secure, Affordable and Low Carbon Electricity* (July 2011).

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

60 DECC, *National Policy Statement- Overarching Energy* ("EN-1") (2011) [3.4.5] and [2.3.2].

61 DECC (n 11) [1.3.1].

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

63 DECC (n 11) [3.1.4].

64 Planning Act 2008, ss 42 and 43.

65 *ibid* s 47.

66 *ibid* s 49.

67 *ibid* s 88, 90 and 93.

68 *ibid* s 56 and 60.

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.⁶⁹ 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.⁷⁰

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.⁷¹ This information and a non-technical summary must be made available to the public within a reasonable time to provide them with opportunities to express their opinions before the development consent is granted.⁷² 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.⁷³

In analysing the relationship between policy objectives and participation in the approval for major wind projects, Lee and others 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.⁷⁴ In the light of the more compelling national priority for decarbonisation and energy security, issues related to landscape and visual impact (LVI), noise and 'place-based values'⁷⁵ are not in themselves legitimate reasons for turning down the application, except in special circumstances.⁷⁶ This limited scope for participation might reflect a model of engagement that emphasises public acceptance over public participation. 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.⁷⁷ These include seascape,

69 *ibid* s 104.

70 *ibid* s 105.

71 EIA Directive (n 36) art 5. DECC (n 60) para 4.2.2.

72 *ibid* art 6.

73 *ibid* arts 6(2), 8 and 9.

74 Lee and others (n 6) and Rydin Lee and Lock (n 7).

75 *ie* '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 JEL 223, 226.

76 DECC (n 60) [5.9.10] and [5.11.13]. See also (n 71).

77 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 75); Claire Hagggett, 'Over the Sea and Far Away? A Consideration of the Planning, Politics, and Public Perception of Offshore Wind Farms' (2008) 10 J of Env Pol Plan 289; Karen Scott, 'Tilting at Offshore Windmills: Regulating Wind Farm Development Within the Renewable Energy Zone' (2006) 18 JEL 87.

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.⁷⁸ These are measures aimed ‘to avoid, prevent or reduce and, if possible, offset likely significant adverse effects on the environment’.⁷⁹ Mitigation can include avoidance (eg avoiding certain areas), moderation (eg noise barriers), rescue (eg transfer of species), repair (eg reinstatement of plants and animals) and compensation for environmental loss⁸⁰ (eg donating or creating substitute habitat areas, or shadow projects⁸¹). Opportunities for the public 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.⁸² In planning terms, mitigation measures can be regarded as material considerations for the decision.⁸³ 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.⁸⁴ In many cases, though, the ability of the public to effectively engage in this area is challenging due to the highly technical character of the information and the reliance of decision-makers on expert advice.⁸⁵

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 harm.⁸⁶ 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’.⁸⁷ However, mitigation is not always possible and the NPSs recognise that

78 For a focused analysis, Rydin Lee and Lock (n 7).

79 EIA Directive (n 36) art 5(c).

80 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 *Trans Inst Br Geographers* 292.

81 Eg 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’.

82 EIA Directive (n 36) arts 4 and 5; Planning Act 2008, ss 47, 60, 88, 90–94.

83 Following on from *Stringer v Minister of Housing and Local Government* [1970] 1 WLR 1281 on the open-ended connotation of ‘material considerations’.

84 On mitigation as planning obligation, s 106 Town and Country Planning Act 1990. See also s 174 Planning Act 2008 (regulating planning obligations for NSIPs).

85 With respect to wind NSIPs, Rydin, Lee and Lock (n 7).

86 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].

87 DECC (n 60) [4.2.6].

very little can be done to mitigate the LVI from wind farms.⁸⁸ In light of the benefits of (and need for) the project, the NPSs consider the inability to mitigate impacts on landscape and visual amenities as an insufficient ground to refuse consent.⁸⁹

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 judgment 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 show (section 5), any reduction in scale will compromise the project's energy output, and may therefore 'not be feasible'.⁹⁰ Looking at the early decisions of the EA on major wind farms, Rydin, Lee and Lock found that mitigation measures are scrupulously sought to balance people's concerns with the need for development to proceed.⁹¹ 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 means that the role of the public in regards to mitigation measures is not participatory. From this perspective, the purpose of the planning system is to 'assert the national interest over unwilling local host communities' rather than 'support participation'.⁹² This is not new in the context of land use planning where '[b]oth context and law place the emphasis on the ideology of public interest rather than, and at the expenses of, the ideology of public participation'.⁹³ Although the legal institutionalisation of public participation in environmental decision-making means that people and their participatory rights cannot be

88 *ibid* [1.7.2] and [5.9.15].

89 DECC (n 11) [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'. DECC, Secretary of State Decision Letter & Statement of Reasons- Proposed Navitus Bay Wind Park (11 September 2015), [54].

90 DECC (n 11) [2.7.51].

91 Rydin, Lee and Simon Lock (n 7) 142.

92 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 *Eur Environ* 155.

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

openly avoided, the tension between rhetoric of participation and a limited ability to influence remains unresolved.⁹⁴

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.⁹⁵ 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 developer.⁹⁶ 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’⁹⁷ and paying compensation for the impact of the project.⁹⁸ 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 a form of bribery to ‘buy off’ acceptance remain problematic.⁹⁹ 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.

94 House of Commons - Public Administration Select Committee, *Public Engagement in Policy-Making Second Report of Session 2013-14* (HC 75, 3 June 2013).

95 Richard Cowell, Gillian Bristow and Max Munday, ‘Acceptance, Acceptability and Environmental Justice: The Role of Community Benefits in Wind Energy Development’ (2011) 54 *J Env Plan Manag* 539, 549.

96 Derek Bell and others, ‘Re-visiting the “Social Gap”: Public Opinion and Relations of Power in the Local Politics of Wind Energy’ (2013) 22 *Env Politics* 115. See also Louise Gallagher, Susana Ferreira and Frank Convery, ‘Host Community Attitudes Towards Solid Waste Landfill Infrastructure: Comprehension Before Compensation’ (2008) 51 *J Env Plan Manag* 233.

97 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) *J Env Policy Plan* 255.

98 Centre for Sustainable Energy (CSE), *Delivering Community Benefits From Wind Energy Development: A Toolkit* - Centre for Sustainable Energy (2007). I do not discuss financial compensation here, but see Rydin, Lee and Simon Lock (n 7). 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.

99 On the definition of community, Bristow, Cowell and Munday (n 9) 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, Walker and Devine-Wright (n 97).

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.¹⁰⁰ The Department of Energy and Climate Change (DECC) 2014 *Guidance on Community Benefits for Onshore Wind Developments: Best Practice Guidance for England* sets the principles and engagement best practices for designing and managing community benefits for wind developments in England.¹⁰¹ According to the Guidance, community benefits can take a variety of forms, including: funds; benefits in-kind (eg 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;¹⁰² socio-economic community benefits (eg job creation and training)¹⁰³ and material benefits (eg improved infrastructure).¹⁰⁴ 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 planning conditions or obligations.¹⁰⁵ As such, they must be necessary, relevant to planning, directly related to the development (including its scale and kind) and reasonable.¹⁰⁶ 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'.¹⁰⁷ In England and Wales, developers have favoured, and increasingly routinized, the provision of community funds, for both onshore and offshore developments.¹⁰⁸ Despite claiming a broad definition of 'community', the Guidance frames it as people living in geographic proximity of the development.¹⁰⁹ The Guidance recommends that the establishment of voluntary

100 E.g. DTI, *Energy White Paper - Our Energy Future - Creating a Low Carbon Economy* (2003) [4.36] (stressing that community engagement is crucial 'in gaining acceptance of new infrastructure'); HM Government (n 58) [3.34] (stating that, together with community engagement, the government also considers the rolling out of individual projects as a factor to 'increase public acceptance of renewable energy projects, such as wind farms').

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

102 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.

103 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) [18.14] (hereinafter 'Welsh Practice Guidance').

104 DECC Guidance (n 101) 8. See also Welsh Practice Guidance, *ibid* [18.12].

105 On planning conditions, Town and Country Planning Act 1990, s 70. On planning obligations, (n 84).

106 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* (n 85).

107 DECC Guidance (n 101) [15]. The distinction is however not clear cut as the mechanisms can coexist and overlap, leaving some discretion. In this context, s143(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.

108 Welsh Practice Guidance (n 103) [18.6].

109 For a discussion, CSE (n 98) 2009 updated ed, cf Bristow, Cowell and Munday (n 9).

community benefits is 'timely, transparent, constructive, inclusive, fair and unconditional'.¹¹⁰ Each of these principles bears important challenges. First, the idea that public engagement on community benefits should start early in the approval process is relatively well established in policy documents,¹¹¹ but has been contested in the literature.¹¹²

Secondly, despite calls for transparency,¹¹³ 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 and others 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'.¹¹⁴

Thirdly, 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'.¹¹⁵ This reference not only gives a superficial recognition of the complex debate about the role of public participation in advancing environmental 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.¹¹⁶ This connection between provision of benefits and social acceptance of the project is potentially problematic, not only because it is vulnerable to claims of bribery, 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 planning channels.¹¹⁷ This is necessary to avoid the decision-making process being influenced by external financial conditions unrelated to planning considerations. However, this approach might artificially isolate the discussion on community benefits within an acceptance model and underestimate their wider political implications.¹¹⁸

The Guidance requires the engagement process to be structured in three phases. In the preparation of the benefits, the community should consider 'how a wind

110 DECC Guidance (n 101) 13.

111 DECC, *Community Engagement for Onshore Wind Developments: Best Practice Guidance for England* (2014); Welsh Practice Guidance (n 103) [18.8], CSE, *The Protocol for Public Engagement with Proposed Wind Energy Developments in Wales* (March 2007).

112 Cass, Walker and Devine-Wright (n 97) 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 repair. Both framings are problematic.

113 DECC Guidance (n 101) 14

114 Cass, Walker and Devine-Wright (n 97) 257–58.

115 DECC Guidance (n 101) 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).

116 Cowell, Bristow and Munday (n 95).

117 DECC Guidance (n 101) 14.

118 Cowell, Bristow and Munday (n 95).

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'.¹¹⁹ 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 proposed benefit package, 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. 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: Best Practice Guidance for England* supplements the Guidance on community benefits and provides a good example of the relationship between participation and acceptance.¹²⁰ 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'.¹²¹

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: agreeing expectations for economic and community benefits in partnership with industry; ensuring that the project generates economic benefits for the community; ensuring that communities have access to advice, expertise and funding to cooperatively harness appropriate renewable technologies (including wind); and creating a mechanism to transparently report the level and nature of benefits associated with energy developments.¹²² The latter has been implemented though the establishment of the Welsh Registry of Community Benefits and Engagement.¹²³ The 2005 *Technical Advice Note (TAN) 8 (TAN8)* includes minimal

119 DECC Guidance (n 101) 20 and 24.

120 DECC (n 111).

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

122 Welsh Government, *Energy Wales: A low Carbon Transition* (March 2012) 18. See also Welsh Assembly Government (n 11).

123 Welsh Assembly Government, Register of Economic and Community Benefits from Onshore Wind <<http://gov.wales/topics/environmentcountryside/energy/renewable/wind/register/?lang=en>> accessed 15 August 2016.

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)’.¹²⁴ However, there is a strong emphasis on the sustainability and climate integrity of the schemes.¹²⁵ 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’.¹²⁶

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. 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.¹²⁷ 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’.¹²⁸ 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 definitive 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.

124 Welsh Assembly Government, (n 11) Annex B, [2.3].

125 *ibid* [2.3].

126 *ibid*.

127 Melissa Leach, Ian Scoones and Andy Stirling, *Dynamic Sustainabilities: Technology, Environment, Social Justice* (Routledge 2010). See also Bell and others (n 96).

128 Gordon Walker and others, ‘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 258 megawatts in the Liverpool Bay.¹²⁹ It is an extension of an already operational wind farm. During the examination of the proposed project, strong concerns were expressed about its seascape, landscape and visual impact (SLVI), affecting people's experiences of the coastal area.¹³⁰ 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'.¹³¹ However, the EA found that, although the rare experiences provided by the coastal area (eg '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'.¹³² 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'.¹³³ 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 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'.¹³⁴ The developer clarified that they were involved in discussions to that effect, which would progress 'in their own time and at their own pace'.¹³⁵ 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'.¹³⁶ 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

129 DONG Energy, *Burbo Bank Extension Offshore Wind Farm – Environmental Statement. Non-Technical Summary* (March 2013) [1.3.4].

130 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) [4.7] and [4.12A].

131 *ibid* REP-035.

132 *ibid* [4.18].

133 *ibid* [4.19].

134 *ibid* [4.121].

135 *ibid* [4.125].

136 *ibid* [4.138].

public] to such change [was] reduced'.¹³⁷ 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 resulting from a stringent risk assessment method. 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 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 (ie 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.¹³⁸ 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 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.¹³⁹ Although, these criteria do not seem to

137 *ibid* [4.164].

138 Burbo Bank Extension Community Fund Criteria <<http://www.grantscape.org.uk/fund/burbo-bank-extension-community-fund/criteria/>> accessed 15 August 2016.

139 *ibid*.

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, as the ability to influence decisions is in practice reduced.

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’.¹⁴⁰ 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’,¹⁴¹ which could only be outweighed by ‘a significant level of harm to interests of acknowledged importance’.¹⁴² However, the report 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’.¹⁴³ 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.¹⁴⁴ 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.¹⁴⁵ 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).¹⁴⁶ Mitigation measures had been proposed by some interested parties that the height of the turbines be reduced to align with other wind farms given consent in the area (100–120 m). 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’.¹⁴⁷ 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

140 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) [3.27].

141 *ibid.*

142 *ibid* [4.17].

143 *ibid* [8.40].

144 *ibid.*

145 *ibid* [4.54].

146 *ibid* REP WR_002; WR_003; WR_004; WR_008; WR_009; WR_010 and WR_013.

147 *ibid* [4.81].

exercise if the objective is to enable more wind turbines to be constructed'.¹⁴⁸ Interestingly, some mitigation measures were agreed through planning obligations to mitigate the impact of the development on TV receptors.¹⁴⁹ Unlike LVI or noise, the EA found that there was actually no evidence that the development would have a significant impact upon TV reception.¹⁵⁰ 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.¹⁵¹ 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'.¹⁵² 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 requests 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 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

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.¹⁵³ The model of engagement embedded in the planning framework under which the *Clocaenog Forest Wind Farm* and *Burbo Bank Extension* projects were decided seems

148 *ibid* [4.137].

149 Schedule 2, Agreement under s 106 of the Town and Country Planning Act 1990 relating to the land within the Clocaenog Forest located within the counties of Conwy and Denbighshire, North Wales (11 March 2014).

150 *ibid* [4.312].

151 See 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 15 August 2016.

152 *ibid*.

153 Barry and Ellis (n 92).

to align with the paradigm of 'decide-announce-defend'.¹⁵⁴ 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 'pro-development bias' is not a new phenomenon in planning law and raises complex issues, especially from a public participation perspective.¹⁵⁵ 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.¹⁵⁶ From this perspective, a 'decide-announce-defend' pattern is likely to lead to conflicts and public mistrust.¹⁵⁷ Nor does it empower those in favour of the project, who may be discouraged from expressing their support.¹⁵⁸

The idea of planning law as persuasion is strictly connected to models of public acceptance in decision-making. 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.¹⁵⁹ This is because proceduralisation 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.

An approach to planning law in terms of persuasion and public acceptance 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'.¹⁶⁰ Supporting a deliberative approach to planning, Healey notes how this is deeply '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'.¹⁶¹ From

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

155 See Antonia Layard, 'Planning and Environment at a Crossroads' (2002) 14 *JEL* 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).

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

157 Among many, Gordon Walker, 'Renewable Energy and the Public' (1995) 12 *Land Use Policy* 49; Maarten Wolsink, 'Wind Power and the NIMBY-Myth: Institutional Capacity and the Limited Significance of Public Support' (2000) 2 *Renew Energy* 49; Claire Hagggett and Geoff Vigar, 'Tilting at Windmills? Understanding Opposition to Wind Farm Applications' (2004) 73 *Town Count Plan* 288; Susanne Agterbosch and others, 'The Relative Importance of Social and Institutional Conditions in the Planning of Wind Power Projects' (2009) 13 *Renew Sust Energy Rev* 393.

158 Martin Pasqualetti, 'Wind Energy Landscapes: Society and Technology in the California Desert' (2001) 14 *Soc Nat Resour* 689, referred to in Hagggett (n 77) (discussing the difficulties of unwrapping 'public silence').

159 cf Elizabeth Fisher, *Risk Regulation and Administrative Constitutionalism* (Hart 2007) ch 1 (discussing how the debate on risk decision-making might sideline the role of law).

160 Patsy Healey, *Collaborative Planning* (2nd edn, Palgrave Macmillan 2006) 84.

161 *ibid* 86.

this perspective, many have recognised the potential of planning in providing a space for dialogue about environment and development.¹⁶² 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.¹⁶³ In this more deliberative framing, planning could be seen as a space for discussion and promotion of different perspectives of the common good.¹⁶⁴ 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.¹⁶⁵ 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'.¹⁶⁶

In light of this debate, it should not be surprising that calls for institutional reform and re-design in various forms have emerged.¹⁶⁷ 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'.¹⁶⁸

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, through 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

162 See Yvonne Rydin and Mark Pennington, 'Public Participation and Local Environmental Planning: The Collective Action Problem and the Potential of Social Capital' (2000) 5 *Local Environ* 153; Owens and Cowell (n 155); Claire Hagggett, '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).

163 Owens and Cowell (n 155). For a critique of aggregation of preferences, Sagoff (n 50).

164 Patrick McAuslan, 'The Ideologies of Planning Law' (1979) 2 *Urban Law Policy* 1.

165 Richard Cowell and Susan Owens, 'Governing Space: Planning Reform and the Politics of Sustainability' (2006) 24 *Environ Plan C-Govern Policy* 403.

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

167 Hagggett (n 6); Rydin and Pennington (n 162).

168 House of Commons: Written Ministerial Statement (HCWS42) - DCLG Written Statement made by Secretary of State for Communities and Local Government (Greg Clark), 18 June 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 Cabinet Office and Her Majesty the Queen (n 13) 31.

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 strengthening the role of public participation. Through exchange of multiple knowledges and opinions 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 recognise the value of 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.¹⁶⁹ 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 uncritically¹⁷⁰—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.¹⁷¹ The potential for participation in the elaboration of community benefits to shape attitudes towards the development is therefore dismissed.¹⁷² 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.¹⁷³ 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 towards 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

169 Black, Part II (n 25) 37 (arguing that advocating for greater participation is a point of departure rather than a conclusion).

170 Cowell, Bristow and Munday (n 95).

171 See HM Government (n 58).

172 Mhairi Aitken, ‘Wind Power and Community Benefits: Challenges and Opportunities’ (2010) 38 Energy Policy 6066; Benjamin Walker, Bouke Wiersma and Etienne Bailey, ‘Community Benefits, Framing and the Social Acceptance of Offshore Wind Farms: An Experimental Study in England’ (2014) 3 Energy Res Soc Sci 46.

173 Devine-Wright (n 6).

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 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'.¹⁷⁴

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 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. 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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