NORTH WEST LEICESTERSHIRE DISTRICT COUNCIL

DETERMINATION OF PLANNING APPLICATIONS WHERE THE DEVELOPMENT COULD AFFECT A DESIGNATED SPECIAL AREA OF CONSERVATION UNDER THE HABITATS DIRECTIVE 92/43/EEC

O P I N I O N

Introduction

1. I am asked to advise North West Leicestershire District Council ("**the Council**") on a series of issues arising with regard to 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 the UK transposing regulations, the Conservation (Natural Habitats &c.) Regulations 1994 ("**the Habitats Regulations**").

Background

2. I am instructed that the Council's Ashby Area Development Control team has outstanding undetermined major and minor planning applications (including large housing and retail schemes) which have objections from the Environment Agency and Natural England, including applications which have been determined but no decision notice has been issued (e.g. as no S106 has been completed), s. 73 applications, and applications where there are claimed to be "fallback" positions.

3. The foul drainage for existing and proposed future development in Ashby is to the Packington Sewage Treatment Works ("**PSTW**") owned and operated by Severn Trent Water Ltd, which in turn discharges into the River Mease via a tributary the Giliwiska Brook, which are designated a Special Area of Conservation ("**SAC**") and SSSI which was designated a "European Site" for the purposes of the Habitats Regulations in 2004 or 2005. The internationally important interest features of the River Mease SAC are the habitat itself and the presence of spine loach and boar head fish, white clawed crayfish and otter, the fish species being the two primary notification features of the SAC.

4. I am instructed that the River Mease SAC is currently in an "unfavourable" condition, primarily due to poor water quality arising from discharges and other sources. Essentially the river is at

saturation point in terms of the amount of treated effluent it already receives, and is currently failing its water quality targets for phosphate. Of particular importance are the very high levels of ortho-phosphate in the river and the Gilwiskaw Brook. Elevated levels of phosphates in the river are harmful because it encourages the growth of algae which can reduce the dissolved oxygen content in the river. Current evidence from the EA is that by far the greatest contribution to ortho-phosphate loads in the Gilwiskaw Brook is from the PSTW although there are other sources, particularly from agriculture.

5. As a result of difficulties which have arisen with regard to the impact of the application/proposals mentioned above on the SAC, there is pressure from competing housing and retail developers for the Council to clarify its position on the Habitats and SAC issues.

6. I shall deal in a separate opinion with the specific claim by one developer claims to have favourable advice from Leading Counsel that existing use rights are protected by having regard to the "fallback" position which does not require a full assessment (because of the fallback position) on impact in a subsequent application. For reasons I set out there and below, I do not agree with that view.

Issues

7. The issues I am asked to advise on at the present time are, in the context of the application of the Habitats Directive and Regulations, the following:

   (1) the correct approach to take as a matter of law to a the following cases:

      (a) planning application where a fallback position is claimed, or exists; and

      (b) applications for the discharge of conditions, the approval of reserved matters or other multi-stage consents including whether they could amount in law to a "plan or project";

      (c) applications for changes of use including cases where the change of use and/or operational development is claimed to reduce impact on the SAC (e.g. because it replaces existing more harmful development);

      (d) applications involving qualitative planning and not quantitative improvements where no increased discharge to the SAC is anticipated;

      (e) certificates of lawfulness

   (2) the correct approach to take where there are a number of "smaller scale" applications which taken alone may result in an insignificant increase in discharge, but the cumulative or "in combination" effect will be significant;

(3) The Council's obligations under regs. 60 to 63 of the Habitats Regulations and the requirement for permitted development ("**PD**") rights granted by development order to be subject to the Habitat Regulations and an appropriate assessment.

8. For present purposes in the context of the first issue:

(1) I assume that the earlier fallback permission is one which could as a matter of planning law be regarded as a fallback, namely a valid and implementable permission for which there exist reasonable prospects of implementation if a later scheme were to be refused permission. If this were not the case then, of course, the basis of a fallback contention would not exist; and

(2) I am providing my opinion on the legal issues only and do not propose to comment on any likely impacts or adverse effects on the European site which might arise from any specific schemes or on the approach which might be taken to specific cases or groups of cases. Such matters can be covered in subsequent advice, as appropriate.

9. For completeness I first set out the legislative context and then turn to deal with the above issues. Although there is as yet no direct case authority (whether domestic or EU) on these issues, I consider that the analysis and response to the questions which I set out below to be firmly rooted in the environmental jurisprudence of the ECJ and the provisions, and legislative policy, of the Habitats Directive and Regulations.

Summary of my advice and conclusions

10. I consider that an application for a new project (whether it is wholly new or a project amending or varying an earlier consent) should be subject to the assessments required under reg. 48 for a number of reasons:

(1) The "project" which requires assessment should not be artificially cut-down by reference to the earlier consent. The project to which reg. 48 refers must be the project for which consent is sought and which may only be granted if the requirements of reg. 48 are complied with; and/or

(2) Even if only the new aspect of the application were to be assessed, it would still fall to be assessed "in combination with" the project for which consent has already been granted and, to the extent that the combined effects would have an adverse effect on integrity, mitigation would have to address the "in combination" effects even if the earlier consent failed to do so; and

(3) Consent may only be granted if, based on objective evidence, there is no risk of significant effects or, if there is, that there is certainty that there will be no adverse

effect on the integrity of the European Site. The decision maker must be "convinced" of such a conclusion before consent may be granted lawfully.

11. Further:

(1) In the case of applications for the discharge of conditions, the approval of reserved matters or other multi-stage consents the reasoning applied to EIA by the ECJ and HL in ***R (Barker) v. Bromley LBC Case C-290/03*** and ***Commission v. UK Case C-508/03*** [2006] Q.B. 764 and [2007] 1 A.C. 470 (House of Lords) is equally capable of applying to Habitats given the importance of the policy and the relationship between EIA and Habitats identified by the ECJ in ***Waddenzee***. It is highly likely that the Habitats procedures will have to be applied to at least negative (and arguably all) conditions, and the approval of reserved matters if they have not been considered at the stage of the initial grant of permission or, as in ***Barker*** there has been a failure to consider some significant aspect of the effects of the project and this means the project has not been properly assessed. The critical difference is that whereas EIA is a process requiring the assessment of significant effects, the Habitats requirements dictate a negative outcome to an application if there is an adverse effect on integrity (absent the application of the derogation conditions).

(2) In the case of applications for changes of use including cases where the change of use and/or operational development is claimed to reduce impact on the SAC (e.g. because it replaces existing more harmful development) -

(a) The requirements of the Habitats Regulations and Directive apply and the question is whether either the screening test applies or, if it does, there is an adverse effect on integrity. It is a question of fact and judgment in each case whether the change of use proposed would fall within the terms of the provisions;

(b) Where it is said that the application will reduce the impact on the SAC then it is again a matter of fact and judgment whether the proposals will have such an effect. However, this does require the Council to consider whether the existing permitted or lawful use/development is realistically capable of being revived (or implemented) and whether there is a real prospect that it will be revived (or implemented). In other words, the Council must satisfy itself that there will in reality be a reduction in impact on the SAC. If the judgment on the facts is that the previous or permitted use is unlikely to be revived or implemented, the proper comparison for the Council will be between the current situation (with the impact of the site as it actually is at the date of the determination) and the

impact of the application proposals.

(3) In the case of applications involving qualitative planning and not quantitative improvements where no increased discharge to the SAC is anticipated then, if as a matter of fact and judgment, the Council concludes either that there is likely to be no significant effect on the SAC or, if there is, then (following appropriate assessment0 there will not be an adverse effect on integrity of the SAC, the application of the Directive and Regulations will not require the proposals to be refused.

(4) I do not consider that certificates of lawfulness fall within the requirements of the Habitats Regulations and Directive since it does not grant consent for any plan or project but merely recognises the acquisition of lawful use rights. However, there may be structural issues with regard to local planning authorities allowing lawful use rights to be acquired without taking enforcement action, as several cases have suggested.

(5) Where there are a number of "smaller scale" applications which taken alone may result in an insignificant increase in discharge, but the cumulative or "in combination" effect will be significant, the Council is obliged to have regard to the cumulative "in combination" effects as the Regulations and Directive require.

(6) The Council's obligations under regs. 60 to 63 of the Habitats Regulations subject PD to the requirements of art, 6(3) and (4) the Habitats Directive and the trigger for such is the likelihood of significant effect under reg. 60 as under reg. 48 for planning applications, subject to notification of the appropriate nature conservation body. If there is determined or deemed there to be such a likelihood (see regs. 62 and 63(3)-(5)), then the implementation of PD rights are subject to appropriate assessment and to there being no adverse effect on integrity. Essentially, the provisions remove the rights to develop in accordance with the GPDO unless the procedure in regs. 60-63 is gone through and satisfied.

The legislation

12. The Habitats Regulations implement the Wild Birds Directive and the Habitats Directive by providing for the protection of "European sites"[1] - including Special Areas of Conservation and Special Protection Areas classified under the Birds Directive.

<u>The Habitats Directive</u>

13. Articles 6(2) to (4) of the Habitats Directive provide:

[1] Defined by reg. 10 of the Habitats Regulations as including both SACs and SPAs.

"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 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.

4. If, in spite of a negative assessment of the implications for the site and in the absence of alternative solutions, a plan or project must nevertheless be carried out for imperative reasons of overriding public interest, including those of a social or economic nature, the Member State shall take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected. It shall inform the Commission of the compensatory measures adopted."

14. Important guidance on the application of these requirements has been given by the Commission in **Managing Natura 2000** ("**MN2000**"), which has been accepted and applied by the ECJ e.g. 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, below.

<u>The Habitats Regulations</u>

15. In the Habitats Regulations, the requirements of art. 6(3) and (4) are given effect in the development plan and control context though principally regs. 47-49 and 53.

16. The Regulations, since they transpose the Directive into UK law, should be construed to give proper effect to the Directive in accordance with:

(1) ***Marleasing v. La Comercial Internacional de Alimentación*** (Case C-106/89) [1990] E.C.R. I-4153, 4159 -

"It follows that, in applying national law, whether the provisions in question were adopted before or after the directive, the national court called upon to interpret it is required to do so, so far as possible, in the light of the wording and the purpose of the directive in order to achieve the result pursued by the latter ..."

(2) ***Webb v. Emo*** [1993] 1 W.L.R. 49. As Lord Keith held pp 59-60 -

"...it is for a United Kingdom court to construe domestic legislation in any field covered by a Community directive 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: see ***Duke v. GEC Reliance Ltd*** [1988] AC 618 at 639-640 per Lord Templeman. This is so whether the domestic legislation came after or, as in this case, preceded the directive: see ***Marleasing SA v. La Comercial Internacional de Alimentación SA*** Case C-106/89 [1990] ECR I-4135... As the European Court said, a national court must construe a domestic law to accord with the terms of a directive in the same field only if it is possible to do so. 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."

17. Reg. 47(1) states:

"**47. Application of provisions of this Part**

(1) The requirements of -

(a) regulations 48 and 49 (requirement to consider effect on European sites), and

(b) regulations 50 and 51 (requirement to review certain existing decisions and consents, &c.),

apply, subject to and in accordance with the provisions of regulations 54 to 85, in relation to the matters specified in those provisions."

18. Reg. 48 of the Habitats Regulations provides that:

"**48. Assessment of implications for European site**

(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 (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.

(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

49. Considerations of overriding public interest

(1) If they are satisfied that, there being no alternative solutions, the plan or project must be carried out for imperative reasons of overriding public interest (which, subject to paragraph (2), may be of a social or economic nature), the competent authority may agree to the plan or project notwithstanding a negative assessment of the implications for the site.

(2) [priority habitats and species] ...

(3) (4) [requests for Commission's opinion] ...

(5) Where an authority other than the Secretary of State propose to agree to a plan or project under this regulation notwithstanding a negative assessment of the implications the site concerned, they shall notify the Secretary of State.

Having notified the Secretary of State, they shall not agree to the plan or project before the end of the period of 21 days beginning with the day notified to them by the Secretary of State as that on which their notification was received by him, unless the Secretary of State notifies them that they may do so.

(6) In any such case the Secretary of State may give directions to the authority prohibiting them from agreeing to the plan or project, either indefinitely or during such period as may be specified in the direction.

This power is without prejudice to any other power of the Secretary of State in relation to the decision in question.

...

53. Compensatory measures

Where in accordance with regulation 49 (considerations of overriding public interest)-

(a) a plan or project is agreed to, notwithstanding a negative assessment of the implications for a European site [or European offshore marine site], or

(b) a decision, or a consent, permission or other authorisation, is affirmed on review, notwithstanding such an assessment,

the Secretary of State shall secure that any necessary compensatory measures are taken to ensure that the overall coherence of Natura 2000 is protected."

19. Reg. 54 provides:

"**Planning**

54. Grant of planning permission

(1) Regulations 48 and 49 (requirement to consider effect on European site) apply, in England and Wales, in relation to -

(a) granting planning permission on an application under Part III of the Town and Country Planning Act 1990;

(b) granting planning permission, or upholding a decision of the local planning authority to grant planning permission (whether or not subject to the same conditions and limitations as those imposed by the local planning authority), on determining an appeal under section 78 of that Act in respect of such an application;

(c) granting planning permission under -

(i) section 141(2)(a) of that Act (action by Secretary of State in relation to purchase notice),

(ii) section 177(1)(a) of that Act (powers of Secretary of State on appeal against enforcement notice), or

(iii) section 196(5) of that Act as originally enacted (powers of Secretary of State on reference or appeal as to established use certificate);

(d) directing under section 90(1), (2) or (2A) of that Act (development with government authorisation), or under section 5(1) of the Pipe-lines Act 1962, that planning permission shall be deemed to be granted;

(e) making -

(i) an order under section 102 of that Act (order requiring discontinuance of use or removal of buildings or works), including an order made under that section by virtue of section 104 (powers of Secretary of State), which grants planning permission, or

(ii) an order under paragraph 1 of Schedule 9 to that Act (order requiring discontinuance of mineral working), including an order made under that paragraph by virtue of paragraph 11 of that Schedule (default powers of Secretary of State), which grants planning permission, or confirming any such order under section 103 of that Act;

(2) [Scotland only]

(3) Where regulations 48 and 49 apply, the competent authority may, if they consider that any adverse effects of the plan or project on the integrity of a European site would be avoided if the planning permission were subject to conditions or limitations, grant planning permission or, as

the case may be, take action which results in planning permission being granted or deemed to be granted subject to those conditions or limitations.

(4) Where regulations 48 and 49 apply, outline planning permission shall not be granted unless the competent authority are satisfied (whether by reason of the conditions and limitations to which the outline planning permission is to be made subject, or otherwise) that no development likely adversely to affect the integrity of a European site could be carried out under the permission, whether before or after obtaining approval of any reserved matters.

In this paragraph "outline planning permission" and "reserved matters" have the same meaning as in section 92 of the Town and Country Planning Act 1990 or section 39 of the Town and Country Planning (Scotland) Act 1972."

20. Where there is a negative appropriate assessment, planning permission must be refused unless the exceptional provisions of regs. 49 and 53 are applied.

21. The provisions are adapted to remove the effect of PD rights granted consent by Development Order (typically the GPDO 1995) where there is likely to be a significant effect. This is done by the deeming of a condition on the development order permission requiring the prior approval of the planning authority. In such cases, the PD rights may not be relied on (or continue to be relied on if development was commenced before commencement of the Regulations) unless notice of approval has been received from the planning authority under reg. 62.

"**60. General development orders**

(1) It shall be a condition of any planning permission granted by a general development order, whether made before or after the commencement of these Regulations, that development 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 not be begun until the developer has received written notification of the approval of the local planning authority under regulation 62.

(2) It shall be a condition of any planning permission granted by a general development order made before the commencement of these Regulations that development which -

(a) is likely to have a significant effect on a European site in Great Britain (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,

and which was begun but not completed before the commencement of these Regulations, shall not be continued until the developer has received written notification of the approval of the local planning authority under regulation 62.

(3) Nothing in this regulation shall affect anything done before the commencement of these regulations."

22. The provisions apply whether the development order was made before or after the Habitats Regulations and where development was begun before the commencement of the Regulations *but not completed*. Otherwise, the Habitats Regulations do not affect anything done prior to the commencement of the Regulations.

23. There are provisions for the consultation of the appropriate nature conservation body in reg. 61 but where the view remains that there is likely to be a significant effect, an appropriate assessment is required. If the appropriate assessment shows that there will be an adverse effect on integrity, then the planning authority may not issue a notice approving the use of the PD rights. See reg. 62(6):

> "(6) In any other case in which the application has been sent to the appropriate nature conservation body, the local planning authority shall, taking account of any representations made by the appropriate nature conservation body, make an appropriate assessment of the implications of the development for the European site or European offshore marine site in view of that site's conservation objectives.
>
> In the light of the conclusions of the assessment the authority shall approve the development only after having ascertained that it will not adversely affect the integrity of the site."

24. There is no derogation procedure, and in such cases a planning application will have to be made as there had been no PD rights.

25. Overall, the procedure is a clearly structured one and the Regulations are closely modelled on the language of Articles 6(3) and (4) of the Habitats Directive. As MN2000 states in Section 4.2:

> "Article 6(3) and (4) define a step-wise procedure for considering plans and projects[2].
>
> (a) The first part of this procedure consists of an assessment stage and is governed by Article 6(3), first sentence.
>
> (b) The second part of the procedure, governed by Article 6(3), second sentence, relates to the decision of the competent national authorities.
>
> (c) The third part of the procedure (governed by Article 6(4)) comes into play if, despite a negative assessment, it is proposed not to reject a plan or project but to give it further consideration.
>
> The applicability of the procedure and the extent to which it applies depend on several factors, and in the sequence of steps, each step is influenced by the previous step."

26. The most significant guidance on the application of those provisions is found in the ECJ's judgment in ***Waddenzee***. That structure requires, before granting consent for a project, the following:

(1) There must be an assessment by the competent authority (generally the LPA) as to whether a project is likely to have "a significant effect" on a European Site (providing it is not directly connected with or necessary to the Site's management) whether in combination with other plans or projects or alone. This is carried out on a precautionary basis. The trigger for assessment does not presume that the plan or project considered definitely has such effects, but rather follows from the mere possibility that such effects attach to the plan or project, so that an assessment is required if there is a probability or

[2] See the flowchart at MN2000 Annex III.

risk that the plan or project will have an effect on the site concerned (regs. 48(1), 60-62 and Art. 6(3))[3].

(2) If there is likely to be such a significant effect, the competent authority (on appeal, the Secretary of State) must carry out an appropriate assessment (regs. 48(1), 62(6) and Art. 6(3)).

(3) The appropriate assessment must consider the implications for the European Site "in view of" that site's conservation objectives (regs. 48(1), 62(6) and Art. 6(3)). 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 but, conversely, 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.

(4) There are obligations with regard to information and consultation (reg. 48(3) & (4) and Art. 6(3)).

(5) The competent authority must have regard to the manner in which the project is proposed to be carried out or to any conditions or restrictions subject to which it is proposed that the consent should be given (reg. 48(6)).

(6) In the light of the conclusions of the assessment, the competent authority shall agree to the project only after having ascertained that it will not adversely affect the integrity of the European Site (reg. 48(5) and Art. 6(3)). This is adapted in the case of PD rights to withholding approval (reg. 62(6)). These provisions imposes a stringent requirement, the ECJ in ***Waddenzee*** (below) holding that the project in question may be only be authorised where the competent national authorities "are convinced that it will not adversely affect the integrity of the site concerned"[4]. The full passage is worth recalling –

> "56. It is therefore apparent that the plan or project in question may be granted authorisation only on the condition that the competent national authorities are convinced that it will not adversely affect the integrity of the site concerned.
>
> 57. So, where doubt remains as to the absence of adverse effects on the integrity of the site linked to the plan or project being considered, the competent authority will have to refuse authorisation.
>
> 58. In this respect, it is clear that the authorisation criterion laid down in the second sentence of Article 6(3) of the Habitats Directive integrates the precautionary principle … and makes it possible effectively to prevent adverse effects on the integrity of protected sites as the result of the plans or projects being considered. A less stringent authorisation criterion than that in question could not as effectively ensure the fulfilment of the objective of site protection

[3] ***Waddenzee***, below, paras. 40-54 of the judgment.

[4] ECJ, para. 56.

intended under that provision.

59. Therefore, pursuant to Article 6(3) of the Habitats Directive, the competent national authorities, taking account of the conclusions of the appropriate assessment of the implications of mechanical cockle fishing for the site concerned, in the light of the sites conservation objectives, are to authorise such activity only if they have made certain that it will not adversely affect the integrity of that site. That is the case where no reasonable scientific doubt remains as to the absence of such effects …"

See also, for example, the ECJ's judgment in ***Dragaggi & Others*** Case C-117/03 [2005] Env. L.R. 31, paras. 23-27, ***Commission v. Portugal*** Case C-239/04 (judgment 26.10.06) and ***R. (Hart DC) v Secretary of State*** [2009] J.P.L. 365.

(7) If it cannot be ascertained that the project will not adversely affect the integrity of the European Site, the authority must then consider whether there are any alternative solutions (reg. 49(1) and Art. 6(4)). In the Dibden Bay decision letter, the Secretary of State considered that alternatives should be considered on a broad basis: see paras. 51 and 52 of the decision letter in particular. This is consistent with Commission guidance in MN2000 para. 5.3.1[5]:

"5.3.1 … They could involve alternative locations (routes in case of linear developments), different scales or designs of development, or alternative processes. The 'zero-option' should be considered too."

Alternative solutions are those which satisfy the need, as identified by the competent authority, but which also better respect the integrity of the site in question. This means that a competent authority must consider the comparative ecological impacts on European sites arising from alternatives in order to identify alternative solutions[6].

(8) If there are no alternative solutions (Art. 6(4) uses the language "in the absence of alternative solutions") and "notwithstanding a negative assessment of the implications for the site" consent or authorisation etc may be granted for the project but only "for imperative reasons of overriding public interest" (IROPI) (reg. 49(1) and Art. 6(4)).

(9) IROPI may be of a social or economic nature (unless the site hosts a priority natural habitat type or a priority species in which case the considerations are significantly restricted) (reg. 49(1) and Art. 6(4)).

(10) Even if the authority is satisfied that there are IROPI etc., notwithstanding a negative assessment of the implications for a European Site, the Secretary of State is under a duty to secure that any necessary compensatory measures are taken to ensure that the overall coherence of Natura 2000 is protected (reg. 53 and Art. 6(4)).

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[5] See also the Commission's *Methodological Guidance* set out in its *Assessment of plans and projects significantly affecting Natura 2000 sites* (November 2001) para. 3.3.2.

[6] See ***Commission v Portugal*** Case-239/04, paras. 34-40.

27. The Habitats Directive and Regulations are of considerable significance where they apply since they superimpose on the domestic development control decision-making process a structured approach which must be followed in order that a lawful decision on the application for permission may be reached. This is apparent from several cases, see e.g. ***ADT Auctions v. SSETR*** [2000] J.P.L 1155.

CONSIDERATION OF THE ISSUES

(1) The fallback position

28. In the first place, the Council may wish to note that I have advised on this issue in the context of opinions disclosed to an inquiry earlier this year[7] where rival opinions were presented to the Inspector as part of both the appellant's and planning authority's cases. The Secretary of State appears in his decision letter[8] of 20.8.09 to have accepted the view which I set out in those opinions, and which I explain below, that the fallback position does not permit the impacts of the fallback permission to be discounted, or left out of consideration, when screening an application under reg. 47 of the Habitats Regulations or consideration whether there is an adverse effect on integrity of the European Site under reg. 48.

29. The decision letter included the following:

> "17. The question of whether or not the appeal proposals have an adverse effect on the integrity of the SPA arises in consequence of regulation 48 of the Habitats Regulations and the Thames Basin Heaths SPA. Regulation 48(1) is to the effect that, before granting planning consent for a project, the competent authority (which in this case is now the Secretary of State) must either be able to conclude that it will not have a significant effect on any protected European site (either alone or in combination with other plans or projects) or, if he cannot do that, he must carry out an appropriate assessment before granting planning permission. Subject to regulation 49 of the Habitats Regulations, if an appropriate assessment is required, regulation 48(5) means that consent cannot be granted if, on the basis of that assessment, it is not possible to ascertain that the project will not have an adverse effect on the protected European site. The Secretary of State does not consider that regulation 49 applies in this case. It is not part of the appellants' case that the development must be carried out for imperative reasons of overriding public interest.
>
> 18. BFBC has concluded that, following an appropriate assessment and in the light of the available information and the representations of Natural England (NE), it is unable to satisfy itself that the proposal (in combination with other projects) would not have an adverse effect on the integrity of the SPA. It therefore refused planning permission (ground 7) in accord with regulation 48 and Article 6(3) of the Habitats Directive (IR9.3.3).
>
> 19. The Secretary of State has carefully considered all the evidence and the legal opinions that have been provided on this matter. He considers that under regulation 48 the plan or project which is to be considered and assessed is that for which planning permission is being sought and that is a development of 781 units. The Secretary of State considers that this requirement under regulation 48 applies notwithstanding the review requirements of regulation 50. The requirement

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[7] Appeal by Taylor Wimpey UK Ltd & Homes & Communities Agency, Former RAF Staff College (The Parks), Broad Lane, Bracknell, Berks Rg12 9dd appeal ref. APP/R0335/A/08/2084226. I provided opinions which were used by Natural England and Bracknell Forest DC in resisting the appeal.

[8] A copy of which I enclose with this opinion.

> under regulation 48 to scrutinise the proposal as a whole means that the Secretary of State agrees with the Inspector that the proposal should be assessed for its potential impact on the SPA for 781 dwellings (IR15.3.9).
>
> 20. The Secretary of State recognises that this conclusion represents a departure from those conclusions reached on similar matters in the decisions referred to in paragraph 8 above. However, he considers that this inconsistency is justified in view of the significant additional legal advice provided on this point in the context of the present appeal."

30. 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. This was the view of the Secretary of State in his decision letter in August 2009, referred to above.

31. 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".[9]

32. 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 ."

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

> "… 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…"

34. 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

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[9] Regulation 48(1) and Article 6(3).

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.

35. I consider that ***Hart*** runs contrary to the view that the fallback position should be taken into account and the impacts "discounted" when assessing the effects of the subject application. To do so would fail to view the project holistically, and to judge its overall likely effect on the relevant habitats, but would artificially decouple the fallback impacts from the development proposals which have not been assessed and to artificially seek to have them treated as not part of the project and excluded even from "in combination" effects.

36. 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* project on the application site. At the screening stage, adverse effects cannot be ignored simply because the fallback position might or would have worse effects.

37. 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. See the summary of the position under the Directive and the effect of ***Waddenzee***.

38. 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."

39. 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).

40. 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."

41. 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) .
>
> [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."

42. 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 a European Site.

43. 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 in combination with others. It therefore as a matter of law focuses on the effect of the specific proposal and, for that reason alone, may as a matter of law preclude consideration of the fallback position since that is a different consent. A straightforward application of the language of the legislative provisions supports this construction:

    (1) Art. 6(3) requires that "*any ... project ... likely to have a significant effect thereon* [a site], *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*" and refers only to assessing the project, although considering it "in combination" with other projects;

    (2) Reg. 48(1) requires consideration to be given in screening the proposals to the likely effects of "*the project*" and, if they cannot be screened out, "*shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the European site*." This seems, on a straightforward reading, to refer to the effects of *the*

project not the project *less* the effects of other projects. Nor does it appear apt to be construed as allowing agreement to the project consent *if they are not worse than* the effects of other projects.

44. 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.

45. 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:

> "[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."

46. 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 EUROPEAN SITE arising from the plan or project.

47. The purpose of the provisions of Directive strongly supports the approach I advise. As the ECJ noted in para. 26 of ***Waddenzee*** when considering the term "project", the purpose of the Habitats Directive is a broad one, like the EIA Directive:

> "26. Such a definition of "project" is relevant to defining the concept of plan or project as provided for in the Habitats Directive, which, as is clear from the foregoing, seeks, as does Directive 85/337, to prevent activities which are likely to damage the environment from being authorised without prior assessment of their impact on the environment"

48. Note also the reference at para. 37 to using art. 6(2)

> "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."

49. The broad purpose of the Habitats Directive can also be seen from the paragraphs of its Preamble:

> "Whereas, the main aim of this Directive being to promote the maintenance of biodiversity, taking account of economic, social, cultural and regional requirements, this Directive makes a contribution to the general objective of sustainable development; whereas the maintenance of such biodiversity may in certain cases require the maintenance, or indeed the encouragement, of human activities;
>
> Whereas, in the European territory of the Member States, natural habitats are continuing to deteriorate and an increasing number of wild species are seriously threatened; whereas given that the threatened habitats and species form part of the Community's natural heritage and the threats to them are often of a transboundary nature, it is necessary to take measures at Community level in order to conserve them;
>
> …
>
> Whereas, in order to ensure the restoration or maintenance of natural habitats and species of Community interest at a favourable conservation status, it is necessary to designate special areas of conservation in order to create a coherent European ecological network according to a specified timetable;
>
> …
>
> Whereas sites eligible for designation as special areas of conservation are proposed by the Member States but whereas a procedure must nevertheless be laid down to allow the designation in exceptional cases of a site which has not been proposed by a Member State but which the Community considers essential for either the maintenance or the survival of a priority natural habitat type or a priority species;
>
> Whereas an appropriate assessment must be made of any plan or programme likely to have a significant effect on the conservation objectives of a site which has been designated or is designated in future…"

50. The objectives of the Directive are also stated in MN2000 at pp. 8-9:

> "Considered globally, the provisions of Article 6 reflect the general orientation expressed in the recitals of the directive. This involves the need to promote biodiversity by maintaining or restoring certain habitats and species at 'favourable conservation status' within the context of Natura 2000 sites, while taking into account economic, social, cultural and regional requirements, as a means to achieve sustainable development.
>
> ...
>
> Seen in a wider context — that of the Treaty establishing the European Community — Article 6 can be regarded as a key framework for giving effect to the principle of integration, since it encourages Member States to manage the protected areas in a sustainable way and since it sets the limits of activities which can impact negatively on protected areas while allowing some derogations in specific circumstances."

51. It follows, in my opinion, that 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.

52. 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[10]. 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.

53. For the above reasons, I consider that it would be wrong in principle for a planning decision-maker to have regard to the fallback position in concluding that the scheme would not be likely to have significant effects on a European Site. The 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.

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[10] Or if the derogation provisions in art. 6(4) and reg. 49 are applied. This is likely only to occur in truly exceptional cases.

Potential points which developers might raise

54. I do not propose to consider all arguments which individual developers might raise, given that I have already set out what I consider to be the correct legal analysis, above. However, there are three arguments which are worth rehearsing since they may be raised by applicants on applications to the Council or on appeals which the Council seeks to resist. These arguments were raised before the Secretary of State at the Bracknell appeal and were not successful.

(i) "Existing rights"

55. I have seen it argued that the fallback position ought to lead to an equivalent discounted impact assessment for the latter application in order that to do otherwise would be to "disturb existing rights" which arise from the earlier permission.

56. In my view the "existing rights" argument is misconceived and does not grapple with the full effect of the legislation.

57. 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.

58. It is an artificial argument to assume therefore that there is any disturbance to existing rights if, in fact, all that is under consideration is the extent of an assessment to a wholly new application which has elements in common with an earlier permission. The disturbance which in fact occurs is as a result of the decision to make the new application and the fact that the developer now wishes to develop, not according to the fallback permission, but by obtaining a new permission.

59. Moreover, subject to any decision to revoke or modify the fallback permission, it remains implementable. That is of the essence in law of a fallback position and, if there is not a reasonable prospect of its implementation, and the developer requires the new permission to develop the land, then it is not a genuine fallback permission in any event and the issue will be resolved for that reason.

(ii) Failure to consider the fallback permission under the Habitats provisions

60. It might be the case that the fallback permission was not considered under the Habitats provisions. There are strong reasons for not treating this absence as a *fait accompli*, whatever its reason, and beyond the power or obligations of the planning decision maker. If there were

no further consent process then the only means of doing so might be reg. 50 (see below) but this is not the case here.

61. The positive obligation in art. 6(2) of the Habitats Directive supports this approach:

> "(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 the Directive."

62. The approach to the fallback position, and construction of the Habitats Regulations, set out above, is a practical "appropriate step" within art. 6(2) if the effect of the fallback position argued by the appellant would place at risk, or have an adverse effect, on the relevant habitats or disturb the relevant species.

63. Indeed, this approach has the support of the ECJ and Advocate General in ***Waddenzee***. As I noted in my first opinion, the ECJ held at para. 37 that the general duty in article 6(2) is an ongoing duty (emphases 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."

64. Advocate General Kokott said this of the same issue (emphases 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. ...
>
> [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**."

65. It is also appropriate to recall the approach of the ECJ to multi-stage planning consent processes in ***R (Barker) v. Bromley LBC Case C-290/03*** and ***Commission v. UK Case C-508/03*** [2006] Q.B. 764 and [2007] 1 A.C. 470 (House of Lords). The ECJ rejected the UK's contention that because, on a reserved matters application, the principle of development had already been determined this meant that there should be no EIA at a subsequent (albeit subsidiary) stage. In ***Barker***, the ECJ held:

> "47. Secondly, as the Court of Justice explained in *Wells* [2004] ECR I-723, para 52, where national law provides for a consent procedure comprising more than one stage, one involving a principal decision and the other involving an implementing decision which cannot extend beyond the

> parameters set by the principal decision, the effects which a project may have on the environment must be identified and assessed at the time of the procedure relating to the principal decision. It is only if those effects are not identifiable until the time of the procedure relating to the implementing decision that the assessment should be carried out in the course of that procedure.
>
> 48. If the national court therefore concludes that the procedure laid down by the rules at issue in the main proceedings is a consent procedure comprising more than one stage, one involving a principal decision and the other involving an implementing decision which cannot extend beyond the parameters set by the principal decision, it follows that the competent authority is, in some circumstances, obliged to carry out an environmental impact assessment in respect of a project even after the grant of outline planning permission, when the reserved matters are subsequently approved: see, in this regard, Case C-508/03, post, paras 103-106. That assessment must be of a comprehensive nature, so as to relate to all the aspects of the project which have not yet been assessed or which require a fresh assessment."

66. In the House of Lords in ***Barker***, Lord Hope held at para. 24 (emphases added):

> "24. As the European court [2006] QB 764 said in para 48 of its judgment, however, the competent authority may be obliged in some circumstances to carry out an EIA even after outline planning permission has been granted. **This is because it is not possible to eliminate entirely the possibility that it will not become apparent until a later stage in the multi-stage consent process that the project is likely to have significant effects on the environment**. In that event account will have be taken of all the aspects of the project which have not yet been assessed or which have been identified for the first time as requiring an assessment. **This may be because the need for an EIA was overlooked at the outline stage**, or it may be because a detailed description of the proposal to the extent necessary to obtain approval of reserved matters has revealed that the development may have significant effects on the environment that were not anticipated earlier. In that event account will have to be taken of all the aspects of the project that are likely to have significant effects on the environment which have not yet been assessed or which have been identified for the first time as requiring an assessment. ..."

67. There are differences between the circumstances in ***Barker*** and the legal regimes, although the relationship between EIA and Habitats is apparent from ***Waddenzee***. However, these differences are not critical and in my opinion the policy of environmental protection is more important and leads the ECJ to a purposive approach to applying the EU provisions in the context of national consent systems in order to give efficacy to the EU requirements.

68. As ***Barker*** shows, even if the current domestic planning system does not easily fit the EU requirements the Habitats Directive must be given effect notwithstanding. The ECJ cases demonstrate that where the protection of the environment is concerned, the ECJ does not find persuasive or determinative arguments which would preclude giving full effect to the requirements of EU environmental law because of earlier, possibly flawed decisions, even if made according to national planning law. Indeed, the presence of the art. 6(2) obligation does not permit this in any event, and is additional to the type of considerations applicable to EIA in ***Barker***.

69. A similar approach can be taken in the present context, consistently with the approach to art. 6(2) in ***Waddenzee***. If there had been a failure to apply the Habitats approach to when the fallback permission was granted, then there is a strong argument that on a subsequent

application, where the development of the Site is to be considered again, then the competent national authorities should ensure that the assessment is properly carried out even if it had been omitted when an earlier decision was reached. Moreover, given the less specific nature of the Habitats Regulations as compared with the planning EIA Regulations under consideration in ***Barker***, the purpose of the Habitats Directive can be served without finding a deficiency in transposition (as in ***Barker***) and simply by the application of the words used in the Regulations.

70. On a planning application, unlike the EIA reserved matters cases (where the decision making was already predicated on the basis of an outline permission), there does not exist even the argument that full consent is not required for the scheme to proceed since it is a new and freestanding application. The case which may be advanced is simply that an approach to "fallback" under domestic planning law should be permitted to derogate from the full effect of the EU obligation which, in my view, is a substantially weaker argument than the one regarding subsidiary authorisations which, in any event, failed in ***Barker***.

(iii) Absence of a regulation 50 review

71. In the case of a fallback position resulting from a permission granted before the designation of the relevant European Site (which will depend on the circumstances of the specific case) it has been suggested that, given the obligation to review existing permissions under reg. 50, the absence of such any such:

    (1) Inaction has effectively affirmed the fallback scheme; and

    (2) If such a review were to be carried out in the future this would ensure that there was no avoidance of European legal obligations.

72. If it were claimed that there were a legitimate expectation that there would be no review or there were no adverse effects I do not consider that such contentions would stand scrutiny since, given the legal duties under the Habitats Directive, and the duty of co-operation under Article 10 of the EC Treaty[11], it is difficult to see how a substantive legal obligation could be overridden by inaction or even a positive decision not to act. It would mean that the efficacy of the Directive could be undermined by incompetence or accident or simple failure to act, which seems wholly contrary to the approach of the ECJ in Habitats cases. Indeed, as Simon Brown LJ pointed out in ***R. v. Devon County Council, Ex parte Baker*** [1995] 1 All E.R. 73, 88-89,

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[11] "*Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community's tasks. They shall abstain from any measure which could jeopardise the attainment of the objectives of this Treaty."*
See Lord Bingham in ***Berkeley v. Secretary of State*** [2001] 2 A.C. 603, 608 – "the duty laid on member states by article 10 of the EC Treaty, the obligation of national courts to ensure that Community rights are fully and effectively enforced."

legitimate expectations cannot be claimed if they would be inconsistent with statutory duties.

73. Secondly, there is no scope for an estoppel argument since planning law generally no longer recognises the operation of the concept of estoppel, that cannot be relied upon: see ***R (Reprotech (Pebsham) Ltd) v. East Sussex County Council*** [2003] 1 W.L.R. 348.

74. The fact that there may be a review in the future is irrelevant:

(1) There is a legal obligation to scrutinise the appeal proposals as a project within reg. 48. There is no suggestion in the Regulations that an "in combination" impact can be ignored if it could be the subject of a future reg. 50 review;

(2) The review provisions in reg. 50 are a domestic provision and not part of arts. 6(3) or (4) of the Habitats Directive. Applying the approach which requires transposing legislation to be construed consistently with its European source, it would be difficult to construe the obligations consistently with the Directive if they were to be postponed by an interpretation based on the existence of reg. 50;

(3) The suggested construction is wholly inconsistent with the clear legal obligation in reg. 48 which is that consent cannot be given unless the assessment process has been undertaken for the specific plan or project under consideration and it is concluded that there is either no significant effect or, if there is, there is no adverse effect on integrity. The judgment of significant effect in reg. 48(1) plainly requires an assessment of the specific project as does the requirement for an appropriate assessment if the project is not screened out. The fact that reg. 48(5) (reflecting the clear words of art. 6(3)) states "*shall agree to the plan or project* ***only after having ascertained*** *that it will not adversely affect the integrity of the European Site…"*must mean that permission will not be given <u>following</u> an assessment of the effects of the project. It does not allow that assessment to be deferred to some uncertain future date after permission is granted which would be wholly inconsistent with the words of reg. 48(5);

(4) Art. 6(3) itself requires that the assessment must precede the consent (emphases added) -

> "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 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. …"

(5) Reg. 56(3) of the Habitats Regulations provides -

> "(3) Where the authority ascertain that the carrying out or, as the case may be, the continuation of the development would adversely affect the integrity of a European site ..., they nevertheless need not proceed under regulations 50 and 51 if and so long as they consider that there is no likelihood of the development being carried out or continued."

If, as a result of the application project, the fallback scheme does not proceed as permitted, then the duty to review may not in any event arise.

75. It follows that in my view, the lack of a reg. 50 review, or the possibility of a future review, as a matter of law cannot affect the extent or content of the assessments required under reg. 48 of the Habitats Regulations or art. 6(3) of the Habitats Directive for a specific planning application.

(iv) Conclusion on the potential arguments

76. I do not consider that any of the potential arguments which I have referred to above leads to a different conclusion from the approach I have advised above.

(2) Application of Habitats requirements to the discharge of conditions

77. In my view, the ECJ has made it clear in the EIA context that the operation of EIA and that EIA development consents for "projects" may be applicable to approvals of reserved matters or conditions, although generally in the context of negative conditions which prohibit the implementation of the consent without the discharge of the reserved matters or conditions.

78. The principal authorities are ***R (Delena Wells) v. Secretary of State*** Case C-201/02 [2004] 1 C.M.L.R. 31, which concerned the application of EIA procedures to the approval of conditions imposed on old mineral permissions under the Planning and Compensation Act 1991 (adopting the approach applied by the Court of Appeal in ***R v. Durham County Council ex parte Huddleston*** [2000] 1 W.L.R. 1484) and the ECJ's decisions in ***Commission v. UK*** Case C-508/03 and ***Barker*** Case C-290/03 and the House of Lords in ***R. v Bromley LBC Ex p. Baker***, already referred to above.

79. The application of EIA principles to Habitats has already been evident by the ECJ's judgment in ***Waddenzee***, in which it held that the meaning of "project" had a similar meaning in both contexts.

80. I will set out my detailed reasons below, but in my opinion it is likely that if the issue were to come before the ECJ, it would hold that the requirements of art. 6(4) would be applicable to the discharge of conditions or approval of reserved matters at least in circumstances where the project could not be carried out without discharge of the specific condition or approval of

reserved matters[12]. This is most likely to occur in cases where there is a negative prohibition imposed on the commencement of development, or its continuation beyond a specific point and consent is required before it can proceed further.

81. As was anticipated by the ECJ's judgment in ***Wells***, the ECJ in ***Commission v. UK*** and ***Barker***, and the House of Lords in ***Baker***, introduced the possibility of EIA being required at stages in the planning decision-making after an in-principle decision granting outline planning permission. As ***Wells*** itself shows, the implications are not limited to reserved matters alone but may also extent to cases where approvals under negative conditions, effectively conditions precedent to development proceeding, are required.

82. The effect of those decisions has been reflected in the amendments introduced by [ ] which apply not only to the approval of reserved matters but also to [ ]. This is an indication of the width of the principle and that DCLG does not consider the Barker principle to be restricted to reserved matters approvals.

83. While it is clear that ***Barker*** and ***Commission v. UK*** were concerned only with consideration of the specific question under the EIA Directive of whether a reserved matters approval was a "development consent", it is important to recall the importance which the ECJ attaches to giving full effect to the purpose of directives and of its willingness to take a broad, protective stance in environmental cases.

84. Policy is strong in the context of the Habitats and Wild Birds Directives, as I have already explained when considering issue (1) above.

85. Further, as ***Waddenzee*** and ***Commission v. Portugal*** both show[13], and the line of cases on designation[14], the approach adopted by the ECJ to habitats is strongly protective. In fact, when examined, the language of Art. 6(3) of the Habitats Directive is even wider than that of the EIA Directive. In place of the "development consent" concept, Art. 6(3) states

> "(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 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.

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[12] This argument appears at the end of the notes in the Planning Encyclopaedia following reg. 48 of the Habitats Regulations. However, since I wrote that commentary, it would be wholly self-serving to rely on it.

[13] See, e.g., the passages quoted above.

[14] See, e.g., ***Commission v. Germany*** C-57/89[1991] E.C.R. I-883 ("Leybucht Dykes"), ***Commission v. Spain*** C-355/90[1993] E.C.R. I-4221 ("Santoña Marshes") and ***Commission v. France*** C-374/98[2000] E.C.R. I-10799 ("Basses Corbières").

86. The phrase "shall agree to the plan or project" is very wide, and to be read in the context that projects should only proceed if properly screened and, where necessary, subject to appropriate assessment. It is difficult to see how or why the ECJ would take in this context a significantly different approach to multiple stages of the planning authorisation process than it took under the EIA Directive.

87. The requirements of Art. 6(3) and (4) are stronger than the EIA provisions since they do not merely set out an appropriate procedure for the gathering of information and making an assessment, but may dictate the outcome of the application depending on the result of that assessment process. While both procedures prohibit the grant of consent until the relevant procedures are complied with, the Habitats procedure takes an important step further by requiring the refusal of authorisation in certain circumstances, i.e. if there is an adverse effect on integrity and the exceptional derogation provisions of regs. 49/53 and Art. 6(4) do not apply.

88. If they key consideration is, as it was in EIA, that in an authorisation process involving several stages more than one authorisation is required before the project can proceed, then this is a characteristic of the domestic system which also falls to be considered in the context of the Habitats provisions.

89. In my opinion, the question is not whether the discharge of conditions is a "project" but whether they amount to *agreeing to a project* within art. 6(3) or the giving of "any consent, permission or other authorisation" *for a project* within reg. 48(1). The project is the development project which has already received at least an outline planning permission.

90. The opening sentence of reg. 48(1) is apparently wide in its scope –

> "before deciding to undertake, or give any consent, permission or other authorisation for, a plan or project…"

91. The language of reg. 54(1) seems restrictive of the application of the procedure to applications which lead to planning permission of one form or another[15]. It is possible that the wording would be approached broadly taking the approach to sympathetic interpretation required by ***Marleasing*** and ***Webb v. Emo*** (see above). However, the use of "planning permission" in reg. 54(1) may prove too much even for a flexible approach to interpretation.

92. In that event, if Art. 6(3) and (4) do apply to stages subsequent to the grant of permission then the Habitats Regulations would be in a similar position to the EIA Regulations prior to their amendment in making no provision for reserved matters/subsequent stages in the

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[15] ODPM Circular 06/05 paras. 9 and 11, and Figure 1, deal with the Habitats Regulations procedure only in terms of "planning permission":

authorisation process. In that event, direct effect would have to be given to the Directive provisions to include the subsidiary decisions and the Habitats Regulations would require amendment. The ECJ has already held in ***Waddenzee*** at paras. 66-70 that Art. 6(3) meets the preconditions for direct effect. See also ***Marshall v. Southampton and South West Hampshire Area Health Authority*** Case 152/84 [1986] Q.B. 401 and ***R v. Durham CC ex parte Huddleston*** [2000] 1 W.L.R. 1484.

93. In my opinion, reg. 54(5) does no more than apply an ***ex parte Milne***[16] type of approach to outline permissions in Habitats cases where the authority needs to be able to exclude adverse effect on the full extent of the development permitted by the terms of the planning permission. However, if the full effect of the Habitats Directive cannot be achieved by construing the Habitats Regulations then, as in ***Huddleston,*** the planning authority (as an emanation of the state) must disregard the national provisions to the extent that they are inconsistent and give direct effect to art. 6(3).

94. It is not clear whether the wider language of art. 6(3) and reg. 48(1) requires for them to apply that the discharge of the condition, or the approval of the reserved matters, is required for the project to proceed. This requirement applies to EIA since a development consent is a consent required for a project to proceed, but this may not apply to the scope of the Habitats provisions. At the very least, in my opinion, negative conditions and reserved matters approvals (which are secured by a negative reserved matters condition) would be caught and it is at least arguable that other conditions would also be caught – at least in cases where there had not been an assessment at the initial stage when the original permission was granted.

95. If the Habitats provisions required an approach similar to that taken by the ECJ in ***Barker***, then the need to follow the Art. 6(3) and (4) procedure would only arise where significant effects are identified at the subsequent stage (whether reserved matters, approval of negative conditions or s. 73 application) which were –

    (1) not identifiable at the outline or original planning permission stage. This is likely to include those effects which were not identified as well, such as cases decided before the implications of designation may have been understood; or

    (2) previously identified but which now require "a fresh assessment". As noted above, this could mean where there has been some material change of circumstances since the grant of planning permission. This could include the change of policy.

96. The effect of the Habitats provisions requiring screening and appropriate assessment is that if

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[16] ***R v Rochdale Metropolitan Borough Council, Ex p Milne*** (2000) 81 P & CR 365, applied subsequently and approved by the House of Lords in ***R (Edwards and another) v. Environment Agency*** [2008] Env. L.R. 34.

the application cannot be screened out, and the authority is not convinced that there will not be an adverse effect on the integrity of the site in question, then it must refuse to discharge the condition or approve the reserved matters. The effect of this would be that, by a decision on a subsidiary element of a consent process, the project can be rejected.

97. The approach of the ECJ and the House of Lords does not in terms require the assessment of reserved matters to lead to outright refusal and effective refusal of the development despite its being established by the in principle decision at the outline stage. However, they were dealing with EIA, not Habitats, cases.

98. In my opinion, because of the specific requirements relating to Habitats, and the dictating of the substantive outcome by the appropriate assessment (subject to the art. 6(4) procedure), as I have noted, the position appears to me to be quite different. Therefore, although such an approach might run contrary to the normal principle of UK planning law, considered in Section (1) above, that a reserved matters decision cannot go back on the principle of outline planning permission, it seems a clear consequence of the specific legal duty in art. 6(3) and reg. 48(5), if applicable.

(3) Applications for change of use

99. Where the Council receives applications for changes of use, there is no reason in principle why the Habitats Regulations should not apply to that application. It may be that in some cases the change of the use may have an effect on the integrity of the European Site and not in others. There is nothing in a change of use application which would disapply the normal rules – plainly such an application would fall within the scope of regs. 48(1) and 54 if there were a likely significant effect.

100. The question is therefore the usual one of whether the screening test applies and, if it does, there is an adverse effect on integrity. It is a question of fact and judgment in each case whether the change of use proposed would fall within the terms of the provisions.

(4) Applications which may reduce the impact on the SAC

101. Where it is said that the application will reduce the impact on the SAC then it is again a matter of fact and judgment whether the proposals will have such an effect and fall within the provisions of reg. 48. This involves a comparison between the proposed development and either the impact of the land as it stands at the time of the application and/or the impact of the land if it were to be used for a former lawful use or a new permitted use.

102. This will require the Council to consider whether the existing permitted or lawful use/development is realistically capable of being revived or implemented and whether there is a real prospect that it will be revived or implemented.

103. In the case of a permission which has been granted but not implemented, then my advice on the fallback position

104. In other words, the Council must satisfy itself that there is likely in reality to be a reduction in impact on the SAC. In conducting that exercise it should take a precautionary approach, since this underpins the interpretation of the Habitats provisions, as the ECJ has made clear.

105. If the judgment on the facts is that the previous or permitted use is unlikely to be revived or implemented, the proper comparison for the Council to make will be that between the current situation (with the impact of the site as it actually is at the date of the determination) and the impact of the application proposals.

(5) Applications which do not increase impact on the SAC

106. In the case of applications involving qualitative planning and not quantitative improvements where no increased discharge to the SAC is anticipated this is again a question of fact and judgment and making a comparison between a realistic assessment of the position without the new development and the position if it is permitted. If the comparison is with an earlier, unimplemented permission rather than the current state of affairs, then see my advice above on the fallback position.

107. Apart from fallback cases, if as a matter of fact and judgment the Council concludes either that there is likely to be no significant effect on the SAC or, if there is, then (following appropriate assessment) there will not be an adverse effect on integrity of the SAC, the application of the Directive and Regulations will not require the proposals to be refused. It then remains a matter of planning judgment for the Council whether it grants permission

(6) Lawful development certificates

108. The purpose of lawful development certificates under ss. 191 and 192 of the Town and Country Planning Act 1990 do not grant permission or consent but merely determine the legality of existing or proposed uses.

109. In the case of proposed uses, then the following considerations apply:

    (1) If the proposed use is said to be lawful under permitted development rights under a development order, then the PD provisions of regs. 60-62 of the Habitats Regulations apply and the existence of PD rights is unlikely to be determinative; and

(2) A planning permission which may be relevant to the proposed development may be subject to review under the reg. 50 procedure.

110. In the case of existing lawful uses, or those proposed in accordance with existing rights not within the above exceptions, it is unlikely that the application for a certificate could be regarded as falling with the requirements relating to a plan or project since it does not give consent or permission. It merely declares in a definitive manner rights which exist, or would exist in any event, and does not allow their modification at all.

111. The issue arose in the EIA context before the ECJ in Commission v. UK Case C-98/04 and, although the Advocate General seemed to consider that LDCs should be subject to environmental assessment the ECJ dismissed the infraction since there had been no account taken of the expiry of the enforcement time limits:

> "19 During both the pre-litigation stage of the present procedure and the litigation itself, the Commission concentrated its criticisms on the issue of LDCs in so far as it allows by-passing of the procedures governing application for consent and environmental impact assessment required by Directive 85/337 for projects likely to have significant effects on the environment by virtue, inter alia, of their nature, size or location.
>
> 20 The Commission has not put forward any complaints concerning the actual existence of time-limits for the taking of enforcement action against development which does not comply with the applicable rules, although the introduction of LDCs is by its very nature inseparable from the provisions laying down such rules of limitation. Pursuant to section 191 of the TCPA, an LDC is issued, in particular, when no enforcement action may then be taken against the uses or operations concerned, whether because they did not involve development or require planning permission or because the time for enforcement action has expired.
>
> 21 Consequently, the present action for failure to fulfil obligations, since it puts before the Court only one aspect of a legal mechanism composed of two inseparable parts, does not satisfy the requirements of coherence and precision referred to above.
>
> 22 That conclusion is all the more necessary because the arguments put forward by the United Kingdom Government to contest the failure to fulfil obligations are based, in essence, on the system of time-limits which the Commission failed to include in the subject-matter of the dispute and which, accordingly, could not form the basis of detailed discussion between the parties.
>
> 23 It follows from the foregoing that the action must be dismissed as inadmissible."

112. Nonetheless, the Advocate General emphasized the unsatisfactory nature of UK planning law, albeit in the EIA context but in terms which are applicable to Habitats:

> "30. It is of little importance whether the ground of the breach relates to the date on which the local authorities, in the exercise of their discretion, took no action or to the point in time when the LDC was issued, precluding any breach; it is of still less relevance whether the certificate in question is in the nature of a decision or is merely declaratory. The crucial point is that, for reasons of convenience, it was decided not to intervene and a situation in breach of arose, whereas, wide as the discretion of the administration is, it may not give rise to a result contrary to the central objective of the Community legislation set out in Article 2(1) thereof. …
>
> …
>
> 33. If those responsible for monitoring the lawfulness of town planning do not react on learning that a facility is operating without an assessment of its effects on the environment having been

> carried out, or, where its scale is evident, do not require its assessment, they are tacitly consenting to it and, thereby, contravening the directive. The fact that, by reason of the passage of time and in the light of the principle of legal certainty, it was not appropriate to take enforcement action, does not make conduct which was previously on the margins of the law 'lawful'; it merely precludes any reassessment of the past in order to safeguard the stability of legal relations, which is one of the pillars of our coexistence in society. That conclusion does not preclude those harmed by the unlawful conduct from obtaining compensation on other grounds such as the responsibility of the State in breach to safeguard property rights, which the position of the United Kingdom Government would undermine.
>
> 34. In short, the obligation on the Community Member States to adopt the rules necessary to achieve the result sought by the directive is binding on all public authorities under the third paragraph of Article 249 EC, so that national legislation which allows the administration to take no action and allow a project awaiting consent and assessment of its effects on the environment to be implemented without those assessments being made infringes Articles 2(1) and 4 of the directive, as the United Kingdom Government accepts."

113. However, there is likely to be an issue with local authorities allowing the time limits for enforcement to expire, and possibly the operation of the immunity time limits, in EIA and Habitats cases since, by inaction, a planning authority could allow the equivalent of the grant of consent without either observing the requirements of EIA and the Habitats provisions. These issues were the subject of considerable criticism from the Administrative Court in ***Ardagh Glass Ltd v. Chester City Council*** [2009] Env. L.R. 34. There the Deputy Judge (HH J Mole QC) held:

> [103] I am clear that, with one reservation, the enforcement procedures under English law are effective and are well able to take into account and protect the fundamental objectives of Directive 85/337 . Once an enforcement notice is issued, either there will be no appeal, in which case the development ought to be removed by one method or another; or there will be an appeal and the Secretary of State will consider whether planning permission ought to be granted for the development enforced against. In that case permission will not be granted unless the Secretary of State is satisfied that a satisfactory EIA has been undertaken. The Secretary of State can and in my view should also consider, in order to uphold the Directive, whether granting permission would give the developer an advantage he ought to be denied, whether the public can be given an equal opportunity to form and advance their views and whether the circumstances can be said to be exceptional. There will be no encouragement to the pre-emptive developer where the Secretary of State ensures that he gains no improper advantage and he knows he will be required to remove his development unless it can demonstrate that exceptional circumstances justify its retention.
>
> [104] The reservation I have is that English law does leave open the possibility that the pre-emptive developer might achieve immunity without any proper EIA.
>
> ...
>
> [110] In my judgment, a purposive interpretation of art.2(1) strongly suggests that for the defendant councils to permit the Quinn Glass development to achieve immunity, whether by a positive decision not to take enforcement action or by mere inaction, would, as Schiemann L.J. contemplated [in *R (on the application of Prokopp) v London Underground Ltd* [2004] Env. L.R. 8], amount to a breach of the UK's obligations under the Directive. It may be that the provisions of s.171B need to be re-examined and perhaps disapplied in the case of EIA development so that for such development immunity would never arise and pre-emptive EIA development could only become lawful by, after full public participation, undertaking a comprehensive EIA comparing both initial and current circumstances and establishing exceptional justification. However, the circumstances of the *Prokopp* case are very different from the present case and, in my view, distinguishable. Whether the correct analysis would be to say that action or inaction on behalf of

> the planning authorities in the present case would be equivalent to development consent, is not a matter I need to decide. That is because there is no doubt that once enforcement notices are issued, as I order, and there is an appeal to the Secretary of State, as I anticipate there will be, any consent that might be given on the deemed application for permission would certainly be "development consent".

114. I understand that the Court of Appeal allowed the developers' appeal last week, but the appeal concerned only the question of attacking the retrospective grant of permission. I will advise further once the terms of the judgment are known.

115. As a precautionary measure, the Council should be very careful to consider enforcement action in the context of SPA/Habitats issues if information with regard to potential breaches becomes available. There is at the very least a reasonable argument that a decision not to take enforcement action when it is known (or reasonably suspected) that there is a breach, or a potential breach, is a decision to grant consent without going through the required procedures of the Habitats Regulations or Directive.

(7) Cumulative impacts of smaller scale applications

116. Both the Habitats Regulations Directive require not only the effects of the proposals to be considered but their effects "in combination" with others i.e. cumulative effects. In principle, it is quite possible that adverse effect on integrity could result from many small increases or impacts even though one or more may not be capable of being shown to be harmful in themselves. This is precisely the problem which has arisen in the context of the Thames Basin Heaths SPA and residential development in south central England where recreational pressures from new dwellings are likely to have an adverse effect on the SPA's integrity. The South East Plan addresses this problem at Policy NW6, pp 99-102[17].

117. Guidance on "in combination" effects is found in MN2000 at Section 4.4.3:

> "**4.4.3. … either individually or in combination with other plans or projects**
>
> A series of individually modest impacts may in combination produce a significant impact. Article 6(3) tries to address this by taking into account the combination of effects from other plans or projects. It remains to be determined what other plans and projects are covered. In this regard, Article 6(3) does not explicitly define which other plans and projects are within the scope of the combination provision.
>
> 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. In that context, one can consider plans or projects which are completed; approved but uncompleted; or not yet proposed:
>
> - 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

[17] See http://www.gos.gov.uk/gose/planning/regionalPlanning/815640.

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.
- On grounds of legal certainty, it would seem appropriate to restrict the combination provision to other plans or projects which have been actually proposed. At the same time, it must be evident that, in considering a proposed plan or project, Member States do not create a presumption in favour of other as yet unproposed plans or projects in the future.

  [Box] For example, if a residential development is considered not to give rise to a significant effect and is therefore approved, the approval should not create a presumption in favour of further residential developments in the future.

When determining likely significant effects, the combination of other plans or projects should also be considered to take account of cumulative impacts. It would seem appropriate to restrict the combination provision to other plans or projects which have been actually proposed."

118. The guidance suggests therefore that the "in combination" consideration should apply to those projects which have been proposed, as well as those which have already been permitted and those under construction or built. This means that the Council must also consider other proposals as well as consented development. The comment in the box makes it clear that permitting one form of development does not create and presumption of further grants of permission in the future.

119. Whilst it is not wholly clear what is meant by "proposed" but in my opinion this is likely to include numbers proposed in the development plan or in formal development plan or draft development plan policies, or even SPD, since the Habitats provisions apply to plans as well as to projects – as the guidance makes clear. The Council must be wary of considering only the cumulative effect of those developments which are actually proposed in the form of planning applications since such an approach is likely to be regarded as inconsistent with the objectives and purpose of the Habitats provisions.

(8) Permitted development rights and Habitats

120. PS rights do not escape the Habitats regime, nor could they do so consistently with the provisions of the Habitats Directive. In order that the provisions of art. 6(3) are properly transposed, permissions granted by development order (including the GPDO) are subject to a condition requiring prior approval as set out in regs. 60-62, discussed above.

121. The appropriate nature conservation body must be consulted and, depending on the availability of information, will be able to give an opinion on the likely effect of the reliance on the PD rights. If a significant effect is likely (applying the approach set out above, there being

no reason to distinguish between reg. 48 and the PD provisions) then the Council must carry out an appropriate assessment. If an adverse effect on integrity is found, on the ***Waddenzee*** principles set out above, then prior approval must not be given and the developer may not rely on the PD rights.

122. There is no provision equivalent to art. 6(4) or regs. 49 and 53. It seems that if a developer wishes to go through the exceptional derogation provisions and demonstrate an absence of alternatives, IROPI etc., then a normal planning application must be made regardless of the apparent PD rights since use of those is blocked once there is found to be an adverse effect on integrity.

123. In practical terms, the Council will need to be alert to the possible use of PD rights in a manner which might, alone or in combination, have an adverse effect on the SAC. This could, for example, result from the cumulative effects of the PD enlargement of dwellings discharging into the river if they were "in combination" to permit an increase in the number of inhabitants in the dwellings and thus the potential for discharge into the river.

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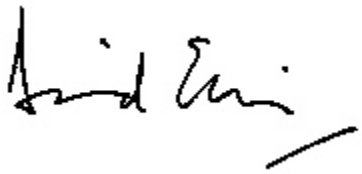
124. I have nothing further to add as presently instructed.



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8 February 2010

NORTH WEST LEICESTERSHIRE DISTRICT COUNCIL

DETERMINATION OF PLANNING APPLICATIONS WHERE THE DEVELOPMENT COULD AFFECT A DESIGNATED SPECIAL AREA OF CONSERVATION UNDER THE HABITATS DIRECTIVE 92/43/EEC

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