BRACKNELL FOREST DISTRICT COUNCIL

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

FORMER RAF STAFF COLLEGE, BROAD LANE, BRACKNELL

O P I N I O N (No. 2)

Introduction

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

2. I am now instructed to consider the approach adopted by the appellant, through its ecological witness Karen Colebourn, to this issue on the appeal concerning the former RAF Staff College, Broad Lane, Bracknell ("the Site"). The inquiry into the appeal against the Council's refusal of permission is due to begin shortly and it is expected that this Opinion and that of 4 December will be provided to the inquiry in support of the position adopted by the Council and Natural England[1].

3. Both the Council and Natural England are concerned that the proposals may adversely affect the Thames Basin Heaths SPA ("the SPA") and that at the least mitigation measures appropriate for the appeal proposals should be secured. The appellant, Taylor Wimpey UK Limited, contends that there will be no significant effect on the SPA having regard to its fallback position of an earlier,

[1] See Natural England's Statement of 15.10.08 and its letter of 19.1.09.

implementable planning permission and the minimal difference in impacts when the appeal scheme is compared with the development which already has permission.

4. For the purposes of this further opinion, I assume that the earlier 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 the later (appeal) scheme were to be refused. If this were not the case then, of course, the basis of the appellant's contentions would not exist.

5. I also make it clear that I am giving my opinion on the legal issues only and do not comment on the evidence on the substantive issues of likely impact or adverse effect on the SPA caused by the appeal or fallback schemes. Miss Colebourn's proof at para. 4.4 appears to confuse the substantive assessment of the ecological implications of the proposals (with or without account being taken of the fallback) and my opinion which is confined to the legal issues.

6. However, as referred to in my Opinion of 4 December, the decisions of the ECJ, particularly 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, require that:

   (1) The assessments should be approached on a precautionary basis;

   (2) The trigger for assessment pursuant to Art. 6(3) does not presume that the plan or project considered definitely has such effects, but rather follows from the mere probability or risk that such an effect attaches to the plan or project. Such a risk must be assumed where it cannot be excluded "on the basis of objective information" that the plan or project would have significant effects on the site concerned (***Waddenzee*** judgment paras. 41, 43-45); and

   (3) Consent can only lawfully be granted for the project following an appropriate assessment if that assessment (***Waddenzee*** judgment paras. 56-

58[2]) if it is *convinced* that the project will not have adverse effects on the integrity of the protected site (emphases added) –

> "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.
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> 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.
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> 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 intended** under that provision."

(4) As the ECJ itself summarised the position in "20. In that regard, the Court has already held that a plan or project such as the one in question may be granted authorisation only on the condition that the competent national authorities are certain that it will not have adverse effects on the integrity of the site concerned. That is so where no reasonable scientific doubt remains as to the absence of such effects."

7. To summarise my analysis of the legal position, 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

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[2] Repeated in later judgments such as ***Commission v. Portugal*** Case-239/04 para. 20 where the language of certainty is used.

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 SPA. The decision maker must be "convinced" of such a conclusion before consent may be granted lawfully.

Summary of the background to the appeal

8. Although the precise details are not critical to the legal issue, I note the following matters of relevance:

(1) In April 2003 the Council granted outline planning permission for up to 730 dwellings to be built on the Site. This was followed by another permission under s. 73 of the Town and Country Planning Act 1990 in December 2003 ;

(2) Although the planning permissions were both accompanied by Crown planning obligations under s. 299A of the 1990 Act, the obligation contained no mitigation measures to prevent adverse impact on the SPA;

(3) The Site lies within the 5 km radius generally regarded as the zone within which residential development is likely to give rise to an adverse impact on the SPA;

(4) In December 2007 the owner of the Site submitted an application (which began as a reserved matters application but then became a freestanding full application) for a different form of residential development which would not have increased the number of dwellings permitted in 2003;

(5) The appeal of that application was dismissed on grounds unrelated to the SPA, although the Inspector accepted the fallback argument as referred to in my Opinion of 4 December;

(6) The current appeal concerns a different application which if permitted would allow 1,120 dwellings to be developed on the Site. Development of the 2003 permission has commenced but I am instructed that only 339 dwellings being built, and these are excluded from the red line area of the

current appeal scheme. The remainder will be replaced by the 781 dwellings in the new application.

(7) In reliance on the earlier decision letter regarding the fallback position, the appellant contends that mitigation only need be provided for the additional 390 dwellings in excess of those already permitted, i.e. discounting not only those which are under construction but the additional unbuilt from the 2003 scheme.

9. I have been provided with the proof of evidence of Karen Colebourn of Ecological, Planning and Research Limited ("EPR") and the Opinion of Mr Timothy Straker QC.

10. The proof recites the decision letter of 26 August 2008 at para. 2.2 and my Opinion of 4 December at 2.3 with which Miss Colebourn expresses disagreement though I note she nowhere explains in detail why she disagrees but states that this will be "a matter for legal submissions".

11. Miss Colebourn claims that there are points which appear to have been overlooked in my earlier advice, and I will therefore consider the points she makes in her proof. Given the confusion I have mentioned in her para. 4.4, it may be that what Miss Colebourn is referring to is that I have not examined the specific ecological implications of the appeal proposals.

12. As I have already made clear, my opinion is concerned only with the legal requirements under UK and EU law with regard to Habitats and not with the specific factual and scientific issues regarding either screening or appropriate assessment arising on this appeal. That said, the correct approach in principle as a matter of law as to what should be assessed for the purposes of reg. 48, and the legal relevance of a fallback position, cannot turn on the facts of a specific case. If the appellant's argument is that, on the facts, there is not a significant effect/adverse effect on integrity then that is simply a case specific argument and it follows that such facts do not justify concluding as a matter of principle that the effect of a fallback position must be disregarded.

13. The essence of her contention is, though she noted that Habitats Regulations Guidance Note 4 requires "in combination effects" to include "approved but as

yet uncompleted plans or projects" (para. 2.4) she then states at 2.6 and 2.7 (emphasis added):

> "2.6 When considering the potential for combined effects, it must be remembered that 391 of the houses within the Appeal scheme are a replacement for 391 of the houses in the Approved scheme. **The impacts from this part of these schemes can therefore not combine**.
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> 2.7 The replacement houses in the Appeal Scheme are **not likely to have any greater effect on the SPA than they would under the Approved scheme**, and therefore there is **no potential for any increased combined effect** with the existing housing. Indeed given the dog ban they are likely to have less effect (see later)."

14. It is not clear from the proof why it is said that the impacts "***can*** *therefore not combine*" though I assume this is a reference to the legal contention that the fallback position must be excluded from the screening exercise and any appropriate assessment under reg. 48. There appears to be no basis for treating "*can ... not*" as meaning that an in combination assessment (or an assessment of the proposals absent a discounting for the impact of the fallback) could not actually be carried out.

15. Mr Straker's Opinion is submitted in support of the legal analysis relied on by the Appellant and does so by an argument that the concept of "project" in the Habitats Regulations and Directive should be construed to exclude consideration of that part of the application. Part of his advice appears to run contrary to part of Miss Colebourn's approach (see below).

16. I will deal with the opinions expressed in the Proof and the Opinion in turn.

General points

17. It is also worth considering general aspects of the approaches by Miss Colebourn and Mr Straker in giving the reasons for their view concerning the effect of the fallback position. There are some additional reasons, not explored in detail in my first opinion, which support my conclusions.

(i) Purpose of the Habitats provisions

18. First, a highly significant general consideration which is neither acknowledged in Miss Colebourn's proof nor Mr Straker's Opinion, is the strong purposive approach which underpins the Habitats Directive and the national transposing regulations and the broad and precautionary approach to the requirements

which have been adopted by the European Court of Justice ("ECJ"). See, for example, ***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. As the ECJ noted in para. 26 of its judgment 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"

19. 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."

20. The broad purpose of the Habitats Directive can also be seen from the paragraphs of its Preamble. They are stated by the Commission in **Managing Natura 2000** ("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.
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> ...
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> 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."

21. Importantly, in the context of the present contentions, the ECJ held:

    (1) the fact that in ***Waddenzee*** that there were a series of decisions made periodically did not preclude the full operation of the assessment requirements each time an application was made -

> "28. The fact that the activity has been carried on periodically for several years on the site concerned and that a licence has to be obtained for it every year,

each new issuance of which requires an assessment both of the possibility of carrying on that activity and of the site where it may be carried on, does not in itself constitute an obstacle to considering it, at the time of each application, as a distinct plan or project within the meaning of the Habitats Directive."

(2) An assessment under the Habitats provisions must consider all the aspects of the project (which the appellant seeks to avoid here) –

> "53. None the less, according to the wording of that provision, 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.
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> 54. Such an assessment therefore implies that all the aspects of the plan or project which can, either individually or in combination with other plans or projects, affect those objectives must be identified in the light of the best scientific knowledge in the field. Those objectives may, as is clear from Arts 3 and 4 of the Habitats Directive, in particular Art.4(4), be established on the basis, inter alia, 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 that directive or a species in Annex II thereto and for the coherence of Natura 2000, and of the threats of degradation or destruction to which they are exposed."

22. The above passages, in my view, might well be thought to be strongly supportive of the analysis of the fallback position adopted by the Council and Natural England.

(ii) Managing Natura 2000

23. Secondly, there is no consideration of the Commission's guidance on "in combination" effects in MN2000, which is the key European guidance on the legal obligation under consideration[3]. I quote the relevant part of it at para. 23(2) of my earlier opinion and, given the contentions now made by the appellant, it is important to note that the Commission do not consider that the legal obligation to assess "in combination" effects to be restricted to approved but as yet uncompleted projects. As can be seen from the passage I quoted, the Commission considers the obligation to extend to "projects which are completed" if they have continuing effects on the site in question.

24. That broad approach underlines my view that the European authorities would not look favourably on an argument that approved but uncompleted projects

[3] It appears to have the approval of the ECJ: see para. 41 of its judgment in ***Waddenzee***.

should be disregarded or that a significant part of a new project should be ignored for the purposes of assessment because of an earlier approved project.

(iii) How to approach the earlier absence of assessment

25. Regardless of the question of fault with regard to the absences of assessment or mitigation when the original permission was granted (it preceded formal designation of the SPA), there are strong reasons for not treating this absence as a *fait accompli* 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.

26. The obligations in art. 6(3) and (4) which substitute for the original provisions of the Birds Directive[4] should be considered in the light of the purpose of the Birds Directive which in my view lend additional support to the construction in my opinion of 4 December. In particular, the original art. 4(4) which was replaced by 6(3) and (4) of the Habitats Directive provided:

> "In respect of the protection areas referred to in paragraphs 1 and 2 above, Member States shall take appropriate steps to avoid pollution or deterioration of habitats or any disturbances affecting the birds, in so far as these would be significant having regard to the objectives of this Article. Outside these protection areas, Member States shall also strive to avoid pollution or deterioration of habitats."

27. The positive obligation in art. 6(2) of the Habitats Directive also supports the Council's 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."

28. The approach to the fallback position, and construction of the Habitats Regulations, set out in my 4 December opinion, 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.

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[4] Directive 79/409/EEC on the Conservation of Wild Birds.

29. Indeed, this approach to rectifying the earlier failure in granting the 2003 permission 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."

30. 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. ...
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> [AG57] However, practical consequences relating to authorised projects and plans would arise from Art.6(2) of the habitats directive if they resulted in deterioration or significant adverse effects in spite of an appropriate assessment. **In that case the Member State concerned would be obliged to take the necessary preventative measures in spite of the fact that authorisation had been given**."

31. Finally, it is worth recalling the approach of the ECJ to multi-stage planning consent processes in ***R (Barker) v Bromley LBC Case C-290/03*** and ***Commission v United Kingdom Case C-508/03*** [2006] Q.B. 764. 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.
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> 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."

32. In the House of Lords in ***Barker*** [2007] 1 AC 470, 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. ..."

33. Of course, 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 what is most important is that the policy of environmental protection is one which 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.

34. 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***.

35. A similar approach could be applied here, and consistently with the approach to art. 6(2) in ***Waddenzee***. If there had been a failure to apply the Habitats assessment process to the original application for permission then there is a strong argument that on a subsequent application, where the development of the Site is to be considered again, then the national authorities should ensure that the assessment is properly carried out even if it had been omitted (for whatever reason) 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.

36. In this appeal, unlike the 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 appellant's case here 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***.

Points raised by the Colebourn Proof

Summary of my view

37. Before turning to the detailed points raised by Miss Colebourn, it is helpful if I note that:

    (1) None of the points she raises are matters of significance of which I was not aware when I wrote my Opinion; and

    (2) Nothing in the proof persuades me that I had (or have) reached the wrong interpretation of the Habitats obligations or that her contentions are correct as a matter of law.

Regulation 50 review

38. Miss Colebourn refers at paras. 2.12-2.14 to the obligation to review under reg. 50, the absence of such a review and her conclusions:

(1) Inaction has effectively affirmed the approved scheme (2.13); 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 regarding the SPA.

39. Both of these points are, in my view, wholly unpersuasive and provide no support for Miss Colebourn's primary case.

40. In the first place, I do not consider there could be any "effective affirmation" such as would preclude legal obligations under the Habitats Regulations or Directive. The reg. 50 obligation to review "*as soon as reasonably practicable*" which would apply in principle since the SPA was designated in March 2005, after the coming into force of the Habitats Regulations and after the grant of the original permission. However, even were there a positive act of affirmation (which I doubt) and a clear decision not to review, there may be other reasons for the absence of review. Moreover, 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.

41. Finally, 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:

(1) There is no clear act or conduct which would support such an expectation. An absence of action is ambiguous and uncertain; and

(2) Given the legal duties under the Habitats Directive, and the duty of co-operation under Article 10 of the EC Treaty[5], 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,

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[5] "*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."

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

42. Secondly, the fact that there may be a review in the future is in my view clearly 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 Art.s 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 some 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) That the logic of the second strand to Miss Colebourn's argument lacks any coherence is further underlined by the wording of art. 6(3) itself which puts

beyond doubt 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) Finally, Mss Colebourn's approach is contradicted by reg. 56(3) of the Habitats Regulations:

> "(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 appeal scheme, the 2003 scheme does not proceed as permitted, then the duty to review may not in any event arise.

43. 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/appeal.

Remaining issues: Colebourn, paragraphs 2.15-2.76 and Section 3

44. These parts of the Proof deal with the case specific assessments by Miss Colebourn and, for reasons I have already explained, cannot affect the issue of EU and UK law whether the implications of a fallback position should be excluded from assessments of the implications of a specific project under the Habitats provisions. I have already pointed out the apparent confusion in Miss Colebourn's conclusions at para. 4.4. between the correct approach in law to the provisions and the assessment of the specific facts. I leave the issue of Miss Colebourn's assessment of the likely effects of the proposals (with or without

fallback) to the various experts who will be dealing with these matters for the Council and Natural England.

The Opinion of Timothy Straker QC

45. I have been provided with a copy of the Opinion of Mr. Timothy Straker QC dated 20 January 2009. It is produced in response to the Council's position though it is far from clear that Mr. Straker has seen my Opinion on 4 December since he has not addressed many of the points which I raised, although the appellant had been provided with a copy of it. Nonetheless, I have considered his advice and the reasoning which leads him to the conclusion that the project which should be considered for the purposes of the Habitats Regulations is only the additional 390 houses.

46. I disagree with Mr. Straker's conclusions and consider his reasoning to be flawed.

47. In my opinion, his starting point is misconceived, namely that regulation 48 has to be read in a "*straightforward way bearing in mind it is intended to be operated by a variety of bodies without disturbing existing rights*". It is open to criticism for a number of reasons:

    (1) While it is necessary to construe the words, it is plain that European legislation and national transposing legislation should be approached purposively, in order to give effect to the European obligations. See under ***General Points***, above;

    (2) There is no discussion of the purpose of the Habitats provisions, the ECJ authorities or the Commission guidance in MN2000 in considering and giving effect to the purpose;

    (3) There is no specific requirement to operate the reg. 48 procedure "without disturbing existing rights" - although that phrase is itself uncertain since disturbance may take a variety of forms and strengths. ***Barker*** itself involved the "disturbance" of rights to the extent that EIA was required at the reserved matters stage though it had not been required before and outline planning permission had been granted. I do not consider that the concept of "not disturbing existing rights" can be regarded as consistent

with the clear and positive legal duty under art. 6(2) of the Habitats Directive; and

(4) Moreover, the "existing rights" approach makes an assumption that the assessment of an application which is in some manner a variation of, or contains elements similar to, an earlier permission is a "disturbance" to the earlier permission. I consider this argument to lack any substance. As the appellants themselves point out, absent modification or revocation, there is nothing which can disturb the existing right to develop under the 2003 permission. It is an artificial, and unconvincing, 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 appellant's own decision and the fact that it now wishes to develop, not according to the earlier permission, but by obtaining a new permission to develop the Site more intensively.

48. I have also set out under ***General Points*** other considerations which support the conclusion that Mr Straker's analysis does not given proper account or effect to the requirements of EU law.

49. I also do not agree with Mr. Straker's observations in paras. 22 to 24 of the Opinion since:

(1) Whatever the provenance of development activities in Continental Europe, the point Mr. Straker makes is wrong. His point, in fact, derives from the language used by the UK draftsman since art. 6(3) and (4) do not use this grammatical construction. In Art. 6(3) the reference to the competent authority is only to

> "the competent national authorities <u>shall agree to</u> the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned"

There is no phrase in art. 6 of the Directive which equates to the grammatical construction in reg. 48(1) ("a competent authority, before

deciding to undertake"). The French version of art. 6(3) is similar to the English language version and states

> "les autorités nationales compétentes ne marquent leur accord sur ce plan ou projet qu'après s'être assurées qu'il ne portera pas atteinte à l'intégrité du site concerné"

(2) In any event, the whole point is based on a false premise in construing the UK words and is based on failure to construe the provision as a whole. Instead of the omnibus "agree to" (« marquent leur accord sur ») in art. 6(3) the (UK) draftsman of the Regulations decided to use different terminology i.e. "deciding to undertake" in referring to plans and "give any consent…for" in referring to projects. "Undertake" therefore does not apply to projects. If reg. 48(1) applied only to projects carried out by public authorities, it would be severely deficient in terms of its implementation of the Directive and would have to be construed to give proper effect to the Directive in accordance with

(a) ***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 ..."

(b) ***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."

(3) The point is wrong both in terms of the language of the Regulations, the mistaken assumption as to the wording of the Directive and, in any event, it is irrelevant.

50. The central argument by Mr Straker relates to the approach to "project" which he construes to mean something other than what is the subject of an application but only what might be termed the "new" aspects of the application.

51. In my opinion, the notion that the project is to be considered as something other than that which is applied for, and for which consent is sought, is not supported by the words or the purpose of the Regulations:

(1) The natural meaning of the words of the regulations points to a project as being something for which consent is sought and which may not be granted unless the proper assessments are carried out and which reach a particular conclusion. On the contrary, it requires a strained or artificial approach to the language to require the screening or appropriate assessment to exclude parts of the development for which permission is sought in the relevant application;

(2) The language of reg. 48(1) "before deciding to undertake, or give any consent, permission or other authorisation for, a plan or project" suggests that the concept of project and the permission process are closely linked;

(3) Art. 6(3) similarly suggests that the consent process is a critical factor;

(4) MN2000 at para. 4.3.1 advises that "project" should be approached broadly as in EIA;

(5) Although it is possible that a project may be phased and divided into a number of applications for convenience, that would not support the view that part of what is applied for could be ignored or discounted. If it is not part of the project, the question might be asked why permission is being sought for it in the first place. If permission is sought because it is required now to develop in a manner which differs from the earlier permission then it seems plain that it must be part of the project;

(6) There are no provisions equivalent to those in the EIA Directive which deal with amendments to existing EIA projects.

52. I will not dwell at length on the potentially difficult considerations which the appellant's analysis might create, in deciding what is or is not the "project" if it is not defined by the application for which consent is sought, and which suggests his analysis is anything but based on the plain meaning of the words in the Regulations. It is one thing, as in ***Hart***, to widen the concept beyond the application to ensure that what is being assessed are the full effects but it is quite another to seek to draw a line between different parts of an application. If planning permission is required for a development, it is natural to treat that development as a project or, possible, part of a larger project.

53. The decision of Sullivan J. in ***R(Hart DC) v Secretary of State for Communities and Local Government*** [2008] 2 P & CR 16 relied upon by Mr Straker was dealing with the measures for mitigation as part of the analysis of the effect of a project. He was not suggesting that project might mean something less than what was applied for but that it should encompass measures which might not be part of the application but could be mitigation e.g. through a legal agreement or imposed via condition. The basis of that is clear, namely that the assessment of effects should encompass all the aspects of the project including mitigation, not artificially exclude them from the analysis of its overall effect. Indeed, the way in which Sullivan J. expressed the issue makes it clear that what was being considered was the effect of a project for which permission is sought (emphasis added):

> "55. The first question to be answered under Art.6(3) or reg.48(1) is: what is the plan or project which is proposed to be undertaken or for which consent, permission or other authorisation is sought? The competent authority is not considering the likely effect of some hypothetical project in the abstract. **The exercise is a practical one which requires the competent authority to consider the likely effect of the particular project for which permission is being sought**. 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."

54. Importantly, Sullivan J. having considered the EU guidance and the authorities held that the Habitats provisions were not to be approached artificially but were an aid to effective environmental decision making:

> "72. The underlying principle to be derived from both the *Waddenzee* judgment and the domestic authorities referred to above is that, **as with the EIA Directive, the**

> **provisions in the Habitats Directive are intended to be an aid to effective environmental decision making, not a legal obstacle course**. If, having considered the "objective information" contained in the EPR Report, and agreed by NE in the Statement of Common Ground, the first defendant, as the competent authority, was satisfied that the package put forward by the second and third defendants, including the SANGS, would avoid any net increase in recreational visits to the SPA (thereby avoiding any increased disturbance to the Annex 1 bird species), it would have been "ludicrous" for her to disaggregate the different elements of the package and require an appropriate assessment on the basis that the residential component of the package, considered without the SANGS, would be likely, in combination with other residential proposals, to have a significant effect on the SPA, only for her to have to reassemble the package when carrying out the appropriate assessment. "

55. Viewed in that way, ***Hart*** is authority which runs contrary to the appellant's approach. The appellant does not seek to view the project holistically, and to judge its overall likely effect on the relevant habitats, but seeks to hive off part of 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.

56. Mr Straker's approach to "project" is suggestive of the approach to "project" in EIA which was rejected by the ECJ in ***Commission v. Spain*** C-227/01 [2005] Env. L.R. 384 and which warned against artificially dividing up projects to avoid assessment. In that case, the Spanish authorities had argued unsuccessfully that consent for a relatively short section of railway was not part of a long-distance track and did not require EIA:

> "53. If the argument of the Spanish Government were upheld, the effectiveness of Directive 85/337 could be seriously compromised, since the national authorities concerned would need only to split up a long-distance project into successive shorter sections in order to exclude from the requirements of the Directive both the project as a whole and the sections resulting from that division."

57. There is no difficulty if a project is phased and each is subject to due assessment and considers "in combination" effects to that the effect of the whole can be assessed. However, that is not the case here where a significant element of the development of the Site was not subject to Habitats screening or assessment.

58. Finally, and consistently with the other matters I have referred to, the requirement to consider all the effects of a project alone and in combination, sought to be avoided by the appellant, was stated by the ECJ in ***Waddenzee*** at para. 54:

> "54. Such an assessment therefore implies that all the aspects of the plan or project which can, either individually or in combination with other plans or projects, affect those objectives must be identified in the light of the best scientific knowledge in the field..."

In combination effects

59. I do not comment on the likelihood or otherwise of significant effects from the application scheme whether alone or in combination with other schemes, e.g. the houses currently being built of the full 2003 permission. That is a matter for expert opinion applying the strict and precautionary tests applicable to screening and appropriate assessment I have set out above.

60. Mr. Straker's approach is influenced by his view that the project is only one of 390 houses which for the many reasons I have advanced, should be rejected.

61. He acknowledges at paras. 30 and 32 that if the screening requirement is triggered by an in combination effect then an assessment must be carried out

62. However, he states at para. 28 that there cannot be an in combination effect with a completed project. Even if the 339 houses from the 2003 permission are completed, I have already referred to the MN2000 guidance above which states that it may be appropriate to consider in combination effects with completed projects. There is nothing in the concept of "project" which requires it to be an incomplete one: reg. 48 is dealing with applications for permission for projects but "in combination" refers to projects not merely other applications. As the ECJ held in ***Waddenzee***, a broad approach is taken to "project" as in EIA and, in EIA terms, the definition of "project" (applied by the ECJ to Habitats at paras. 21-27):

> "— the execution of construction works or of other installations or schemes,
>
> — other interventions in the natural surroundings and landscape including those involving the extraction of mineral resources."

The build dwellings are plainly "construction works" or "interventions in the natural surroundings".

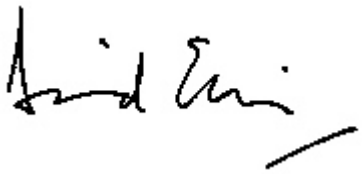
63. Further, if the first project had not been subject to Habitats considerations or assessment, I have already advised that there are strong reasons under EU law for requiring that now to be done given there is a new application before the national authorities.

64. Mr. Straker observes at para. 31 that if there are no significant effects from the specific project which he has defined, there can be no in combination effect with another project. This approach appears to me to be consistent with the legal requirement to consider "in combination" effects under both the Habitats Regulations and Directive since at least part of the purpose of such a requirement is to ensure that projects which may not be harmful in themselves are not overlooked if their combined effect with other projects may cause harm. Further, I do not consider that it can be a matter for legal opinion but expert judgment whether a proposal which might be innocuous alone will have a significant adverse effect when combined with another in the circumstances of a specific project. I do not think it is appropriate to substitute a legal view for an expert judgment with regard to such an issue since the ECJ has made it clear that judgments as to both screening and assessment are to be based on objective evidence.

65. I agree with Mr. Straker's view at para. 38 that the possibility of revocation is irrelevant to the regulation 48 issues. However, the effect of this is that the contentions made by Miss Colebourn with regard to reg. 50 are, in effect, rejected by Mr. Straker.

66. For the reasons set out in this section and above, I conclude that the approach in Mr. Straker's evidence (with the limited exceptions noted above) should be rejected and that there is nothing is Miss Colebourn's proof which justifies a different approach in law.

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



DAVID ELVIN Q.C.

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1 February 2009

BRACKNELL FOREST DISTRICT COUNCIL

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

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