BRACKNELL FOREST DISTRICT COUNCIL

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

FORMER RAF STAFF COLLEGE, BROAD LANE, BRACKNELL

O P I N I O N (No. 3)

Introduction

1. I have advised in writing on 4 December 2008 and 1 February 2009 with regard to the correct approach to take to a planning application where a fallback position is claimed, or exists, having regard to the requirements of the Conservation (Natural Habitats &c.) Regulations 1994 ("the Habitats Regulations") and Council Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora of 21 May 1992 ("the Habitats Directive").

2. In Opinion (No. 2) of 1 February I considered the written Opinion of Mr Timothy Straker QC and the written ecological evidence produced by the appellant. I concluded that the matters which they set out did not provide a proper basis for the contention that a fallback planning permission should be disregarded for the purposes of considering whether an appropriate assessment was required, or in carrying out such as assessment, for the purposes of the Habitats Regulations (and Directive).

3. Mr Straker has considered the position further and has provided another Opinion, dated 17 March 2009, in which he considers some of the views which I set out in my 1 February Opinion.

4. I am asked to consider Mr Straker's latest Opinion, though I doubt whether either that Opinion or this, as a response to it, is likely to take the matters much

further in terms of providing assistance to the decision-maker. References to paragraph numbers in parentheses are to that latest Opinion.

5. I do not consider that Mr Straker's latest Opinion causes me to change the views I have now expressed in my two earlier Opinions, in part because he addresses so little of the substance of the analysis.

6. It is still highly significant that, as in his earlier Opinion[1], Mr Straker has neither considered nor dealt with:

   (1) the purposive approach which should be followed with regard to the interpretation of EU legislation and the requirement for the legislation which transposes it into national law to be read consistently with it. It is necessary to follow the approach set out by Lord Keith in ***Webb v. Emo*** [1993] 1 W.L.R. 49[2] that national legislation "*in any field covered by a Community directive*" should be construed "*so as to accord with the interpretation of the directive as laid down by the European Court, if that can be done without distorting the meaning of the domestic legislation... That means that the domestic law must be open to an interpretation consistent with the directive whether or not it is also open to an interpretation inconsistent with it*"; and

   (2) the substance of the EU and UK authorities and Commission Guidance on Habitats referred to in my earlier opinion and which run contrary to his opinion.

7. I find these omissions surprising given that this area of the law (i.e. EU environmental regulation[3]) is frequently litigated and the approach to EU legislation is well-known. My own views on these matters were set out in detail in the earlier opinions.

8. The lengthy discussion by Mr Straker over what he terms a "straightforward reading" of the Regulations misses the point at several levels and seems to me to be little more than a semantic argument. In particular -

---

[1] These criticisms were also made in my Opinion No. 2 and Mr Straker has not responded to them.
[2] See para. 48(2) of my Opinion No. 2. See also the reference to ***Marleasing*** in 48(2)(a).
[3] Note in ***Commission v UK*** Case 06/04 [2006] Env. L.R. 29 the ECJ held "*26. It follows that, in the context of the Habitats Directive , which lays down complex and technical rules in the field of environmental law, the Member States are under a particular duty to ensure that their legislation intended to transpose that directive is clear and precise...*".

(1) I do not suggest that a plain (or "straightforward") reading of the Directive and Regulations should be ignored (paras. 4 and 5). My criticisms were of the approach which Mr Starker characterised as "straightforward"[4]. If that was unclear previously, I have now clarified the position. For the avoidance of doubt, I disagree with what Mr Straker regards as a straightforward reading of the Regulations for the reasons set out in my Opinions and note his failure to respond to the majority of the reasons I advanced for my view;

(2) The legal meaning of legislation (UK or EU) cannot turn on the different character or resources of those having to understand or apply it (para. 6, 8). It would be surprising if a lay person could avoid the operation of complex statutes because it might be said that he or she could not easily understand them (ignorance of the law not being any defence) or to suggest that legislation should be interpreted as it might be understood by such a lay person.

9. Mr Straker's conclusion that the legislation was not intended to "disturb existing rights" is both incorrect and nothing to the point (para. 7). The purpose of the Habitats procedures is to subject plans and projects to procedures to which they were previously not subject and to do so in the context of a process which could lead to rejection on grounds not previously applicable, in order to protect Natura 2000. This includes the consideration of cumulative impacts of the subject application with existing consented projects. Considering the cumulative effects of the appeal application with the existing permission is not disturbing existing rights but is a means to judge the full impacts arising from the appeal project.

10. In any event, the propositions I have advanced in my advice do not involve the disturbance of existing rights since

(1) The issue is whether the *current* appeal application should be fully assessed or whether its impact should be "discounted" *by reference to* the fallback. Consideration of the existing appeal application in all its aspects does not involve the disturbance of existing rights.

---

[4] See para. 47 of my Opinion No. 2.

(2) The earlier permission could be implemented and that permission is not disturbed or altered by an appropriate assessment of the current appeal scheme. As I noted in Opinion No. 2, the truth is that the appellant does not wish to implement that earlier permission but to obtain permission for a larger proposal.

11. The fact that the Commission's guidance in MN2000 was published after the Habitats Directive and Regulations does not make it irrelevant or reduce its weight (para. 8). It is authoritative guidance on the approach to be taken to the Habitats provisions. The same could be said of much of planning policy postdating the latest Town and Country Planning Act 1990. Moreover, the courts, e.g. the ECJ in ***Waddenzee*** Case C-127/02 [2004] ECR I-7405 (see e.g. the judgment at para. 41), have considered the MN2000 guidance to be relevant and appropriate.

12. I have already explained in Opinion No. 2 why Mr Straker's view as to "undertake", which appears to be premised on the view that projects are often undertaken by public bodies, would prevent the Regulations applying to many cases of private development (para. 10-13)[5]. Grammatical analysis of a transposing regulation is not an adequate answer to the substance of the point about the purpose of a Directive obligation. Moreover, the discussion of "undertaking" is a minor issue set against the wider and more important issues explained in my Opinion No. 2. Mr Straker's approach to "undertaken" in his earlier Opinion, apart from my earlier criticisms, runs contrary to the approach in ***Hart*** mentioned below.

13. Finally, with regard to Mr Straker's ultimate conclusions in paras. 18-22, it seems to me that a truly straightforward approach to the issue requires an assessment of the likely impacts of the actual project subject to the appeal application and not some hypothetical variation of it which discounts the impacts of an earlier permission and assumes a smaller development than was in fact proposed. The simplest possible approach surely would be to determine what the project subject to the appeal is and to assess its impacts, no less and no more.

---

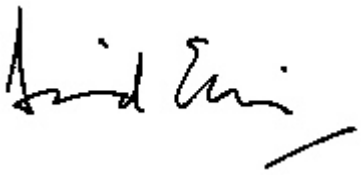
[5] Without unnecessarily elaborating on this, it is also difficult to see how the approach Mr Straker advances can stand with the approach required by ***Webb v. Emo***, above.

14. In any event, as I advised previously, the cumulative effect of the appeal proposal with the earlier permission would have to be considered. There could be no possible justification in principle or on the language of the Habitats Regulations for both ignoring the impact of the earlier permission (on the basis it would not be built out) and also discounting it from the appeal application (on the hypothesis that if the appeal were refused, it would be built). That would simply undermine the objectives of appropriate assessment of projects and would not be supported by the terms of either EU or UK legislation.

15. Indeed, it is worth recalling the judgment of Sullivan J. in ***R(Hart DC) v Secretary of State for Communities and Local Government*** [2008] 2 P & CR 16[6] which makes it clear that what should be considered is the effect of the project for which permission is sought not some hypothetical scheme (emphasis added):

> "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**."

16. It is the appellant's analysis which departs from the straightforward approach that the application should be approached having regard to its likely effect, and it should be rejected for reasons I have previously explained.



DAVID ELVIN Q.C.

Landmark Chambers,

180 Fleet Street,

London EC4A 2HG

2 April 2009

---

[6] Dealt with in more detail at paras. 53 to 55 of my Opinion No. 2.

BRACKNELL FOREST DISTRICT COUNCIL

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

FORMER RAF STAFF COLLEGE, BROAD LANE, BRACKNELL

O P I N I O N (No. 3)

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]