BRACKNELL FOREST DISTRICT COUNCIL

RE: THE CONSERVATION (NATURAL HABITATS &c.) REGULATIONS 1994

O P I N I O N

Introduction

1. I am asked to advise Bracknell Forest Borough Council ("the Council") with regard to the correctness as a matter of law of views expressed by a Planning Inspector (Mr. R J Yuille) in a decision letter ("DL") dismissing an appeal against the Council's refusal of planning permission for a residential development at the Former RAF Staff College, Broad Lane, Bracknell on 26 August 2008[1].

2. My Instructions seek specific advice on a further issue arising in connection with the proper approach under the Conservation (Natural Habitats &c.) Regulations 1994 ("the Habitats Regulations") to a European Site, here the Thames Basin Heaths SPA.

3. I am asked to provide this Opinion with regard to the correct approach to take to similar issues in the future rather than to consider it in the context of the specific appeal. I therefore have not examined that particular DL in any detail except on the specific observations on which my views are sought. The concern which the Council has arises with regard to the Inspector's consideration of submissions made by the appellant and the Council in respect of the approach to take where a fallback position is claimed, or exists, having regard to the requirements of the Habitats Regulations.

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[1] PINS ref: APP/R0335/A/07/2052970.

The Inspector's decision

4. In brief, the particular situation before the Inspector was that there was a planning permission in place (and being implemented) for a larger development including the appeal site. It was agreed at the Inquiry that

   (1) the permitted scheme was likely to cause significant harm to the Thames Basin Heaths SPA but no mitigation measures were in place;

   (2) there was no reason to suppose that, if the appeal were dismissed, the permitted scheme would not be completed;

   (3) the appeal scheme triggered the need to consider, under the Habitats Regulations, whether the scheme was likely to have an adverse effect on the SPA; and

   (4) the appeal scheme offered a covenant preventing the owners of the residential units from owning dogs (DL 52).

5. In summary, the contentions of the parties were as follows:

   (1) The Council's submission was that no account should be taken of the permitted scheme in assessing the likely effects of the proposal on the SPA; and

   (2) The Appellant's submissions was that, because the appeal scheme would involve no increase in the number of dwellings from the permitted scheme, there would be no harmful effect beyond that already to be caused by the permitted scheme and therefore it could not be concluded that there would a significant effect on the SPA.

6. The Inspector's conclusions, set out at DL paragraphs 67 to 70, were (so far as material for present purposes) as follows:

   (1) It "is common practice to take account of the "fallback" position when making planning decisions. Moreover… when preparing, for instance, an Environmental Statement the baseline for any relevant assessment would include existing commitments";

(2) "Commonsense dictates that when considering the likely effect of a scheme on the SPA, account should be taken of what is likely to happen if that scheme does not go ahead… if, as in this instance, there is a reasonable prospect of a scheme more harmful to the SPA being implemented if the appeal scheme is not permitted then this is also a material consideration";

(3) "While the dog covenant proposed by the appellant would, if properly monitored and managed, mitigate to some extent the likely effect of the appeal scheme on the SPA, the likelihood is that the appeal scheme will still have significant effect on the SPA. However, this is outweighed by the fact that it is likely to have less of an effect on the SPA than would the permitted scheme. That being so I conclude that the proposed development would not conflict with the aims of either the [Habitats] Regulations or of Policy CS14 of the Bracknell Core Strategy DPD";

(4) "… the appeal scheme would not be likely to have a significant effect on the SPA…", a conclusion reached in the light of the above.

7. A number of basic errors appear from the above:

(1) The Habitats Regulations are not to be treated as if they were policy and able to be dealt with by an absence of conflict with their aims. The regulations are legal requirements which must be complied with if consent is to be granted. The consequence of non-compliance is that a consent granted in breach would be liable to be quashed. As it happens, since the appeal was dismissed for other reasons than the SPA issues, no breach in fact occurred in the present case;

(2) The Habitats regime introduced a fundamental change into the approach to decision-making than that normally applicable in planning. See the consideration of the general consequences of this by the High Court in ***ADT Auctions v. Secretary of State*** [2000] J.P.L. 1155 and the effect of failure to comply in the Dibden Bay Defra decision letter of 20 April 2004.

Relevant law

8. Regulation 48 of the Habitats Regulations provides:

"(1) A competent authority, before deciding to undertake, or give any consent, permission or other authorisation for, a plan or project which -

(a) is likely to have a significant effect on a European site in Great Britain or a European offshore marine site(either alone or in combination with other plans or projects), and

(b) is not directly connected with or necessary to the management of the site,

shall make an appropriate assessment of the implications for the site in view of that site's conservation objectives.

…

(5) In the light of the conclusions of the assessment, and subject to regulation 49, the authority shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the European site or European offshore marine site (as the case may be).

(6) In considering whether a plan or project will adversely affect the integrity of the site, the authority shall have regard to the manner in which it is proposed to be carried out or to any conditions or restrictions subject to which they propose that the consent, permission or other authorisation should be given."

9. The Habitats Regulations transposed into national law the requirements of Council Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora of 21 May 1992 ("the Habitats Directive") and should, as far as possible, be construed consistently with the provisions of the Directive[2].

10. So far as is material, Article 6 the Habitats Directive provides:

"**Article 6**

…

2. Member States shall take appropriate steps to avoid, in the special areas of conservation, the deterioration of natural habitats and the habitats of species as well as disturbance of the species for which the areas have been designated, in so far as such disturbance could be significant in relation to the objectives of this Directive.

3. Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. In the light of the conclusions of the assessment of the implications for the site and subject to the provisions of paragraph 4, the competent national

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[2] Under the usual approach to the interpretation of transposing legislation, the national regulations should be construed so far as is practicable to give full effect to the Directive. To do otherwise would be to risk putting the UK in breach of the obligation to transposes directives fully into national law. See e.g. ***Marleasing S.A. v. La Comercial Internacional de Alimentacion S.A.*** Case 106/89 [1990] E.C.R. I-4135, ***Duke v. G.E.C. Reliance Systems Ltd.*** [1988] A.C. 618, at 639-640, and ***Webb v. Emo Air Cargo Ltd.*** [1993] 1 W.L.R. at 59.

> authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public. …"

Analysis of the issues

11. The question of the relevance of the fallback position is a difficult one and as yet has not been specifically addressed in the case law.[3] However, in my opinion, on an approach to the interpretation of the legal obligations, which takes account of the firmly protectionist and precautionary approach of the ECJ, the Inspector's approach is wrong in law. In my opinion, it is not legally correct to take account of the fallback position in assessing whether a plan or project would have be likely to have significant effects (for the purposes of Regulation 48(1) or article 6(3) of the Habitats Directive) or in assessing whether the plan or project will adversely affect the integrity of a protected or site.

12. The first question is: what should be assessed in examining whether significant effects are likely to occur? The answer in both the domestic and Community legislation is "the plan or project".[4]

13. In ***R(Hart DC) v Secretary of State for Communities and Local Government*** [2008] 2 P&CR 16 the High Court considered the question of whether the "plan or project" being examined should include features which are designed into the development to mitigate the effects of the development on the protected site. Sullivan J held at para. 55:

> "55. The first question to be answered under Art. 6(3) or reg.48(1) is: what is the plan or project which is proposed to be undertaken or for which consent, permission or other authorisation is sought? The competent authority is not considering the likely effect of some hypothetical project in the abstract. The exercise is a practical one which requires the competent authority to consider the likely effect of the particular project for which permission is being sought. If certain features (to use a neutral term) have been incorporated into that project, there is no sensible reason why those features should be ignored at the initial, screening, stage merely because they have been incorporated into the project in order to avoid, or mitigate, any likely effect on the SPA ."

14. Sullivan J concluded on this issue at para. 76:

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[3] Nor does the Commission's guidance assist.
[4] Regulation 48(1) and Article 6(3).

> "… I am satisfied that there is no legal requirement that a screening assessment under reg.48(1) must be carried out in the absence of any mitigation measures that form part of a plan or project. On the contrary, the competent authority is required to consider whether the project, as a whole, including such measures, if they are part of the project, is likely to have a significant effect on the SPA. If the competent authority does not agree with the proponent's view as to the likely efficacy of the proposed mitigation measures, or is left in some doubt as to their efficacy, then it will require an appropriate assessment because it will not have been able to exclude the risk of a significant effect on the basis of objective information…"

15. Whilst it is appropriate to take account of in-built mitigation measures at the screening (and the appropriate assessment) stage, it is not the same thing to say that all benefits in ecological terms of the plan or proposal should also be taken into account. The point is that in-built mitigation measures reduce or eliminate adverse effects arising from a particular project. That is not the case where permitting a particular development might prevent another, more harmful, development coming forward. The actual adverse effects of the proposal cannot be ignored and the approach of the ECJ requires that even a risk of significant effects requires an appropriate assessment.

16. The legal requirement of screening, namely the threshold question of likely significant effect, is that it is done with reference to the effects of the particular plan or project on the site. At the screening stage, adverse effects cannot be ignored simply because the fallback position might or would have worse effects.

17. That conclusion is consistent with the general approach of the Directive, and in particular the obligation in article 6(2) to "take appropriate steps to avoid" the deterioration of the protected site. In ***Landelijke Vereniging tot Behoud van de Waddenzee and Nederlandse Vereniging tot Bescherming van Vogels v Staatssecretaris van Landbouw ("Waddenzee")*** Case C-127/02 [2004] ECR I-7405 the European Court of Justice ("ECJ") held at paras. 39-49 that a precautionary approach was to be taken to the threshold (screening) issue of *significant effect.* The ECJ's interpretation of the provisions can be summarised as follows:

    (1) Any plan or project likely to have a significant effect on a site (not being directly connected with or necessary to the management of the site), either individually or in combination with other plans or projects, is to be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives (ECJ paras. 39-20);

(2) The trigger for assessment pursuant to Art. 6(3) does not presume that the plan or project considered definitely has such effects, but rather follows from the mere possibility that such an effect attaches to the plan or project (ECJ para. 41);

(3) It follows that the requirement for an assessment pursuant to Art. 6(3) would arise where there was a probability or risk that the plan or project would have an effect on the site concerned (ECJ para. 43);

(4) In the light of the precautionary principle in Art. 174(2) of the EC Treaty, such a risk would exist where it could not be excluded "on the basis of objective information" that the plan or project would have significant effects on the site concerned (ECJ paras. 44 and 45);

(5) Where a plan or project has an effect on a site, but is not likely to undermine its conservation objectives, it cannot be considered likely to have a significant effect on the site concerned (ECJ para. 47);

(6) The converse is also true, so that where a plan or project is likely to undermine the conservation objectives it must be considered as likely to have a significant effect on the site concerned (ECJ para. 48);

(7) The assessment of this risk must be considered in the light of the characteristics and specific environmental conditions of the site (ECJ paras. 48-9);

18. The appropriate assessment must consider the implications for the European Site "*in view of*" that site's conservation objectives (reg. 48(1) and art. 6(3)). As to the form that the assessment must take, the ECJ held at para. 53:

> "53 … an appropriate assessment of the implications for the site concerned of the plan or project must precede its approval and take into account the cumulative effects which result from the combination of that plan or project with other plans or projects in view of the site's conservation objectives."

19. All the aspects of the plan or project which can either individually or in combination with aspects of other plans or projects affect the conservation objectives of the site must be identified in the light of the best scientific knowledge in the field. In turn, the conservation objectives may be established

on the basis of the importance of the sites for the maintenance or restoration at a favourable conservation status of a natural habitat type in Annex I to the Habitats Directive or a species in Annex II and for the coherence of Natura 2000, and of the threats of degradation or destruction to which they are exposed (ECJ, ***Waddenzee***, para. 54).

20. The ECJ dealt with the relationship between the general duty in article 6(2), and the provision for authorisation in article 6(3). The ECJ noted at para. 37 that the general duty in article 6(2) is an ongoing duty (emphasis added):

> "37. … it cannot be precluded that such a plan or project subsequently proves likely to give rise to such deterioration or disturbance, even where the competent national authorities cannot be held responsible for any error. Under those conditions, application of Art.6(2) of the Habitats Directive makes it possible to satisfy the essential objective of the preservation and protection of the quality of the environment, including the conservation of natural habitats and of wild fauna and flora, as stated in the first recital in the preamble to that directive."

21. In her opinion, Advocate General Kokott said this of the same issue (emphasis added):

> "[AG56] Where the provisions are complied with, there is, following the authorisation procedure under Art.6(3) of the habitats directive, no need for subsequent measures under Art.6(2) . An ideal appropriate assessment would identify precisely any adverse effect which occurred subsequently. Therefore, authorisation would be granted only where the plan or the project did not adversely affect the integrity of the site concerned. For the purpose of providing a consistent standard of protection this would also exclude the possible occurrence of deterioration or disturbance which could be significant in relation to the objectives of the directive. At the same time the practical effectiveness of authorisation under Art.6(3) of the habitats directive would be safeguarded since the effects expressly permitted therein could not constitute an infringement of Art.6(2) .
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> [AG57] However, practical consequences relating to authorised projects and plans would arise from Art.6(2) of the habitats directive if they resulted in deterioration or significant adverse effects in spite of an appropriate assessment. In that case the Member State concerned would be obliged to take the necessary preventative measures in spite of the fact that authorisation had been given."

22. The reason that this is of particular relevance is that it demonstrates that there is a continuing duty to take steps to avoid adverse effects on protected sites. In my opinion, a planning authority cannot resign itself the existence of fallback position which would adversely affect the SPA.

23. The duty under reg. 48(1) (and art. 6(3) of the Directive) is directed to the effects of the specific project for which consent is sought alone or cumulatively with others. It therefore requires the effect of the specific proposal to be considered and, for that reason alone, may as a matter of law preclude consideration of the fallback position since that is another consent. There are a number of other ways in which the same result can be achieved, having regard to the fact that the ECJ applies a strongly purposive approach to the Habitats Directive in order to ensure that its efficacy and objectives are not undermined or weakened:

(1) If the proposal under consideration is considered "in combination with" with the fallback project for the same site (see above), together they will have (or there is a risk they will have) a significant effect within reg. 48. A risk is sufficient for the purposes of the precautionary approach to *significant effect* under reg. 48(1); or

(2) The issue of a fallback position arises because the fallback is likely to proceed if the development sought is not permitted. This means that the project for which consent is sought will replace the fallback project and will therefore substitute its effects for those of the fallback project. It follows that if the subject development is permitted and implemented, the effects of the fallback development will not occur. It is unlikely that the ECJ would consider that the subject project application, with its effects, which would be substituted for the fallback application could escape the mandatory requirements of article 6(3) (and thus reg. 48) that require an appropriate assessment (with all of its consequences) if the subject project is likely to have a significant effect as explained above. Indeed, this wide approach to "in combination" is consistent with Commission advice in Managing Natura 2000 at pp. 35-36 (my emphasis):

> "It is important to note that the underlying intention of this combination provision is to take account of cumulative impacts, and these will often only occur over time. <u>In that context, one can consider plans or projects which are completed; approved but uncompleted; or not yet proposed</u>:
>
> - In addition to the effects of those plans or projects which are the main subject of the assessment, it may be appropriate to consider the effects of already completed plans and projects in this 'second level' of assessment. Although already completed plans and projects are excluded from the assessment requirements of Article 6(3), it is

important that some account is still taken of such plans and projects in the assessment, if they have continuing effects on the site and point to a pattern of progressive loss of site integrity.

Such already completed plans and projects may also raise issues under Article 6(1) and (2) of Directive 92/43/EEC if their continued effects give rise to a need for remedial or countervailing conservation measures or measures to avoid habitat deterioration or species disturbance.

- Plans and projects which have been approved in the past and which have not been implemented or completed should be included in the combination provision. The procedure of Article 6(3) and (4) is triggered not by a certainty but by a likelihood of significant effects, arising not only from plans or projects located within but also outside a protected site...."

24. If the permission for the fallback development pre-dated the designation of the SPA, the planning authority would be required to review the permission under reg. 50 of the Habitats Regulations. If the permission post-dated the designation of the SPA, and its adverse effects on the site had only recently become known, in my opinion the general duty in Art 6(2) of the Directive as explained by the ECJ in ***Waddenzee*** requires the planning authority to consider the revocation of the permission under its general revocation powers in s. 97 of the Town and Country Planning Act 1990[5]. In brief, a fallback position which causes significant adverse effects cannot simply be accepted as inevitable in any event[6].

25. Further support may be found for this view from the treatment of extant permissions in the parallel context of decisions as to the initial designation of sites. In ***R (Newsum) v Welsh Assembly (No. 2)*** [2006] Env LR 1 it was argued that in designating land as a Special Area of Conservation the defendant had failed to take into account a material consideration, namely an existing planning permission applying to the site. Richards J rejected that contention and, applying the reasoning of the ECJ in ***R v SSETR ex p First Corporate Shipping Ltd*** Case C-371/98 [2001] All ER (EC) 177, held:

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[5] I note also the general principle of Community law that, where it is possible to re-open administrative decisions which have been made contrary to the Community law, the Member State is under an obligation to do so: ***Kühne & Heitz NV v Productschap voor Pluimvee en Eieren*** Case C-453/00 [2006] 2 CMLR 17.

[6] Where the fallback permission was granted prior to the coming into force of the Habitats Regulations, note also the review requirements of reg. 50 of the Habitats Regulations, though these are of lesser importance 14 years after the coming into force of the regulations given the requirement to review existing decisions "as soon as reasonably practicable."

> "[102] … the relevant assessment criteria are defined exclusively in relation to the conservation objective. If one focuses on the Annex III criteria, as the court makes clear must be done, I see no room for excluding an otherwise appropriate site on the basis that the relevant habitats or species are liable to be affected by the implementation of existing consents. One of the purposes of the Directive is to confer protection upon sites that meet the Annex III criteria. Such protection includes a review of existing consents, to determine whether and on what conditions they can be implemented. It would turn the scheme of the Directive on its head if the existence of a consent could be relied on as a reason for not protecting a site in the first place.
>
> [103] I therefore consider that, if a site otherwise meets the criteria for inclusion as a candidate SAC, it cannot be lawful for a Member State to exclude it from the list of candidates on the ground that the habitats or species it contains will or may be affected by implementation of an existing planning permission or licence."

26. As in the assessment of sites for initial designation, the criteria for screening and appropriate assessment are defined in relation to the site's conservation objective. Applying the reasoning of Richards J to this parallel situation, in my view the correct approach is to disregard the existing planning permission in assessing the likelihood of significant effects on the SPA arising from the plan or project.

27. In my opinion, the proper approach to a development which is considered in the light of a previous permission which falls to be treated as a "fallback position" under the law (i.e. for which there is a reasonable prospect of implementation) is that:

    (1) A proposal must be screened without regard to the fallback position and, if the proposed project is likely to have significant effects, there should be an appropriate assessment;

    (2) Alternatively, if the subject project "in combination with" the fallback position (i.e. on the basis that only one may be developed) would be likely to have a significant effect, then the combined effect (i.e. that one or the other would be implemented) should lead to the requirement of an appropriate assessment; and

    (3) Consideration should be given as to whether steps can be taken to prevent adverse effects arising from the fallback permission.

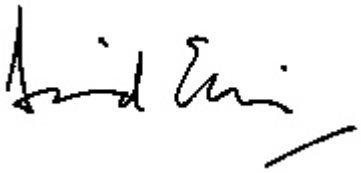
28. The question of mitigation measures only arises if either the in-built mitigation makes it unlikely that significant effects will arise (and hence no appropriate assessment is demanded), or as part of the appropriate assessment. Permission should only be granted if there is no adverse effect on site integrity arising out of the plan or project.[7] Accordingly, developers simply cannot avoid the need to mitigate what would otherwise be adverse effects on site integrity by reference to a fallback position since to do so would

    (1) disregard the mandatory requirements of reg. 48(1) and article 6(3); and

    (2) undermine the efficacy of the provisions protecting Natura 2000 sites.

29. For the above reasons, I consider that the Inspector was wrong to have regard to the fallback position in concluding that the scheme would not be likely to have significant effects on the SPA. It follows that the contention that mitigation need only be provided for those dwellings proposed in excess of the fallback permission is wrong. The plan or project as whole must be assessed by reference to the effects on the integrity of the protected site, not by reference to any fallback position.

30. I have nothing further to add as presently instructed but would be pleased to advise further should it be necessary.



DAVID ELVIN Q.C.

Landmark Chambers,
180 Fleet Street,
London EC4A 2HG
4 December 2008

[7] Of if Reg 49 applies. This will not be relevant in the present situation.

BRACKNELL FOREST DISTRICT COUNCIL

RE: THE CONSERVATION (NATURAL HABITATS &c.) REGULATIONS 1994

O P I N I O N

Alex Jack,

Borough Solicitor,

Bracknell Forest District Council,

Easthampstead House,

Town Square,

Bracknell,

Berkshire RG12 1AQ

DX 33611 Bracknell

Your ref: AIJ/PB

Our ref: Case 101704 [DE]