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THE CITY OF EDINBURGH COUNCIL

Felsham Planning And Development.
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EH12 5QF

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Edinburgh
EH12 0AE

**Decision date: 24 March 2023**

TOWN AND COUNTRY PLANNING (SCOTLAND) ACTS
**DEVELOPMENT MANAGEMENT PROCEDURE (SCOTLAND) REGULATIONS 2013**

Application for 2 dwellings, access, and landscaping.
At Anderson Transport Newhouse Farm Long Dalmahoy Road Dalmahoy Kirknewton

**Application No:** 23/00663/FUL

## DECISION NOTICE

With reference to your application for Planning Permission registered on 16 February 2023, this has been decided by **Local Delegated Decision**. The Council in exercise of its powers under the Town and Country Planning (Scotland) Acts and regulations, now determines the application as **Refused** in accordance with the particulars given in the application.

Any condition(s) attached to this consent, with reasons for imposing them, or reasons for refusal, are shown below;

**Reasons**:-

1. The proposal is contrary to NPF 4 policy 8 (Green belts) as it does not meet the relevant criteria for residential development in this green belt location and will be harmful to its landscape quality and rural character through intrusion onto agricultural land.

2. The proposal is contrary to NPF 4 policy 9 b) (Brownfield, vacant and derelict land) as the residential use of this greenfield site is not supported in principle by policies in the LDP.

3. The proposal is contrary to NPF 4 policy 15 (Local Living and 20 minute neighbourhoods) as the proposal will not contribute towards local living as the residential development would not have good local access to range of sustainable modes of transport, local facilities or services.

Lewis McWilliam, Planning Officer, Central + West Area, Place Directorate.
Email lewis.mcwilliam@edinburgh.gov.uk,
Waverley Court, 4 East Market Street, Edinburgh, EH8 8BG

4. The proposal is contrary to NPF 4 policy 17 (Rural Homes) as the new homes are not located on land designated for housing in the LDP and do not meet the relevant circumstances where this land use will be supported.

Please see the guidance notes on our decision page for further information, including how to appeal or review your decision.

Drawings 01-06, represent the determined scheme. Full details of the application can be found on the Planning and Building Standards Online Services

The reason why the Council made this decision is as follows:

The proposals do not comply with the National Planning Framework 4 and Edinburgh Local Development Plan.

The residential development does not meet relevant criteria of the Green Belt policy and would be an intrusion into the landscape quality and rural character of the area.

The site is not allocated for housing, residential use of this greenfield site is not supported in principle by LDP policy.

It is anticipated there would be a reliance on private car usage. The site is not located in a sustainable location and its residential use would not support local living. Overall, the material considerations support the presumption against granting planning permission.

This determination does not carry with it any necessary consent or approval for the proposed development under other statutory enactments.

Should you have a specific enquiry regarding this decision please contact Lewis McWilliam directly at lewis.mcwilliam@edinburgh.gov.uk.

**Chief Planning Officer**
**PLACE**
**The City of Edinburgh Council**

NOTES

1. If the applicant is aggrieved by the decision to refuse permission for or approval required by a condition in respect of the proposed development, or to grant permission or approval subject to conditions, the applicant may require the planning authority to review the case under section 43A of the Town and Country Planning (Scotland) Act 1997 within three months beginning with the date of this notice. The Notice of Review can be made online at www.eplanning.scot or forms can be downloaded from that website. Paper forms should be addressed to the City of Edinburgh Planning Local Review Body, G.2, Waverley Court, 4 East Market Street, Edinburgh, EH8 8BG. For enquiries about the Local Review Body, please email localreviewbody@edinburgh.gov.uk.

2. If permission to develop land is refused or granted subject to conditions and the owner of the land claims that the land has become incapable of reasonably beneficial use in its existing state and cannot be rendered capable of reasonably beneficial use by carrying out of any development which has been or would be permitted, the owner of the land may serve on the planning authority a purchase notice requiring the purchase of the owner of the land's interest in the land accordance with Part 5 of the Town and Country Planning (Scotland) Act 1997.

# Report of Handling

**Application for Planning Permission**
**Anderson Transport, Newhouse Farm, Long Dalmahoy Road**

**Proposal: Application for 2 dwellings, access, and landscaping.**

**Item – Local Delegated Decision**
**Application Number – 23/00663/FUL**
**Ward – B02 - Pentland Hills**

### Recommendation

It is recommended that this application be **Refused** subject to the details below.

### Summary

The proposals do not comply with the National Planning Framework 4 and Edinburgh Local Development Plan.

The residential development does not meet relevant criteria of the Green Belt policy and would be an intrusion into the landscape quality and rural character of the area.

The site is not allocated for housing, residential use of this greenfield site is not supported in principle by LDP policy.

It is anticipated there would be a reliance on private car usage. The site is not located in a sustainable location and its residential use would not support local living. Overall, the material considerations support the presumption against granting planning permission.

## SECTION A – Application Background

### Site Description

The proposal site is mainly agricultural land and a narrow, vegetated strip which extends to the boundary with Long Dalmahoy Road.

To the north, is vacant land which previously contained large agricultural buildings which has permission to be developed into 8 houses. East of this are residential dwellings, a farm and large industrial style buildings associated with a removal service. To the west, residential dwellings and a livery beyond this.

The site is part of the green belt, it is a section of a wider agricultural field that forms part of the rural landscape to the south.

**Description Of The Proposal**

-Two dwellings, access and landscaping.

**Supporting Information**

-Design Statement
-Planning Statement

**Relevant Site History**
No relevant site history.

**Other Relevant Site History**

The adjoining site to the north has the following planning history :

18 June 2021 - Planning permission granted to alter existing residential layout, form sewage treatments works and erect 8 houses (amendment to 17/02707/FUL) (as amended) - application reference : 19/04036/FUL

9 November 2017 - Planning permission granted for the erection of 7 dwelling houses - application reference : 17/02707/FUL

20 July 2016 - Planning permission granted for the erection of 7 dwelling houses following appeal against delegated refusal to the Local Review Body - application reference : 15/05455/FUL

**Consultation Engagement**

Waste Services

SEPA

Flood Planning

Edinburgh Airport Safeguarding

Communities and Families

Archaeology

**Publicity and Public Engagement**

**Date of Neighbour Notification:** 24 March 2023
**Date of Advertisement:** Not Applicable
**Date of Site Notice:** Not Applicable
**Number of Contributors: 4**

## Section B - Assessment

**Determining Issues**

This report will consider the proposed development under Sections 24, 25 and 37 of the Town and Country Planning (Scotland) Act 1997 (the 1997 Act):

Having regard to the legal requirement of Section 24(3), in the event of any policy incompatibility between National Planning Framework 4 (NPF4) & Edinburgh Local Development Plan 2016 (LDP) the newer policy shall prevail.

Do the proposals comply with the development plan?

If the proposals do comply with the development plan, are there any compelling material considerations for not approving them?

If the proposals do not comply with the development plan, are there any compelling material considerations for approving them?

In the assessment of material considerations this report will consider:

- equalities and human rights;
- public representations; and
- any other identified material considerations.

**Assessment**

To address these determining issues, it needs to be considered whether:

**a) The proposals comply with the development plan?**

National Planning Framework 4 (NPF4) was adopted by the Scottish Ministers on 13 February 2023 and forms part of the Council's Development Plan. NPF4 policies supports the planning and delivery of Sustainable Places, Liveable Places and Productive Places and are the key policies against which proposals for development are assessed. Several policies in the Edinburgh Local Development Plan (LDP) are superseded by equivalent and alternative policies within NPF4.

The relevant policies to be considered are:

The relevant policies to be considered are:

- NPF4 Sustainable Place Policies 1, 2, 3, 4, 7, 8, 9,
- NPF4 Liveable Place Policies 14, 15, 16, 17, 22,

- LDP Developer contributions policy Del 1
- LDP Design policies Des 1, Des 3, Des 4, Des 5, Des 7
- LDP Environment policy Env 16, Env 21
- LDP Housing policy Hou 1, Hou 3, Hou 4,
- LDP Transport policy Tra 2, Tra 3,

The non-statutory Guidance for Development in the Countryside and Green Belt is a material consideration that is relevant when considering NPF 4 policy 8.

Green Belt

LDP policy Hou 1 (Housing Development) part 2 states where a deficit in the maintenance of a five year housing land supply is identified green belt housing proposals may be granted subject to certain criteria.

NPF4 Policy 8 (Green Belts) states development proposals within a designated green belt will only be supported subject to criteria. As summarised, those relevant to the proposed houses include:

-the residential accommodation is for a key or retired worker in a primary industry.
-it is for an intensification of established uses
-it is for one-for-one replacements of existing permanent homes

In addition, the following also need to be met:

-the requirement for a green belt location
-that the green belt purpose is not undermined
-it is compatible with the established countryside and landscape character
-it is of appropriate design
-It will not have significant long-term impact on the environmental quality of green belt.

The Guidance for Countryside and Green Belt states new houses not associated with the countryside use will not be acceptable, unless there are exceptional planning reasons for approving them. These include reuse of brownfield land and gap sites within existing clusters of dwellings. In addition, that where existing use is residential, the creation of an additional residential unit does not constitute an intensification of use.

With respect to Hou 1, there is no deficit in housing land supply identified in the LDP.

With respect to NPF 4 policy 8, the proposal does not detail or evidence that the dwellings are for workers linked to a primary industry.

Two, additional houses do not constitute an intensification of the existing residential use. The proposal does not involve the replacement of an existing home. A green belt location is not essential for residential use.

The houses would be designed similarly to the residential development consented on adjacent land to the north. However, they would be located on existing, undeveloped agricultural land. This adjacent site previously contained large agricultural buildings and, in this regard, had a differing circumstance which does not set precedence for assessment of this proposal.

The submitted design statement outlines justification for the proposals including that it will not undermine key principles of the green belt. It states the site is south of an existing residential development and is part of an irregular corner of an agricultural field.

This land nearby maybe subject to change through its redevelopment. However, the application site is mainly an agricultural and provides continuity with the surrounding farmland in the green belt. It does not have the visual character of a gap site in a cluster of dwellings due to the open land adjoining.

There is therefore concern that the addition of two new dwellings on this site, would detract from the landscape quality and rural character of the green belt through an intrusion onto agricultural land.

With regard to the above, the proposal is not acceptable in principle as it does not meet the required criteria of NPF 4 policy 8.

There are no exceptional planning reasons outlined for approving this residential development in this location.

Sustainable, Rural Homes

NPF 4 policy 9 (Brownfield, vacant and derelict land and empty buildings) intent refers to encouraging reuse of brownfield, vacant or derelict land and empty buildings.

Part b) states proposals on greenfield sites will not be supported unless the site has been allocated for development or the proposal is explicitly supported by LDP policies.

The intent of NPF 4 policy 16 (Quality Homes) states it is to encourage, promote and facilitate the delivery of more high quality, affordable and sustainable homes, in the right locations, providing choice across tenures that meet the diverse housing needs of people and communities across Scotland.

Part f) refers to the circumstances where new homes on unallocated LDP sites will be supported including agreed timescales for build out, consistency with the plan spatial strategy policy, local living and 20-minute neighbourhood policies.

In addition, that either detailed evidence of premature delivery of allocated sites is provided; its consistent with rural homes policy; is a small-scaled opportunity in existing settlement boundary or is for the delivery of less than 50 affordable homes.

NPF 4 policy 17 (Rural homes) policy intent is to encourage, promote and facilitate the delivery of more high quality, affordable and sustainable rural homes in the right locations.

Part a) of this policy is broadly compatible with considerations of the Green belt policy.

Part b) for new homes in rural areas, refers to proposals contributing towards local living, identified housing needs, economic considerations, and transport.

With regard to NPF 4 policy 16, the proposal is not supported by an agreed timescale for build out. As per the above, the site is not allocated for housing in the LDP or within the urban area. Therefore, it is not consistent with the plans' spatial strategy policy.

The houses would be near to a National Cycle Route 75 on Long Dalmahoy Road. However, the site is in a detached location in the countryside. This road does not have street lighting, designated foot way or cycle ways. Therefore, it is anticipated future

users would still mainly be reliant on private car. In addition, the site does not have good local access to public transport or services. Overall, it therefore does not meet the criteria for 20 - minute neighbourhoods, support local living or contribute to principles of sustainable development.

No evidence of early delivery of the housing pipeline has been submitted. The location is not an identified settlement. It is beyond a very small cluster of farm buildings and old and new homes are within this location. It is not for affordable housing. It does not involve re-use of a building or brownfield land.

The proposal is therefore contrary to the intent of NPF 4 policy 16 and 17. It fails to provide sustainable rural homes in the right location.

The proposal is contrary to LDP policy 9 b) as it involves the development of a greenfield site which is not supported by LDP policies.

Density and Layout

LDP policy Hou 3 (Private Greenspace) states planning permission will be granted for development that makes adequate provision for green space to meet the needs of future residents.

LDP policy Hou 4 (Housing Density) seeks an appropriate density of development having regard to its characteristics and those of the surrounding area, the need to create an attractive residential environment, accessibility, and its impact on local facilities.

Adequate provision of greenspace is provided on site from the size of garden spaces proposed.

Notwithstanding principle concerns regarding residential use of the site, a low density of development is in keeping with the existing and consented development nearby.

As the site has poorer local access to public transport and facilities a low-density is more appropriate in this rural location.

The proposal therefore does not conflict with LDP policy Hou 3 and 4.

Environment

NPF 4 policy 1 (Tackling the climate and nature crises) states when considering development proposals significant weight will be given to the global climate and nature crises.

NPF 4 policy 2 (Climate mitigation and adaptation) intent refers to development minimising emissions and adapting to current and future impact of climate change.

NPF 4 policy 3 (Biodiversity) intent being to protect biodiversity, reverse biodiversity loss, deliver positive effects from development and strengthen nature networks.

NPF 4 policy 4 f (Natural Places) states development proposals likely to have an adverse effect on species protected by legislation will only be supported where proposal meets the relevant statutory tests.

NPF 4 policy 5 (Soils) intent is to protect carbon-rich soils, restore peatlands and minimise disturbance from soils.

LDP policy Env 16 (Species Protection) states planning permission will not be granted for development that would have an adverse impact on protected species.

There is potential for the site and immediate area to contain protected species. No ecological information has been submitted with the application.

A preliminary ecological appraisal or any additional biodiversity measures have not been sought as the proposal is not supportable overall.

Similarly, further information would likely have been sought to inform assessment against other policies detailed above.

Design

NPF4 Policy 14 (Design, quality and place) supports development proposals that are designed to improve the quality of an area and are consistent with the six qualities of successful places.

LDP policy Des 1 (Design Quality and Context) states that new development should contribute towards a sense of place and design should draw from positive aspects of the surrounding area.

LDP policy Des 3 (Development Design - Existing and Potential Features) states planning permission will be granted for development where it is demonstrated existing features worthy of retention on-site have been incorporated.

LDP policy Des 4 (Design - Setting) states development will be granted that has a positive impact on its surroundings including the character of the wider townscape.

LDP policy Des 7 (Design - Layout) states development should have a comprehensive and integrated approach to layout.

Including regard to height and form; scale and proportions, including space between buildings; position of buildings and other features on site; materials and detailing.

The modern design, scale and layout of the houses would be similar to the approved residential development to the north. The materials including slate, light render and sandstone rubble tie with existing houses nearby.

In this regard, there are no specific design concerns regarding the proposal in relation to relevant design policies.

Amenity

LDP policy Des 5 (Development Design - Amenity) requires development proposals to demonstrate that future occupiers will have acceptable levels of amenity.

The EDG states for three bedrooms or more, dwellings should have a minimum floor space of 91 m².

*Future Occupiers*

The dwellings will have a good internal floor space in excess of the minimum space standards.

Adequate levels of outlook and light will be achieved internally from the size, orientation of windows and space retained to other buildings.

The houses will benefit from large south-facing gardens providing good quality external amenity space.

The houses are sufficiently spaced from all neighbouring properties that adequate levels of privacy will be achieved.

Overall, an acceptable living environment will be achieved for future occupiers.

*Neighbouring Occupiers*

LDP policy Des 5 also requires development proposals to not have an adverse effect on the amenity of neighbouring developments in relation to noise, daylight, sunlight, privacy or immediate outlook.

The houses would retain over 12 m to the boundary of the approved residential development to the north. The distance to nearest existing residential properties either side of this exceed 50 m (east) and 30 m (west).

No amenity information has been submitted. However, the distances outlined above in tandem with the two-storey scale of the houses will prevent any material impact on shade cast on adjacent gardens or impact on light to neighbours' windows.

Similarly, the space retained between properties will prevent any unreasonable impact in terms of overlooking to neighbours' gardens or windows.

In regard to noise, the residential use is the same as uses nearby and it is not anticipated the addition of two houses would lead to any significant impact on this aspect. There are statutory provisions under the Environmental Protection Act 1990 should a noise nuisance be reported from the site.

Overall, the proposal complies with LDP policy Des 5.

Contaminated Land

NPF 4 policy 9 (Brownfield, vacant / derelict land and empty buildings) part c) states where land is known or suspected to be unstable or contaminated proposals will demonstrate the land can be made safe and suitable for the proposed new use.

LDP policy Env 22 (Pollution and Air, Water and Soil Quality) states, amongst other criteria, that permission will be granted where there will be no significant adverse effect on soil quality, ground stability and appropriate mitigation can be provided.

There is the potential that the site may have contaminated the ground through previous agricultural use.

Should the proposal have been acceptable overall, a condition would therefore have been recommended for submission of a site survey prior to commencement of works. This is in order to ensure the ground is safe and stable for residential use in accordance with NPF 4 policy 9 c) and LDP policy Env 22.

Flooding

NPF 4 policy 22 (Flood risk and water management) intent refers to strengthening resilience to flood risk by promoting avoidance as a first principle and the vulnerability of existing and future development to flooding.

LDP Policy Env 21 (Flood Protection) states that planning permission will not be granted for development that would increase flood risk or be at risk of flooding itself.

As identified on SEPA online flood maps, the site is located in an area with no specific river, coastal or surface water flood risk.

Flood planning have been consulted on the proposal and have requested submission of a surface water management plan.

Drainage information would have been sought should the proposal have been acceptable overall.

Transport

*Car Parking*

LDP policy Tra 2 states that car parking provision should comply with and not exceed the levels set out in Council guidance.

The site is identified as within Zone 3 of the Edinburgh Design Guidance Parking Standards where residential properties should have a maximum car parking provision of 1 space per dwelling.

Two car parking spaces are proposed per dwelling which exceeds the maximum car parking standards contrary to LDP policy Tra 2. However, this arrangement is reasonably typical characteristic of the immediate area. Given the small-scale nature of proposals, this infringement is not considered to justify a reason for refusal in isolation.

*Cycle Parking*

LDP policy Tra 3 states cycle parking and storage provision should comply with the standards set out in Council guidance.

The EDG standards state properties in this zone should have a minimum of 2 cycle spaces for dwellings with 3 habitable rooms. For properties with 4 habitable rooms or more, this should equate to 3 cycle spaces.

In addition, principles of the Council's cycle parking factsheet include that provision should include 20 % non-standard bicycles.

No cycle storage is included on the plans however there is adequate space to accommodate the required provision on-site. Details of this could therefore have reasonably be controlled by condition should the proposals have been acceptable overall.

Archaeology

NPF4 Policy 7 o) states that non-designated historic environment assets, places and their setting should be protected and preserved in situ wherever feasible.

The City Archaeologist has been consulted on the proposals and has stated the site is located within an area of historic and archaeological significance, from the development of Newhouse Farm from the 18th century.

A condition has therefore been recommended regarding a programme of archaeological works in accordance with a written scheme of investigation to be submitted, in order to safeguard potential archaeological remains.

This condition would have been imposed, should the proposal have been acceptable overall.

Edinburgh Airport Safeguarding

Edinburgh Airport have been consulted on the proposals and no objections have been received from a safeguarding perspective.

Scottish Water

Scottish Water have not objected to the proposals. However the applicant will be required to submit a pre-development enquiry to Scottish Water prior to any formal technical application.

Waste Services

Waste planning have been consulted on the proposals and raise no objection to the subject to adequate space being provided for waste within each plot.

Developer Contributions

No contributions have been identified for the proposal.

**Conclusion in relation to the Development Plan**

The proposals do not comply with the Development Plan.

The residential development does not meet relevant criteria of the Green Belt policy and would be an intrusion into the landscape quality and rural character of the area.

The site is not allocated for housing and development of this greenfield site is not supported by policy.

It is anticipated there would be a reliance on private car usage. The site is not located in a sustainable location and the houses would not support local living.

**b) There are any other material considerations which must be addressed?**

The following material planning considerations have been identified:

Emerging policy context

On 30 November 2022 the Planning Committee approved the Schedule 4 summaries and responses to Representations made, to be submitted with the Proposed City Plan 2030 and its supporting documents for Examination in terms of Section 19 of the Town and Country Planning (Scotland) Act 1997. At this time little weight can be attached to it as a material consideration in the determination of this application.

Equalities and human rights

Representations have been received stating that the proposal has potential Human Right implications for neighbours' in terms of alleged interference with privacy, home or family life (Article 8) and peaceful enjoyment of their possessions (First Protocol, Article 1).

The proposal has been assessed against all relevant planning policy and guidance which aim to protect the amenity of adjoining land and the proposal site. These have been fully considered and applied. The provisions of Article 1 and 8 the Human Rights Act 1998 have been complied with through this assessment.

Due regard has been given to section 149 of the Equalities Act 2010. No impacts have been identified.

Public representations

A summary of the representations is provided below:

*material considerations*

-Inaccurate / incomplete information submitted : The planning authority has assessed the submitted documents and considers that they are sufficient to accord with the requirements of the Town and Country Planning (Development Management Procedure) (Scotland) Regulations 2013.

-Ecology and Drainage information not submitted : Addressed in section a) Environment and Flooding

-Proposal is contrary to relevant policies in LDP, NPF 4 and other material considerations : Addressed through the above report.

-Potential Human Rights implications through interference with privacy, home or family life (Article 8) and peaceful enjoyment of possessions (First Protocol, Article 1).

-Examples of past planning decisions and case law detailed : This information is noted.

**Conclusion in relation to identified material considerations**

The material considerations support refusal of the planning application.

**Overall conclusion**

The proposals do not comply with the National Planning Framework 4 and Edinburgh Local Development Plan.

The residential development does not meet relevant criteria of the Green Belt policy and would be an intrusion into the landscape quality and rural character of the area.

The site is not allocated for housing, residential use of this greenfield site is not supported in principle by LDP policy.

It is anticipated there would be a reliance on private car usage. The site is not located in a sustainable location and its residential use would not support local living. Overall, the material considerations support the presumption against granting planning permission.

## Section C - Conditions/Reasons/Informatives

The recommendation is subject to the following;
**Conditions**

1. The proposal is contrary to NPF 4 policy 8 (Green belts) as it does not meet the relevant criteria for residential development in this green belt location and will be harmful to its landscape quality and rural character through intrusion onto agricultural land.

2. The proposal is contrary to NPF 4 policy 9 b) (Brownfield, vacant and derelict land) as the residential use of this greenfield site is not supported in principle by policies in the LDP.

3. The proposal is contrary to NPF 4 policy 15 (Local Living and 20 minute neighbourhoods) as the proposal will not contribute towards local living as the residential development would not have good local access to range of sustainable modes of transport, local facilities or services.

4. The proposal is contrary to NPF 4 policy 17 (Rural Homes) as the new homes are not located on land designated for housing in the LDP and do not meet the relevant circumstances where this land use will be supported.

**Background Reading/External References**

To view details of the application go to the Planning Portal

**Further Information -** Local Development Plan

**Date Registered: 16 February 2023**

**Drawing Numbers/Scheme**

01-06

Scheme 1

**David Givan**
**Chief Planning Officer**
**PLACE**
**The City of Edinburgh Council**

Contact: Lewis McWilliam, Planning Officer
E-mail:lewis.mcwilliam@edinburgh.gov.uk

Appendix 1

**Consultations**

NAME: Waste Services
COMMENT: No objections.
DATE: 27 February 2023

NAME: SEPA
COMMENT: No comment received.
DATE:

NAME: Flood Planning
COMMENT: A surface water management is required to support the proposals.
DATE: 24 February 2023

NAME: Edinburgh Airport Safeguarding
COMMENT: No objections.
DATE: 24 February 2023

NAME: Communities and Families
COMMENT: No education contribution sought.
DATE: 22 March 2023

NAME: Archaeology
COMMENT: No objections subject to condition.
DATE: 24 February 2023

The full consultation response can be viewed on the Planning & Building Standards Portal.

PLANNING OBJECTIONS SCOTLAND

**POS REFERENCE: -**

**POS-P-0045**

**OBJECTION TO PLANNING APPLICATION ON BEHALF OF MR DAVID ROWELL**

**REFERENCE: - 23/00663/FUL**

**ADDRESS: - Anderson Transport Newhouse Farm Long Dalmahoy Road Dalmahoy Kirknewton EH27 8EE**

**APPLICATION DESCRIPTION: - Application for 2 dwellings, access, and landscaping.**

RICS

RTPI
Chartered Town Planners

| Document Preparation | | |
|---|---|---|
| Prepared for | Contact Details | |
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| Approved by | Qualifications | Title |
|---|---|---|
| J Russell | MRTPI AssocRICS | Director |

| Document Control | | |
|---|---|---|
| Issue | Date | Version |
| 1 | 10-03-2023 | Draft |
| 2 | 13-03-2023 | Final |

## 1.0 INTRODUCTION

1.1 Planning Objections Scotland has been instructed by David Rowell (The owner of Tui Steading, Long Dalmahoy Road) to review application 23/00663/FUL.

1.2 The review has been commissioned to ensure full details are provided by the applicant/agent as required by legislation and regulations to ensure the planning application can be assessed in a holistic manner, not only by the planning authority but to enable effective public engagement. Our client has also asked us to comment on the proposal's relationship with the Local Development Plan as well as material considerations based on the information submitted to date.

1.3 It is clear from the review below that the application contains errors, omissions and lacks information. A comprehensive assessment of the application cannot be undertaken and, on this basis, alone the Planning Authority should either refuse or seek the withdrawal of the application. The proposal also results in conflicts with the adopted Local Development Plan.

1.4 For the avoidance of doubt, our client's ability to make subsequent representation on any subsequent submissions are reserved.

## 2.0 THE APPLICATION - ERRORS, OMISSIONS AND LACK OF INFORMATION

2.1 The Heads of Planning Scotland (HOPS) – Validation Guidance Note sets out the national standard for the validation and determination of planning applications and other related consents. The application has been reviewed against this guidance note and it is clear that the submission falls below the required standards and as a consequence this application should not have been validated.

**Concerns with the Drawings**

Location Plan(s)

2.2 The HOPS validation standard on location plans (see section 4 paragraphs 4.1 to 4.5) confirms: -

2.3 *A single location plan produced to a scale of either 1:1250 or 1:2500 will normally be required to be submitted with your application. Depending on the location of your application a supplementary location plan may also be required to be submitted with your application.*

2.4 *The purpose of the location plan is to clearly define the extent of the application site in relation to its surroundings and also to provide sufficient detail in order for ourselves or any other interested party to be able to locate the application site and, as such, the plans submitted should typically be Ordnance Survey based.*

2.5 *If the submitted plan is Ordnance Survey based, it should contain the relevant copyright and licensing information to demonstrate that the plan has been legally sourced. If the submitted plan is not Ordnance Survey based it should be clearly stated on the plan and also contain an acknowledgement as to where it was sourced.*

2.6 *The location plan produced to either of these scales should show the following: -*

- *The application site boundary accurately outlined in RED*
- *Any other surrounding land under the same ownership as the application site outlined in BLUE*
- *Surrounding road names/numbers*
- *All surrounding property names/numbers*
- *The direction of north clearly indicated*

- *A copyright disclaimer/acknowledgement relating to the source of the plan*
- *An accurate scale bar*

2.7 The submitted location plan has been reviewed.

- There is no information acknowledging the source of the plan, whether it is Ordnance Survey based and no copyright disclaimer has been provided.
- Only a redline has been detailed on the location plan. A blue line has not been incorporated showing the applicant's ownership. This is at odds with the information presented on the (04) SITE LAYOUT PLAN which notes ‘ownership control’.

2.8 Updated Location plans are required.

Site Plan(s)/Block Plan(s)

2.9 The HOPS standard on Site Plan(s)/Block Plan(s) (see section 6 paragraphs 6.1 to 6.3) confirms: -

2.10 *A proposed site plan will be required in all instances where the proposals involve development on the ground regardless of their proposed purpose. Depending on the nature of the proposals it may also be required to submit a copy of an existing site plan. However, your local Planning office will be able to advise if this will be necessary. A site plan produced to a scale of 1:100, 1:200 or 1:500 will be acceptable. Site plans are required as they provide a more detailed and accurate overview of the application site in terms of the area to be occupied by your proposals and their relationship to their surroundings.*

2.11 *As noted above, the following list of what should be shown on your site plan will not be required in every case and as such reference should be made to the separate guidance available covering your particular type of*

*proposal. The submission of part site plans may also be required under certain circumstance, such as large sites where the actual areas of works are remote from each other. Contact with your local Planning office is highly recommended should you be considering submitting only a part site plan.*

2.12 *The following list along with the example plan shown in figure 9 on the next page indicates what may be asked for and how it should be shown:*

1. *Produced to a scale of either 1:100, 1:200 or 1:500*
2. *Application site boundary outlined in RED*
3. *Any surrounding land owned or controlled by the applicant outlined in BLUE*
4. *The direction of north*
5. *An accurate scale bar*
6. *All land and buildings located within a 20 metre radius of the application site boundary identified*
7. *The accurate footprint/roof plan profile of all existing and proposed buildings and structures located within the application site with appropriate annotation to identify them*
8. *The extent and type of any hard surfacing with the application site boundary identified. Where this is proposed rather than existing this should be clearly stated*
9. *A note of any boundary treatments such as walls and fences including their height. Where these are proposed rather than existing this should be clearly stated*
10. *The access arrangements (vehicular and pedestrian) to the application site should be clearly shown*
11. *A written dimension showing the distance from any part of your proposals to any part of the application site boundary. Note that if you are proposing multiple buildings or structures then a written dimension will be required from each*
12. *Areas of hard and soft landscaping clearly defined*

13. *If connection to an existing private water supply or private drainage system is proposed then the connection point to the supply or system should be clearly annotated within the application site outlined in RED*
14. *Where a completely new private water supply or private drainage system is proposed then the full details of the supply or system should be clearly annotated within the application site outlined in RED. This is also the case for alterations/upgrading works to such supplies or systems*

2.13 The submitted block plan and site layout plans have been reviewed and they fail to meet the above validation criteria: -

(02) BLOCK PLAN

- The full extent of the site is not outlined in red.
- A blue line has not been incorporated showing the applicant's ownership. This is at odds with the information presented on the (04) SITE LAYOUT PLAN which notes 'ownership control'.
- The direction of North is not shown in this plan.
- All land and buildings located within a 20 metre radius of the application site boundary has not been identified.
- The extent and type of any hard surfacing with the application site boundary has not been identified. Existing and proposed block plans should be provided to clearly identify the extent and type of hard surfacing.
- A note of any boundary treatments such as walls and fences including their height has not been provided. Existing and proposed block plans should be provided to clearly identify the extent of new walls and fencing incorporated within the layout.
- There are no written dimensions showing the distance from any part of the proposal to any part of the application site boundary.
- Areas of hard and soft landscaping are not clearly defined.

- Details of the private drainage system have not been clearly annotated within the application site.

(04) SITE LAYOUT PLAN

- All land and buildings located within a 20 metre radius of the application site boundary has not been identified.
- The extent and type of any hard surfacing with the application site boundary has not been identified. Existing and proposed block plans should be provided to clearly identify the extent and type of hard surfacing.
- A note of any boundary treatments such as walls and fences including their height has not been provided. Existing and proposed block plans should be provided to clearly identify the extent of new walls and fencing incorporated within the layout.
- There are no written dimensions showing the distance from any part of the proposal to any part of the application site boundary.
- Areas of hard and soft landscaping are not clearly defined.
- Details of the private drainage system have not been clearly annotated within the application site.

2.14 It is also worth noting that the requirement for accurate dimensions to be shown on plans is discussed in the following Scottish Public Services Ombudsman investigation of Glasgow City Council (see Appendix POS 2.1.2).

Concerns with the Application Redline Boundary

2.15 The HOPS validation document confirms within section 5 that: -

2.16 *Where the application relates to new build proposals the whole area required to accommodate the proposals should be outlined in RED. This includes any area which is required for vehicular and pedestrian access, parking, landscaping, garden ground, private water supply and drainage*

*facilities, SUDS, visibility splays or any other part of the proposals which would constitute development should be contained within the single site outlined in RED.*

2.17 With regards to drainage arrangements:-

2.18 *Proposals which incorporate either new private water supply and drainage arrangements or connection to existing ones require to be shown in a certain way. The area of land required for such proposals should be included within the application site boundary shown on the location and site plans.*

2.19 Based on Planning Objections Scotland's review the drainage arrangements have not been appropriately detailed to meet the HOPS validation requirements. The burn outfall location has not been incorporated into the redline boundary of the site.

2.20 Planning Objections Scotland note that the inclusion of this additional area of land would require a fresh application (with a further neighbour notification exercise undertaken due to the revised boundary). The revised boundary may also have ramifications for the land ownership certificate/declaration that has currently been served, this would require updating to confirm the owner(s) of additional areas of land have been notified correctly.

Elevations

2.21 The HOPS document on Elevations (see section 7) provides details of the validation standards for existing elevations as well as proposed elevations. With regards to proposed elevations: -

2.22 *Proposed elevations will be required in the majority of cases where proposed alterations or extensions will affect the external appearance of the existing property or structure which is the subject of the planning*

*application. These plans should show all elevations of the proposals and should be produced to a scale of either 1:50 or 1:100. The plans should be sufficiently detailed to give a true representation of the detailing of the building or structure as it stands at the moment. Details of the proposed external finishes should also be shown on the plans. For clarity this means any visible underbuild, walls, roof, windows, doors and in certain instances rainwater goods. An accurate scale bar should also be included on your plans along with written dimensions noting height to eaves and roof ridge and the overall length and breadth of the proposals.*

2.23 The proposed elevations have been reviewed and they fall below the standard prescribed in the HOPS validation standards: -

- There are no written dimensions noting height to eaves and roof ridge and the overall length and breadth of the proposals.

2.24 It is also worth noting that the requirement for accurate dimensions to be shown on plans is discussed in the following Scottish Public Services Ombudsman investigation of Glasgow City Council (see Appendix POS 2.1.2).

Sections and Levels Plans

2.25 The HOPS validation standards on sections and level plans is covered in (section 10), this stipulates: -

2.26 *In certain circumstance and depending on what is being proposed the planning authority may require additional section or levels plans, these may be requested as either existing or proposed or both. Site sections and site levels plans may be required where your proposals involve a change in ground level or when you are proposing to develop an uneven site in order for us to determine how your proposals will interact with their surroundings. Section plans may be required as either site sections or building sections. Typically site sections are only requested where there*

*are significant changes in ground levels proposed to give an accurate indication of how the site will look compared to how it is at present. Building sections will typically be required where a new build is proposed in order to show finished floor levels in order for us to determine the impact of your proposals on their surroundings. Below you will find some further information on each of these plan types.*

2.27 *Where existing and proposed site sections are required they should be produced to a scale of either 1:100 or 1:200, the number and location of where the sections should be taken will depend on the nature of your proposals. These plans should also contain an accurate scale bar.*

2.28 *Where existing and proposed building sections are required they should be produced to a scale of either 1:50 or 1:100, typically only one section will be required showing a cross section through each of the existing and proposed buildings with finished floor levels clearly indicated although this will depend on the nature of your proposals. These plan should also contain an accurate scale bar*

2.29 *Where existing and proposed site levels plans are required they should be produced to a scale of either 1:200 or 1:500. These plans should contain an accurate scale bar along with showing the direction of north and clearly identifying a fixed off-site datum point. Generally, contours should be shown at 0.5m intervals*

2.30 From Planning Objections Scotland review the submission is substandard for the following reasons: -

- There are no existing or proposed site level/topographical plans with a fixed off-site datum point detailed to illustrate the extent of cut and fill that will be undertaken at the site. The topography of this site is a potential development constraint. This information should form part of this application to confirm that the envisaged layout and relationship to neighbouring properties is acceptable.

- No site cross-section plans have been provided. Existing and proposed cross-section plans should be provided to clearly illustrate how the proposed development will relate to the site's existing topography.

2.31 It is also worth noting that the requirement for accurate information on site levels and sections has been raised before in the Scottish Public Services Ombudsman case which investigated Aberdeenshire Council (see Appendix POS 2.1.4).

2.32 Planning Objections Scotland's review of the submission thus far has illustrated a number of shortcomings and based on the HOPS document the application should not have been validated by the Planning Authority. It is worth noting that the submission also falls short of the information required SG Annex D Circular 3/2022 (see Appendix POS 2.1.1).

**Concerns with the Application Form**

<u>Accurate Description of proposed Development</u>

2.33 It is important that the applicant/agent provides an accurate description of the proposed development on the application form and this reflects the proposed development on the drawings as per Cumming v Secretary of State for Scotland 1993.

2.34 The description associated with the application is as follows:- Application for 2 dwellings, access, and landscaping.

2.35 There is no reference to the drainage infrastructure. The description of the development is misleading and requires rectification.

## 3.0 OTHER DOCUMENTATION THAT SHOULD BE SOUGHT TO FULLY ASSESS THE APPLICATION

### Requirement for Ecological and Protected Species Survey(s)

3.1 When determining a planning application, the planning authority is required to have regard to the Habitats Directive and the Habitats Regulations. Consideration of how European Protected Species (EPS) are affected must be included as part of the consent process, not as an issue to be dealt with at a later stage. Three tests must be satisfied before the Scottish Government can issue a licence under regulation 44(2) of the Habitats Regulations so as to permit otherwise prohibited acts.

3.2 The application site (incorporating the drainage arrangements to the burn) could be utilised by European Protected Species. A preliminary ecological survey is required to confirm whether this proposal will have any adverse impact on biodiversity and protected species.

3.3 To enable the Planning Authority to comply with the Habitats Directive and the Habitats Regulations survey work is required as clarified by the Scottish Government's Chief Planner letter (see Appendix POS 3.1.1) and the Woolley and Morge Court Cases (see Appendix POS 3.1.2 and POS 3.1.3).

### Requirement for Drainage/Hydrology Assessment

3.4 With the proposed addition of two houses at the site to fully understand the hydrology/drainage implications a Drainage Assessment is required to detail the private foul and surface water drainage arrangements.

## 4.0 LEGAL REQUIREMENTS ASSOCIATED WITH THE PLANNING APPLICATION ASSESSMENT

4.1 Sections 25 and 37(2) of the Town and Country Planning (Scotland) Act 1997 require that planning decisions be made in accordance with the development plan unless material considerations indicate otherwise.

4.2 The operation of section 25 of the Act was given consideration in The House of Lord's judgement on City of Edinburgh Council v the Secretary of State for Scotland (1998). If a proposal accords with the development plan and there are no material considerations indicating that it should be refused, permission should be granted. If the proposal does not accord with the development plan, it should be refused unless there are material considerations indicating that it should be granted. The judgement also set out the following approach to deciding an application:

- Identify any provisions of the development plan which are relevant to the decision,
- Interpret them carefully, looking at the aims and objectives of the plan as well as detailed wording of policies,
- Consider whether or not the proposal accords with the development plan,
- Identify and consider relevant material considerations for and against the proposal, and
- Assess whether these considerations warrant a departure from the development plan.

**The Development Plan**

4.3 Sections 25 and 37(2) of the Town & Country Planning (Scotland) Act 1997 (as amended) require the determination of the proposal to be made in accordance with the provisions of the Development Plan, unless material considerations indicate otherwise. The Development Plan comprises NPF4 and the Edinburgh Local Development Plan 2016. The

applicable policies associated with this proposal are as follows:-

National planning Framework 4 (NPF 4)

- 1. Tackling the climate and nature crises
- 2. Climate mitigation and adaptation
- 3. Biodiversity
- 5. Soils
- 8. Green belts
- 14. Design, quality and place
- 17. Rural homes
- 22. Flood risk and water management

Edinburgh Local Development Plan 2016

- Policy Des 1 Design Quality and Context
- Policy Des 4 - Development Design – Impact on Setting
- Policy Des 5 Development Design – Amenity
- Policy Des 7 - Layout Design
- Policy Hou 4 - Housing Density
- Policy Env 10 - Development in the Green Belt and Countryside

**Material Considerations**

4.4 From a review of case law there are two main tests in deciding whether a consideration is material and relevant:

- It should serve or be related to the purpose of planning. It should therefore relate to the development and use of land, and
- It should relate to the particular application.

4.5 The following material considerations are applicable in the assessment of the Planning Application: -

- PAN 72: Housing in the Countryside
- PAN 79 Water and Drainage
- British Code of Practice – Flows and Loads 4 – Sizing criteria, treatment capacity for small waste water treatment systems

4.6 The case officer's Report of Handling should detail and assess all the relevant planning policies as well as the material considerations as required by the House of Lord Judgement and as detailed in the following maladministration cases POS 4.1.2 and POS 4.1.3.

4.7 To fully comment on the proposal's relationship with the Development Plan and associated material considerations further information is required as discussed in section 2 and 3 of this report. Obtaining this additional information is particularly important due to the proximity of neighbouring residential land uses.

4.8 Planning Objections Scotland's view, based on the information submitted to date, is the proposed residential development will have an adverse impact on the Green Belt, landscape and residential amenity. It clearly conflicts with the Development Plan.

<u>NPF 4 - 1. Tackling the climate and nature crises</u>

4.9 When considering all development proposals significant weight will be given to the global climate and nature crises. This proposal has not taken account of the potential biodiversity resource at the site and therefore has not taken account of the nature crisis. The application does not comply with NPF4 - 1. Tackling the climate and nature crises.

<u>NPF 4 - 2. Climate mitigation and adaptation</u>

4.10 The policy intent is to encourage, promote and facilitate development that minimises emissions and adapts to the current and future impacts of climate change. The development of this site is not in a sustainable

location and will not reduce , minimise or avoid green house gas emissions. It does not result in compact urban growth and is not in a location where rural revitalisation is required. It fails to comply with NPF4 Policy 2.

NPF 4 - 3. Biodiversity

4.11 Proposals for local development require to include appropriate measures to conserve, restore and enhance biodiversity, in accordance with national and local guidance. Measures should be proportionate to the nature and scale of development. The proposal has not taken account of the potential biodiversity resource at the site and incorporates no measures to conserve, restore and enhance biodiversity contrary to NPF4 - 3(c). Biodiversity.

NPF 4 - 5. Soils

4.12 The proposal results in encroachment onto undeveloped Class 2 (Prime) Agricultural Land. It meets none of the criteria contained within NPF4 - Policy 5 b) warranting this encroachment. Accordingly, the proposal is contrary to this policy and should be resisted.

NPF 4 - 8. Green belts

4.13 The proposal intrudes into the designated Greenbelt. It meets none of the criteria contained within NPF4 - Policy 8 where this intrusion would be warranted. It will clearly have an adverse visual impact on the greenbelt landscape and should be resisted.

NPF 4 - 14. Design, quality and place

4.14 Policy 14 criterion a) confirms that development proposals should be designed to improve the quality of an area whether in urban or rural locations and regardless of scale. The proposed dwellings extend

development into an open field. It has no regard to the existing built fabric or the rural landscape.

4.15 It is not considered to meet the aims identified in the ‘six qualities of successful places’ contrary to criterion (b) and (c). The inappropriate backland style development that encroaches past the rear curtilages of Tui Steading and Newhouse Cottages is not considered to create a ‘pleasant’ and attractive built space. It is not well connected, it does not improve accessibility and will be car dependent. It is not ‘distinctive’ and has not taken account of local architectural styles or interpreted in a way to reinforce local identity, it is not ‘sustainable’ by integrating nature positive and biodiversity solutions.

NPF 4 - 17. Rural homes

4.16 The proposal doesn’t meet any of the criteria associated with Policy 17a) Rural Homes. Due to the site's relationship to Edinburgh the development of residential dwellings I also fails to meet criterion b,c and d of Policy 17.

NPF 4 - 22. Flood risk and water management

4.17 Further hydrology and drainage information is required to illustrate compliance with the aims of Policy 22c) which seeks to minimise the area of impermeable surfaces, minimise risk of surface water flooding by managing all rain and surface water through sustainable urban drainage systems which should form part of and be integrated with existing blue/green infrastructure.

Policy Des 1 Design Quality and Context

4.18 This policy seeks innovation in the design and layout of new buildings, streets and spaces, provided that the existing quality and character of the immediate and wider environment are respected and enhanced and local distinctiveness is generated. As discussed under paragraph 4.14-4.15,

which related to NPF4 the proposal is not considered to meet the ‘six qualities of successful places’. The proposal does not create or contribute towards a sense of place. The layout and siting of the development is clearly at odds with the green belt and landscape. The residential scheme would damage the character and appearance of the area contrary to Policy Des 1 Design Quality and Context.

Policy Des 4 - Development Design – Impact on Setting

4.19 This Policy confirms that planning permission will be granted for development where it is demonstrated that it will have a positive impact on its surroundings, including the character of the wider townscape and landscape, and impact on existing views. In this case the positioning of the two dwellings is an inappropriate appendage which is clearly at odds with the wider landscape character.

Policy Des 5 Development Design – Amenity

4.20 Criterion a) confirms that the amenity of neighbouring developments is not adversely affected and that future occupiers have acceptable levels of amenity in relation to noise, daylight, sunlight, privacy or immediate outlook

4.21 Due to a lack of information, no meaningful assessment on overshadowing, daylight, sunlight, privacy or immediate outlook can be undertaken.

4.22 The proposed layout results in the formation of an access road along the full side boundary of Tui Steading as well as properties yet to be built. This backland style access will result in vehicular traffic squeezing past private rear curtilages resulting in noise which in turn will reduce residential amenity.

Policy Des 7 - Layout Design

4.23 The proposed layout does not demonstrate a comprehensive and integrated approach to the layout of buildings, streets, footpaths, cycle paths, public and private open spaces, services or SUDS. The proposal is clearly an inappropriate ad hoc addition to an already convoluted residential layout.

Policy Hou 4 - Housing Density

4.24 This further addition does not respect the existing characteristics of built development on Long Dalmahoy Road and will result in the further erosion and unacceptable damage to local character, environment quality and residential amenity.

Policy Env 10 - Development in the Green Belt and Countryside

4.25 The proposal intrudes into the designated Greenbelt. It doesn't meet the criteria contained within Policy Env 10 which limits development to the re-use of existing buildings or new buildings for agriculture, woodland and forestry, horticulture or countryside recreation, or where a countryside location is essential. It is clear the two dwellings would detract from the landscape quality and rural character of the area.

## 5.0 HUMAN RIGHT IMPLICATIONS

5.1 This proposal has potential Human Right implications for neighbours in terms of alleged interference with privacy, home or family life (Article 8) and peaceful enjoyment of their possessions (First Protocol, Article 1).

5.2 Planning Objections Scotland is of the view that refusal of the application or withdrawal are the only measures that can be deployed to ensure compliance with the Human Right Act. Proceeding on this basis would constitute a justified and proportionate control of the use of property and

is necessary in the public interest to ensure there is no interference with Article 8 and First Protocol, Article 1.

## 6.0 CONCLUSION

6.1 The lack of information associated with this submission means the application should be withdrawn or refused.

6.2 Notwithstanding the lack of information, taking account of the issues identified within section 4 of this report the planning application also fails to comply with NPF4 and the adopted Edinburgh Local Development Plan 2016. Furthermore there are no material considerations that would warrant approval of the application.

6.3 Clarity, openness and fairness are essential elements of the planning process, not opening up any amended plans or additional information to scrutiny would be a failure of the system, local democracy and natural justice. Our client reserves the right to make commentary on any further submissions by the developer.

PLANNING OBJECTIONS SCOTLAND

# POS_2.1.1_SG_Annex_D_Circular_3_2022

RTPI Chartered Town Planners

RICS

## Annex D

## Plans and Drawings

1. All applications should be accompanied by a location plan and almost all will require a site plan. Where the applicant owns some or all of the "neighbouring land" (see paragraph 4.15 of the main circular), a plan showing such land must be included. The following are not statutory requirements but an indication of what planning authorities can reasonably expect by way of a minimum of information on these plans. Planning authorities may also publish their own guidance in this regard.

   **Location plan** – this must identify the land to which the proposal relates and its situation in relation to the locality: in particular in relation to neighbouring land. Location plans should be a scale of 1:2500 or smaller.

   **Neighbouring land owned by the applicant** – where required, this could be incorporated into the above plan or on a separate plan of similar scale.

   **Site Plan** – this should be of a scale of 1:500 or smaller and should show:

   - The direction of North;
   - General access arrangements, landscaping, car parking and open areas around buildings;
   - The proposed development in relation to the site boundaries and other existing buildings on the site, with written dimensions including those to the boundaries;
   - Where possible, all the buildings, roads and footpaths on land adjoining the site including access arrangements;
   - The extent and type of any hard surfacing; and
   - Boundary treatment including walls or fencing where this is proposed.

2. The range of other plans and drawings will depend on the scale, nature and location of the proposal. Planning authorities should consider providing guidance on the levels of information expected in different types of case. The following plans and drawings will not be required in every case, but the list indicates the sort of minimum information which should be included where necessary:

   **Existing and proposed elevations** (at a scale of 1:50 or 1:100) which should:

   - show the proposed works in relation to what is already there;
   - show all sides of the proposal;
   - indicate, where possible, the proposed building materials and the style, materials and finish of windows and doors;
   - include blank elevations (if only to show that this is in fact the case);
   - where a proposed elevation adjoins another building or is in close proximity, the drawings should clearly show the relationship between the buildings, and detail the positions of the openings on each property.

**Existing and proposed floor plans** (at a scale of 1:50 or 1:100) which should:

- explain the proposal in detail;
- show where existing buildings or walls are to be demolished;
- show details of the existing building(s) as well as those for the proposed development; and
- show new buildings in context with adjacent buildings (including property numbers where applicable).

**Existing and proposed site sections and finished floor and site levels** (at a scale of 1:50 or 1:100) which should:

- show a cross section(s) through the proposed building(s);
- where a proposal involves a change in ground levels, show both existing and finished levels to include details of foundations and eaves and how encroachment onto adjoining land is to be avoided;
- include full information to demonstrate how proposed buildings relate to existing site levels and neighbouring development; and
- show existing site levels and finished floor levels (with levels related to a fixed datum point off site), and also show the proposals in relation to adjoining buildings (unless, in the case of development of an existing house, the levels are evident from floor plans and elevations).

**Roof plans** (at a scale of 1:50 or 1:100) to show the shape of the roof and specifying details such as the roofing material, vents and their location.

PLANNING OBJECTIONS SCOTLAND

# POS_2.1.2_SPSO_201605668_Glasgow_City _Council_(dimensions, scale on plans)

RTPI Chartered Town Planners

RTPI Member N .47188

RICS

# SPSO decision report

**Case:** **201605668, Glasgow City Council**
**Sector:** local government
**Subject:** handling of application (complaints by opponents)
**Decision:** some upheld, recommendations


## Summary

Mr C lives in a conservation area. An application for planning permission for external alterations to a property neighbouring his was submitted to the council. The proposal was to increase the height of the roof of an existing utility building and associated works to create additional living space. Mr C submitted objections to the proposal. The council produced a report of handling of the application and granted full planning permission subject to conditions. The first of these was that the development had to be implemented in accordance with the approved drawings.

Mr C was concerned that the council's decision had been procedurally flawed and based on inaccurate information. He complained to the council about this. At both stages of the council's complaints procedure the responses stated their conclusions that the decision had been taken properly and on the basis of accurate information. Mr C was dissatisfied with these responses and raised his complaints with us.

We upheld Mr C's complaints that statements in the report were inaccurate (specifically statements that the pitch of the roof 'will match' the main house and that the rooflights will be 'invisible from a public area'); that the approved drawings associated with the application did not contain sufficient written dimensions to ensure that the precise location and scale of what was being proposed was clear; and that the council did not respond reasonably to some of Mr C's complaints. We did not uphold complaints that the evaluation of the application against relevant guidance was unreasonable or that the inadequacies of the report of handling meant that the decision on the application was unreasonable.


## Recommendations

What we asked the organisation to do in this case:

- Apologise to Mr C that they did not respond reasonably to some of his complaints about the handling of the application.
- Provide Mr C with a direct response to his complaint.
- Amend the approved drawings for the application to ensure the precise location and scale of what was being proposed, and has been approved, is clear.

What we said should change to put things right in future:

- Relevant council staff should be reminded that statements of fact in reports of handling should be accurate.
- Relevant council staff should be reminded that approved drawings should be adequately dimensioned to ensure the precise location and scale of what is being proposed is clear.

In relation to complaints handling, we recommended:

- Relevant council staff should be reminded that issues raised in complaints should be directly responded to.

We have asked the organisation to provide us with evidence that they have implemented the recommendations we have made on this case by the deadline we set.

PLANNING OBJECTIONS SCOTLAND

# POS_2.1.4_SPSO_201508154 Aberdeenshire_Council (finished floor level inaccuracies)

RTPI Chartered Town Planners

RTPI Member N .47188

RICS

# SPSO decision report

**Case:** **201508154, Aberdeenshire Council**
**Sector:** local government
**Subject:** handling of application (complaints by opponents)
**Outcome:** upheld, recommendations


## Summary

Mr and Mrs C raised concerns about the council's handling of various planning applications for a site, including their home. In particular, they said that certain applications failed to protect their home by ensuring that its floor level and that of its neighbour were built to a similar level. As a consequence of this, they said that the council failed to assess the impact of their neighbour's sun lounge on their amenity and privacy.

We made enquiries to the council who confirmed that they had since established that the levels of the properties concerned were not in accord with the applications granted and the houses were not built as envisaged. The difference in levels had led to Mr and Mrs C's property being overlooked.

We took independent planning advice and we found that one of the properties concerned was too high, whereas, the other was too low. The consequence of this was that overlooking of Mr and Mrs C's house was unavoidable. The council were largely responsible for this. Similarly, because the floor levels were incorrect, the council would not have been able to properly assess the impact of the neighbours' sun lounge on Mr and Mrs C's property. We upheld the complaint.


## Recommendations

We recommended that the council:

- make a formal apology to recognise the situation;
- review the staff guidance notes to include the treatment of window alterations during the course of development as consent variations or as permitted development;
- make a formal apology for their inability to assess the impact of the sun lounge;
- be prepared to meet the costs of any agreed solution; and
- review staff guidance notes on planning application handling with regard to successive permissions issued for the same site; the consistency of conditions which require to be carried through from one permission to any future permission; consideration of site levels and especially any proposed changes for residential amenity and overlooking.

PLANNING OBJECTIONS SCOTLAND

# POS_3.1.1_EPS letter from John O'Brien Planning Scottish Executive [2006]

RTPI Chartered Town Planners

RTPI Member N .47188

RICS

SCOTTISH EXECUTIVE

Development Department
Planning Division

Victoria Quay
Edinburgh EH6 6QQ

[redacted]
http://www.scotland.gov.uk

Heads of Planning
Planning Authorities

Your ref:
Our ref:

16 May 2006

Dear Sir/Madam

**EC DIRECTIVE 92/43/EEC ON THE CONSERVATION OF NATURAL HABITATS AND OF WILD FLORA AND FAUNA ("THE HABITATS DIRECTIVE")**

**THE CONSERVATION (NATURAL HABITATS &c) REGULATIONS 1994 ("THE 1994 REGULATIONS")**

**EUROPEAN PROTECTED SPECIES, DEVELOPMENT SITES AND THE PLANNING SYSTEM: INTERIM GUIDANCE FOR LOCAL AUTHORITIES ON LICENSING ARRANGEMENTS ("THE GUIDANCE")**

It has come to our attention that some planning authorities are attaching suspensive conditions to planning permissions instead of fully ascertaining, prior to the determination of the planning application, whether a European Protected Species (EPS) is present on a site, or what the effect might be of such a species being present on a site. An example of this is a condition requiring that a development should not commence until a survey has been undertaken to determine whether bats, otters etc are present.

This letter is to remind planning authorities of the terms of the above Guidance; for ease of reference here is a link to the Guidance: http://www.scotland.gov.uk/library3/environment/epsg-00.asp. The main paragraph that I would draw to your attention is paragraph 29. It states "*it is clearly essential that planning permission is not granted without the planning authority having satisfied itself that the proposed development either will not impact adversely on any European protected species on the site or that, in its opinion, all three tests necessary for the eventual grant of a Regulation 44* (the 1994 Regulations) *licence are likely to be satisfied. To do otherwise would be to risk breaching the requirements of the* (Habitats) *Directive and Regulation 3(4). It would also present the very real danger that the developer of the site would be unable to make practical use of the planning permission which had been granted, because no Regulation 44 licence would be forthcoming. Such a situation is in the interests of no-one*." Case law has reinforced the general message that the EPS requirements must be met with the European Commission showing itself willing to pursue Member States where the process is not properly followed.

Accordingly, to ensure that all decisions are compliant with the Habitats Directive and the Regulations and the above mentioned Guidance, planning authorities should fully ascertain whether

protected species are on site and what the implications of this might be before considering whether to approve an application or not.

It should be noted that, if any future applications notified to the Scottish Ministers are found to have such conditions attached, they will be returned to the planning authority to (a) arrange for any necessary survey etc action to be carried out, and (b) reconsider the proposal in the light of the results.

SNH have reminded its staff of the requirements of this Guidance.

Yours faithfully

[redacted]

**JOHN O'BRIEN**

POS Reference:-3.1.1

PLANNING OBJECTIONS SCOTLAND

# POS_3.1.2_Woolley v Cheshire East Borough Council [2009]

RTPI Chartered Town Planners

RTPI Member N .47188

RICS

Neutral Citation Number: 2009 EWHC 1227 (Admin)

Case No: CO/2820/2008

**IN THE HIGH COURT OF JUSTICE**
**QUEEN'S BENCH DIVISION**
**ADMINISTRATIVE COURT SITTING AT MANCHESTER**

Before :
**HIS HONOUR JUDGE WAKSMAN QC**
**(sitting as a Judge of the High Court)**

Between:
**THE QUEEN**
**(on the application of SIMON WOOLLEY)**
**Claimant**

**and**

**CHESHIRE EAST BOROUGH COUNCIL**
**Defendant**

**and**

**MILLENNIUM ESTATES LIMITED**
**Interested Party**

Richard Harwood (instructed by DLA Piper, Solicitors) for the Claimant
Martin Carter (instructed by Cobbetts LLP Solicitors) for the Defendant
The Interested Party did not appear and was not represented

**Hearing dates: 21 and 22 May 2009**

# Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

His Honour Judge Waksman QC :

## INTRODUCTION

1. This is the hearing of a substantive application for judicial review of the grant of planning permission by the Defendant, now known as Cheshire East Council ("the Council") for the demolition of a property known as Bryancliffe in Wilmslow, Cheshire and its replacement by a larger property consisting of 3 apartments. The planning permission itself was granted on 15 February 2008. That followed a resolution of the Council's Planning Sub-Committee to grant permission subject to conditions and the making of a s106 agreement, on 24 October 2007.

## BACKGROUND

2. The site in question abuts land running down to the River Bollin. See the plan at p261 of the Bundle and the photographs at pp148-153. The area surrounding the river is a designated Area of Special County Value (ASCV) although the site itself is not. The site was largely hidden from the river by a row of mature trees. The developer which bought the site in 2003 ("Millennium" the Interested Party in this case) cut down those trees shortly after acquisition. They were not protected and it was entitled to do so.

3. Millennium first applied for planning permission on 15 April 2005 but it was refused on 15 June. On 9 October 2006 a planning appeal against that refusal was dismissed by the Inspector. A second application was made on 22 December 2006 but later withdrawn after an adverse committee report. A third (and the ultimately successful) application was made on 16 August 2007. On 25 September, the Claimant in this case, the owner of an adjoining property called Bollinholme made representations through his solicitors. On around 14 October, the operative planning officer's report was produced for consideration by the Planning Sub-Committee on 24 October.

4. After the Planning Sub-Committee promulgated its resolution of 24 October, Mr Woolley's solicitors sent a pre-action protocol letter to the Council dated 7 November 2007, threatening judicial review unless its resolution was set aside and the matter returned to the Planning Sub-Committee. This was refused and the formal planning decision letter of 15 February 2008 later followed.

5. In very broad terms, the reason why the appeal failed in 2006 was because the Inspector found that the view of the proposed property from the river (unmasked by trees) was an unacceptable visual intrusion onto the ASCV. Millennium had proposed the planting of trees so as (once more) to mask the property but because of the then layout and location of the flats, the Inspector held that the owners were likely subsequently to obtain permission to remove them.

6. It was also the case before the Inspector that a small bat roost had been found at the existing property. A bat assessment (divider 13) dealt with the evidence

as to the existing roost and put forward proposals for adequate mitigation compensation and enhancement for the local bat population. The Inspector found that the proposal would not result in significant harm to biodiversity interests as set out in paragraph 1 of national policy statement PPS 9.

**THE PLANNING OFFICER'S REPORT**

7. The report referred to the land lying to the North of the site as within the Bollin Valley where special conservation policies applied and also within the Green Belt and an ASCV. The key issues concerned the impact on the visual amenity of the Bollin Valley, the impact on protected trees at the site and the impact on the neighbours' residential amenities. It noted that Millennium had now improved the siting, design and orientation of the new building and had also proposed a wider tree belt along the northern side of the site. It had also amended the bank profile to raise the height of the bank to form an even slope.

8. The existing villa was itself an intrusive urban feature visible from the Bollin River. The new building would be significantly larger than Bryancliffe in terms of footprint mass and scale and would be 1-2 metres higher although 4 metres further away from the valley bank than Bryancliffe. The new building would have a significant visual impact on the valley until the proposed tree belt matured sufficiently to screen and filter views.

9. At p6 the report stated that the most relevant structure and local planning policies included a list of various numbered policies. The Inspector's report on the appeal on the previous planning refusal was said to be a significant material consideration. At p7 the Inspector's concern at the visual intrusion of the proposed new apartments was set out in detail. He had concluded that due to its elevated position the development would be an unduly prominent urban intrusion and that its "unacceptably urbanising effect on the open rural character and visual amenities of the Bollin Valley" was in conflict with SP Policies R2, GEN 3 and NE 1 among others. As already noted he also found that the proposed tree planting plan before him would not provide a solution.

10. The report noted that the main improvement now was that the new building would be set further back from the valley allowing a belt of woodland to be planted and the regrading to the embankment would increase the height of the planting. The result of the resiting of the apartments meant that any new trees would not be under threat of removal by future residents.

11. Although the new building would be much more prominent than the existing one, it would become gradually screened over the 20 years it would take for the new trees to be fully established. At that point the resulting view from the Bollin Valley would be improved from the existing situation. Hence "the main issue for members to determine is whether the potential longer-term improvements outweigh the harm to the visual amenities of the Bollin Valley that would result in the earlier years following development.".

12. The report concluded thus: "Taking into account all representations made, the proposed development is considered acceptable in terms of design the impact on the living conditions of the occupiers of adjoining property the impact on housing supply in the Borough, the interests of nature conservation the impact on protected trees and highway considerations. It is also considered though, that the proposed development will introduce an intrusive building into the landscape when viewed from the Bollin Valley which is characterised by its wooded sides and limited views of buildings. However, on balance, subject to the introduction of a comprehensive and long term landscaping plan, it is considered that the negative impacts of the development can be adequate mitigated and hence overcome the concerns with the previously dismissed appeal. The application is therefore recommended for approval."

13. The report also said that a condition would have to be imposed to secure a method statement concerning the mitigation for the bats.

14. I will deal with other aspects of the report, in context, below.

15. The Council agreed with the recommendation in the report on 24 October, as noted above. It delegated the matter to the Corporate Manager Planning and Development for approval subject to the completion of a s106 agreement to include reference to the fact that any planting must take place prior to the commencement of building works and the conditions set out in the report.

## THE PRESENT POSITION

16. It is common ground, for the reasons set out below, that where demolition was proposed in relation to a site containing a bat roost a licence from Natural England was required. Such a licence was acquired by Millennium on 16 July 2008. In August 2008, it demolished the old building. But in January 2009 it went into administration. So there is now, no longer, any intrusive urban view impacting upon the valley of the River Bollin. The site with the benefit (or otherwise) of the now-challenged planning permission is currently up for sale. The administrators took no part in this hearing.

## THE ISSUES GENERALLY

17. The planning permission is challenged on a total of 7 grounds. I deal with each in the order taken by Counsel at the hearing. It is common ground that subject to the decision of the House of Lords in *Berkeley v SSE* [2001] 2 AC 603, dealing with obligations under EC law, if the permission is found by me to have been unlawful in any way, then it should be quashed provided that the outcome, if there had been no unlawfulness, may or might have been different. Mr Woolley does not have to show that it necessarily, or even probably, would have been. See *Simplex v SSE* (1989) 57 P & CR 306, 327. That deals with the hypothetical position at the time of the original permission. If there might have been a difference at that time, however, Mr Harwood for Mr Woolley accepted that he would also have to show that there might also be a difference if the Council were to make a fresh decision now. There was no issue about

that. Mr Carter for the Council conceded that it might well have done, which is hardly surprising given the change of circumstances referred to above.

18. I deal with the EC law aspect of this in the context in which it arises, Ground 1, to which I now turn.

## GROUND 1: FAILURES IN CONNECTION WITH THE EC HABITATS DIRECTIVE

### Legal Materials

19. Art. 12 (1) of the EC Habitats Directive requires Member States to take requisite measures to establish a system of strict protection of certain animal species prohibiting the deterioration or destruction of breeding sites or resting places. It is common ground that the pipistrelle bats who had their roost at Bryancliffe are so protected. Art. 16 then provides that if there is no satisfactory alternative and the derogation is not detrimental to the maintenance of the populations of the species at a favourable conservation status in their natural range, then Member States may derogate "in the interests of public health and public safety or for other imperative reasons of overriding public interest, including those of a social and economic nature and beneficial consequences of primary importance for the environment" among other reasons.

20. All derogations have to be reported to the European Commission every two years and in *Commission v Finland* C-342/05 the ECJ held that Member States were to ensure that all action affecting the protected species was authorised only on the basis of decisions containing a clear and sufficient statement of reasons referring to the reasons conditions and requirements of Art. 16 (1).

21. This directive is then implemented by the Conservation (Natural Habitats etc) Regulations 1994 ("the Regulations"). The Regulations set up a licensing regime dealing with the requirements for derogation under Art. 16 and this function is now carried out by Natural England. However, Regulation 3(4) provides that local planning (among other) authorities must "have regard to the requirements of the Habitats Directive so far as they may be affected by the exercise of those functions."

22. The critical issue which arises under this Ground is how a local authority such as the Council here should have regard to the Directive. The most pertinent and direct guidance is given by ODPM Circular 06/05 which accompanied and is complementary to PPS 9. Paragraph 98 thereof refers to protected species generally, stating that they are a material consideration for planning permission purposes and that local authorities should consult English Nature before granting planning permission. It then refers to the "further strict provisions" for those species governed by the Habitats Regulations.

23. Paragraph 103 then refers to the licensing regime pointing out that planning permission does not absolve the relevant party from obtaining a licence.

24. Paragraph 116 provides as follows:

> "When dealing with cases where a European protected species may be affected, a planning authority … has a statutory duty under regulation 3(4) to have regard to the requirements of the Habitats Directive in the exercise of its functions. So the Directive's provisions are clearly relevant in reaching planning decisions, and these should be made in a manner which takes them fully into account. The Directive's requirements include a strict system of protection for European protected species prohibiting deliberate killing catching or disturbing of species and damage to or destruction of their breeding sites or resting places. Derogations from this strict protection are only allowed in certain limited circumstances and subject to certain tests being met. Planning authorities should give due weight to the presence of a European protected species on a development site to reflect these requirements, in reaching planning decisions and this may potentially justify a refusal of planning permission."

25. DEFRA Circular 2/2002 is also relevant. It deals with the duties of local planning authorities to provide information to the licensing authority then dealing with a licence application under the Regulations. This is not of direct relevance to the question of their duties when considering a planning application itself. However, it is worth noting that on p2 it is said that authorities will typically be asked to provide information as to whether the tests specified in Art. 16 (1) of the Directive and Regulation 44 of the Regulations have been met. This will include an assessment of the importance attached to the development against the background of national planning policy guidance and regional and local development plans including material considerations. This shows that local planning authorities are expected to have the knowledge to assist in the exercise of whether the Art. 16 (1) tests (see paragraph 20 above) are met.

**The Relevant Duty at the planning stage**

26. Mr Carter submits that the only duty imposed by Regulation 3 (4) on an authority at the planning stage is to note the existence of the Directive and Regulations and to note the existence of the relevant bats. And beyond perhaps also stating that the applicant for permission needs a licence, the authority need not go.

27. I disagree. That approach disregards the very clear guidance set out in paragraph 116 of ODPM Circular 06/05 which (a) refers to the giving of weight "to reflect these requirements" and (b) contemplates that as a result of taking account of the Directive the authority might refuse permission altogether. Indeed, Mr Carter conceded, as he was bound to do in order to give any meaning to the last part of paragraph 116, that in a serious enough case, like an application to build a supermarket on a brownfield site which would involve considerable disruption to a local bat population, the authority might refuse permission where there was adequate space somewhere else on the brownfield site. But if that is right, it recognises that the local authority should engage with the provisions of the Directive. In my view that engagement involves a consideration by the authority of those provisions and considering whether the derogation requirements might be met. This exercise is in no way a substitute for the licence application which will follow if permission is

given. But it means that if it is clear or perhaps very likely that the requirements of the Directive cannot be met because there is a satisfactory alternative or because there are no conceivable "other imperative reasons of overriding public interest" then the authority should act upon that, and refuse permission. On the other hand if it seems that the requirements are likely to be met, then the authority will have discharged its duty to have regard to the requirements and there would be no impediment to planning permission on that ground. If it is unclear to the authority whether the requirements will be met it will just have to take a view whether in all the circumstances it should affect the grant or not. But the point is that it is only by engaging in this kind of way that the authority can be said to have any meaningful regard for the Directive. The very attenuated duty suggested by Mr Carter for the Council is in truth, no duty at all.

28. I have considered whether the Council could discharge its duty simply by making the obtaining of a licence a condition of the grant of permission. But that is not sufficient. After all, if no licence is obtained it is a criminal offence so there is a clear incentive to obtain one anyway. And the making of a condition is not in truth engaging with the Directive.

**Was the Council in breach of Regulation 3(4) here?**

29. In my view it clearly was. Indeed it is not suggested that the Council embarked upon the kind of exercise referred to above. The Planning Officer's report made no mention of the Directive or the Regulations. It referred to the need to have a condition for the mitigation of disturbance to the bats but that in effect assumes that the A16 (1) requirements could otherwise be met. It is true that the bat assessment on Bryancliffe which was referred to in the Planning Officer's report itself makes reference to the Regulations and the need for a licence together with a limited reference to OPDM Circular 06/05. But that does not amount to consideration by the Council.

30. Mr Woolley's solicitors' pre-action protocol letter dated 7 November 2007 expressly referred the Council to the relevant provisions of the Regulation and ODPM Circular 06/05, including paragraph 116. Following this letter the Council had sought to consult with Natural England. And Natural England's response was in effect that it did not have sufficient resources to provide a detailed commentary on the proposed development. But the points made in the letter about the Council's duty under paragraph 116 were not taken up or dealt with in Cobbett's response to that letter. That duty can be fulfilled without input from Natural England.

31. The Planning Permission itself stated in reason 6 that the proposal had an acceptable impact on European protected species. But that is not the question posed by the Directive and Regulation 3 (4) which concerns the requirements to be met before any derogation can take place at all. Equally a reference at the end of the Permission to the existence of the regulations and the need for a licence cannot discharge the Council's duty. The Planning Officer should have specifically raised this rather specialised duty upon the Council in his report so

that the Planning Sub-Committee could then seek to discharge it. As there was no reference to any of the relevant materials it is hardly surprising that the Council gave them no consideration.

32. Accordingly, it is clear that the Council was in breach of Regulation 3 (4).

**Consequences**

33. Mr Carter accepted that if I reached this conclusion as to the nature of the Council's duty and its consequent breach, the unlawfulness on its part had to be seen as a substantive breach of European Law. On that basis, since it is not suggested that the breach was *de minimis*, the principles enunciated by Lord Bingham and Lord Hoffmann in *Berkeley* (supra at pages 608, 613 and 615) come into play. In such a case the unlawful decision should be quashed without more. The Court does not even inquire as to whether it could be said that the impugned decision would have been the same in any event.

34. In any event, given the strict requirements for any derogation I would be very reluctant to hold that the outcome would have been the same in any event. And the fact that a licence was ultimately obtained (and based upon what appear to be some questionable assertions about the existing property and its ability to be used in the future) does not alter that conclusion. Indeed at the Inquiry Millennium's planning witness agreed that imperative reasons of overriding public importance did not arise and that there was a suitable alternative to demolition which was to retain Bryancliffe.

35. The planning permission must therefore be quashed on this ground alone. Strictly, it is not necessary for me to deal with the other grounds in the light of this conclusion. But in deference to the arguments made, I will deal with them briefly below.

**GROUND 5: FAILURE TO TAKE ACCOUNT OF CERTAIN APPLICABLE POLICIES**

**The Law**

36. Section 70 (2) of the Town and Country Planning Act 1990 requires the planning authority to have regard to the development plan so far as is material to the application and to any other material consideration. Section 38 (6) of the Planning and Compulsory Purchase Act 1994 states that if regard is to be had to the development plan, the determination must be made in accordance with the plan unless material considerations indicate otherwise.

37. It is accepted by Mr Harwood that if in substance the planning authority has considered the application, taking into account the provisions of a particular policy the fact that no specific mention is made of it does not render the decision unlawful. One example of that would be where several policies in effect say the same thing but only one is mentioned.

38. A planning officer also has a duty to provide sufficient information and guidance to the planning sub-committee to enable it to reach a decision applying the relevant statutory criteria. See *Lowther v Durham County Council* [2001] 3 PLR 83 at p105.

**The Relevant Policies**

39. Mr Woolley contends that the Council failed to have regard to a number of policies. They are referred to in paragraph 98 of Mr Harwood's Skeleton Argument. It seemed to me that the only two policies which (a) have real relevance and (b) whose provisions might have altered the approach taken by the Council are Structure Plan R1 and GEN 3. Both of them were stated in the Planning Permission to be relevant. R1 did not feature at all in the Planning Officer's Report. GEN 3 did, not as one of the listed relevant polices but as one which the Inspector had relied upon in the appeal when he upheld the refusal.

*R1*

40. At one stage it was contended that this policy was not actually relevant at all. That was a somewhat surprising submission in the light of the fact that the Planning Permission (issued after Mr Woolley's Pre-action protocol letter) said that it was. In any event I find that it was. It refers to loss or damage to particular sites including ASCV's. This includes, in my judgment, interference with its setting. That in turn can include the view to be had from the site which forms part of its overall value.

41. In the highlighted section of the first part of R1 it is stated that:

> "Where, exceptionally, because of other overriding considerations, unavoidable loss or damage to a site or feature or its setting is likely as a result of a proposed development measures of mitigation..will be required."

42. And paragraph 5.24 says that R1 acknowledges that

> "a development which would damage a heritage site or feature may exceptionally be allowed because of other overriding considerations. These considerations relate to the need for the development and whether there are alternatives to the proposal. Alternatives include a reduction in scale or redesign of the development and whether it can be accommodated on a suitable site elsewhere."

*GEN 3*

43. This states that all developments will be required to minimise adverse impacts on the beauty, heritage value and amenity of its site and surroundings. Also a development which has a major adverse impact on adjacent areas particularly ASCV's, should not be allowed.

**Was the Council in breach?**

*R1*

44. There can be no question but that the Council must have regarded its task on this application as essentially balancing two conflicting considerations – the adverse visual impact from the point of view of the river valley, caused by the erection of a new much larger building on the one hand, and the ultimate benefit of the screen provided by the new trees on the other. But R1 suggests that damage to the setting should only be permitted exceptionally. In a case where on any view the competing considerations were finely balanced and against a background of two prior failed applications at the same site, an appreciation of the need to show an exceptional case was of significance as were the other points made in paragraph 5.24.. In my judgment, the Council should have been alerted by the Planning Officer specifically to R1 for that reason. They were not and did not have it in mind.

*GEN 3*

45. This was of course mentioned in the report as being a policy relied upon by the Inspector. But what does not clearly emerge from that is the stipulation that if the development causes a major adverse impact on an adjacent ASCV it should not be allowed. Of course that it not an absolute but it is a strong indicator. That feature of GEN 3 was not set out in terms and in my judgment it should have been.

*Timing of the impact*

46. Mr Carter contends that there is a real question about the extent at least of the application of R1 and GEN3 since any interference would be for the limited period of 20 years at most and decreasing before then. I take that point and obviously the Council had the 20 year period in mind. But that does not alter the fact that they should have considered these policies head-on as it were and then within that they could consider the ameliorating tendencies of the fact that the impact was not to last for a lifetime.

*Conclusion*

47. Accordingly I find that there was unlawfulness here as well. And given the fine balancing exercise in any event performed here, it is impossible to say that the result would have been the same if the Council had considered these two policies directly.

**GROUND 4: FAILURE OF THE REPORT TO SAY WHETHER THERE WAS COMPLIANCE WITH THE POLICIES IN THE DEVELOPMENT PLAN OR NOT**

48. The Planning Permission states that the proposal did not comply with all relevant policies in the Development Plan, but it was considered acceptable because of the long term landscape mitigation. While the report clearly addressed the competing considerations for the Planning Sub-Committee it did not address directly the question of compliance or otherwise with the

Development Plan. Although often policies within a Development Plan as it affects a proposal might pull in different directions (eg housing or employment need as against conservation of the landscape) it is not clear that there were conflicting policies as such here. The proposal manifestly had nothing to do with employment and the Council had a moratorium on more housing at the time so that policy pulled in the same direction as conservation.

49. Given the debate before me as to whether, for example, policies R1 or GEN 3 were truly engaged at all, I take the view that the report should have expressed a view about non-compliance or otherwise with the relevant policies (or the Development Plan as a whole) so that the Council had a clear view of the legal framework within which they were to operate given the terms of s38 (6). This was all the more important where the matter was a finely balanced one. The fact that the Planning Permission expressly stated that there was non-compliance but this was outweighed here itself shows the relevance of the question of compliance or otherwise.

50. Mr Carter submits that it might not be possible for the Planning Officer to come to a clear view on compliance because here it could be said that the temporary nature of the intrusion meant there was compliance or alternatively there was not but there were other material considerations. But that possible ambiguity does not prevent the Planning Officer from taking a view and setting these matters out. And in any event an officer at some stage prior to the Planning Permission (but not the Planning Committee it would seem) took the view that there was non-compliance hence the statement in the Permission itself.

51. As with Ground 5, to which this ground is in truth closely allied, it is not at all clear that the Council would inevitably have come to the same view had the question of compliance been brought to the Committees' attention and addressed head-on. So this is another ground for quashing the Permission.

**GROUND 2: FAILURE TO CONSIDER ALTERNATIVES**

52. As ultimately refined the allegation here was that before the Council agreed that the benefit of a new row of trees screening the proposed building outweighed the visual intrusion for the first 20 years, it should have considered what might have happened if no permission was granted. The existing owner might have decided to plant trees in front of the river valley anyway so that the desired screen would emerge in any event. Then the supposed virtue of this development would in truth have been no virtue because the development was not needed in order to provide the screen.

53. In my judgment there was nothing in this point. The Council was not required to indulge in speculation about what this or some future owner of the site might do in terms of trees, or at all events it was well entitled to decide not to. Millennium might be thought to be unlikely to plant outside of a permission since it had cut the original trees down in the first place. And the position of any purchaser from it was simply unknown. An owner may have preferred an

uninterrupted view of the river. And even if an owner at some point in the future were to plant trees, that process would be starting later than any planting to be undertaken first off as a condition of this Planning Permission.

54. This ground of challenge therefore fails.

**GROUND 3: THE PROPOSED SWAP OF UNITS BETWEEN BRYANCLIFFE AND MACCLESFIELD ROAD/DAVEYLANDS SITES WAS IRRELEVANT AND CONTRARY TO CIRCULAR 05/05**

55. The Council's then policy was against any net increase to the housing supply in the area which of course this development was. Millennium however had planning permission for the building or conversion of up to 15 apartments at another site. It agreed to enter into a s106 obligation whereby that permission would not be put into effect if it built according to a permission for the apartments at Bryancliffe. The Council agreed to this "swap" so that the net housing supply was not increased as a result of the development at Bryancliffe.

56. Circular 05/05 emphasises that planning obligations should be linked to the proposed development with a functional or geographical link between the development and the item being provided by the obligation. In *Tesco v SSE* [1995] 1 WLR 759 Lord Keith stated that an offered planning application that had nothing to do with the development apart from the fact that it was offered by the developer will plainly not be a material consideration and could be regarded as an attempt to buy planning permission. If it had some connection with the proposed development which was not *de minimis,* then regard should be had to it.

57. Here it is said that there was no connection between an offer not to implement a planning permission at some other site in order to obtain permission on this site. And in any event the Council failed to consider whether that other permission might have expired before being implemented anyway.

58. I do not accept this. First, it seems to me that there is a proper functional linkage between what was offered and this development. Specific objection was taken on the basis that without more, housing supply would increase in contravention of Council policy for the area. That consideration by definition deals with a general matter (housing in the area) rather than something specific to the site itself. If the developer is in a position to avoid any net increase to housing supply in the area by giving up another permission, there is a direct connection with one of the policy considerations affecting the planning permission sought. It is not the same as "buying" the instant permission.

59. Moreover, it was not for the Council to speculate as to whether the other permission would in fact be implemented. That would have been an impossible task and it was entitled to assume that as it had been sought, the likelihood was that it would be implemented.

60. In paragraph 34 of his Decision, the Inspector reached the same view and he was right to do so.

61. Accordingly this ground of challenge fails.

**GROUND 6: NO AUTHORITY TO ISSUE THE PLANNING PERMISSION AS THE DECISION NOTICE DID NOT INCLUDE A CONDITION REQUIRING A METHOD STATEMENT FOR PLANTING ON THE SLOPE OR LANDSCAPE AND IMPLEMENTATION CONDITIONS**

62. The report recommended approval subject to a list of conditions which included the submission of details and approval of all landscaping (A01LS) and implementation of landscaping (A04LS). There should also be a method statement for planting on the slope. See Conditions 6, 7 and 24. However such conditions were not included within the Planning Permission. It is said that they were omitted without authority from the Council and accordingly the Planning Permission as a whole was unauthorised and should be quashed for that reason. The original Ground 6 referred only to the omission in the Planning Permission of a condition in relation to the Method Statement.

63. The minutes of the Planning Sub-Committee state that this application was to be delegated to the Corporate manager for Planning for "approval subject to the completion of a Section 106 Agreement to include reference to the fact that any planting must take place prior to the commencement of building works and that any damaged verges must be reinstated, the conditions set out in the report and additional conditions relating to the provision of a wheelwash and the gate post being protected and reinstated." On the face of it, therefore, the Council appeared to want all the conditions recommended by the Planning Officer as well as the s106 Agreement to include planting to take place before commencement of the building works.

64. However, paragraph 3 of the letter from Cobbetts dated 13 March 2008 states that the Council members considered that the grading works should be undertaken before the building works commenced and this was included in the s106 agreement. Accordingly there was no further requirement for the condition and it was omitted from the decision notice. This explanation was no doubt given on the instructions of the Council and it suggests that whatever the minutes might say the intention was that the Condition dealing with a method statement was no longer needed. Certainly, if it was intended to deal with some aspect of the grading works in the s106 agreement it would seem very odd if other aspects still fell to be dealt with by conditions. So although the minutes referred to the conditions generally, there was no intention in fact to retain a condition for the Method Statement.

65. Paragraph 1.5 of Schedule 1 to the s106 agreement provides that a "Detailed Planting Plan and Method Statement will be submitted to the Council for approval prior to the Commencement of the Bryancliffe Permission such consent not to be unreasonably withheld or delayed."

66. Paragraph 1.6 requires Millennium to "implement the On-Site Landscaping Scheme prior to the Commencement of the Bryancliffe Permission.."

67. The Detailed Planting Plan refers to a plan giving details of what was to be planted and where. The Method Statement was defined to mean a method statement for the construction and detail of the retaining walls on the Site, the formation of any banks, the planting of any trees and details of any irrigation scheme.

68. The On-Site Landscaping Scheme meant the Method Statement, Detailed Planting Plan and Drawing No. M1445.01G as annexed to the agreement.

69. In my judgment the effect of all of that was that Millennium had to submit its proposed Method Statement and Planting Plans to the Council for approval prior to commencing the development and that approval had to be given before such work commenced. That is my interpretation of paragraph 1.5. Then, under paragraph 1.6 all of the landscaping work (as approved under paragraph 1.5) had to be completed prior to the commencement of the development. I do not read "implement" as meaning "start". I take Mr Harwood's point that my interpretation might mean that some (but by no means all) of the soft landscaping could not easily be done before the building works started or might be at risk of disruption once they were. Some relaxation of this obligation might be needed in practice. But this potential problem does not to my mind impel a reading of the word "implement" which is contrary to its normal sense. Moreover, to read it as meaning "start" deprives the obligation of much of its effect and would run counter to the Council's clear intention expressed at the meeting.

70. Accordingly, as far as the Method Statement for the grading works is concerned, I do not consider that there was in truth any departure from what the Council authorised in the meeting of the Planning sub-committee.

71. As for soft landscaping other than that involved in the regrading works, I accept that there is a technical difference between placing an obligation within a condition and simply making it part of the s106 agreement. Breach of condition can lead to the issue of an enforcement notice claiming that the development is unlawful, with the possibility of a criminal sanction if not rectified. And while an injunction can be sought on the grounds of a breach of a s106 notice, the Council has the power to seek an injunction in relation to the non-fulfilment of a condition.

72. But given that the Council clearly wanted a very important aspect of landscaping (to do with regrading) covered in the s106 Agreement it is far from obvious to me that in truth it was still insisting on other aspects of soft landscaping remaining as conditions as opposed to being put into the agreement as well. As interpreted by me paragraphs 1.5 and 1.6 well cover all the soft landscaping points. The amendment to Ground 6 to include complaints about the lack of conditions dealing with soft landscaping came very late in

the day. And although Mr Carter was sensibly prepared to deal with them, there was not the same opportunity for the Council to deal with them as it had had when the Method Statement point was raised in DLA Piper's letter of 29 February 2008. Given that the Council might well in fact have been intending that all landscaping should now be in the s106 agreement, which provides for it comprehensively, I am not prepared to find on the materials before me that the officer drawing up the Planning Permission had no authority to deal with that question in the way that he did.

73. Accordingly, Ground 6 fails.

**GROUND 7: FAILURE ADEQUATELY TO SUMMARISE THE RELEVANT POLICIES**

74. Art. 22 (1) (b) of the Town and Country Planning (General Development Procedure) Order 1995 requires decision notices to include a summary of the relevant policies.

75. As noted above the Planning Permission makes reference to a number of polices. It does so by citing their number and then in brackets, what they are about. See p382 of the Bundle. It is said that a fuller description should have been given so as to refer to the particular parts of them that had a bearing on the decision. Reference was made to the decision of Collins J in *Tratt v Horsham District Council* [2007] EWHC 1485 (Admin) in which he stated that it would be insufficient to identify a policy without indicating what it concerns (as occurred in that case). A summary of the relevant policies was required. It need be no more than a few words identifying the relevant aspect of the policy. In *Mid-Counties Co-operative v Forest of Dean District Council* [2007] EWHC 1714 (Admin) Collins J said that all that was needed was an indication of what the policy deals with insofar as it is material to the permission in question.

76. In my judgment, the summaries given in the Planning Permission here were sufficient especially bearing in mind the relatively narrow compass of the issues arising.

77. Accordingly, this final ground of challenge fails also.

**CONCLUSION**

78. However because of my determination of Grounds 1, 4 and 5 in favour of Mr Woolley, this application for judicial review succeeds and the decision which granted planning permission dated 15 February 2008 must be quashed.

79. I am indebted to both Counsel for their excellent and helpful oral and written submissions. I will hear from them hereafter, if necessary, on any consequential matters which cannot be agreed.

PLANNING OBJECTIONS SCOTLAND

# POS_3.1.3_Morge v Hampshire County Council [2011]

RTPI Chartered Town Planners

RTPI Member N .47188

RICS

**Hilary Term**
**[2011] UKSC 2**
*On appeal from: 2010 EWCA Civ 608*

# JUDGMENT

# Morge (FC) (Appellant) *v* Hampshire County Council (Respondent)

**before**

**Lord Walker**
**Lady Hale**
**Lord Brown**
**Lord Mance**
**Lord Kerr**

## JUDGMENT GIVEN ON

## 19 January 2011

**Heard on 8 November 2010**

| *Appellant* | *Respondent* |
| --- | --- |
| Charles George QC<br>Gregory Jones<br>Sarah Sackman<br>(Instructed by Swain & Co Solicitors) | Neil Cameron QC<br>Sasha White<br><br>(Instructed by Hampshire County Council Legal Services) |

**LORD BROWN**

1. This appeal concerns a planning permission granted on 29 July 2009 for a proposed three mile (4.7km) stretch of roadway to provide a rapid bus service between Fareham and Gosport in South East Hampshire. The permission was challenged on environmental grounds including not least its likely impact on several species of European protected bats inhabiting the general area around the proposed busway. The challenge having failed before Judge Bidder QC (sitting as a Deputy High Court judge) on 17 November 2009 – [2009] EWHC 2940 (Admin) – and before the Court of Appeal (Ward, Hughes and Patten LJJ) on 10 June 2010 – [2010] EWCA Civ 608, [2010] PTSR 1882 – this Court on 27 July 2010 gave the appellant limited permission to appeal so as to raise two issues of some general importance.

2. Issue one concerns the proper interpretation of article 12 (1)(b) of the Habitat's Directive 92/43/EEC which provides that:

> "Member States shall take the requisite measures to establish a system of strict protection for the animal species listed [the protected species] in their natural range, prohibiting . . . (b) deliberate disturbance of these species, particularly during the period of breeding, rearing, hibernation and migration; . . ."

3. Issue two concerns the proper application of regulation 3(4) of the Conservation (Natural Habitats, etc) Regulations 1994 SI 1994/2716 (as amended first by the Amendment Regulations 2007 and then the Amendment Regulations 2009), by which domestic effect is given to the Directive:

> "3(4) . . . every competent authority in the exercise of any of their functions, shall have regard to the requirements of the Habitats Directive so far as they [the requirements] may be affected by the exercise of those functions."

With that briefest of introductions let me turn to the essential factual context in which these issues now arise, noting as I do so that altogether fuller descriptions of the facts can be found in the judgments below.

4. The proposed new rapid busway – the first and larger phase of which is already substantially under way, applications for interlocutory relief to stay its continuance having been refused by the Court of Appeal and refused by this Court on granting leave to appeal – runs along the path of an old railway line, last used in 1991. The scheme provides for buses to be able to join existing roads at various points along the route. It will create a new and efficient form of public transport to the benefit of many residents, workers and visitors to the region. Central Government has committed £20m to it.

5. Although most of the scheme lies within a built-up area, there are a number of designated nature conservation sites nearby and, unsurprisingly, once the railway line ceased to be used, the surrounding area became thickly overgrown with vegetation and an ecological corridor for various flora and fauna. Although, therefore, the scheme was widely supported, it also attracted a substantial number of objectors one of whom is Mrs Morge, the appellant, who lives close by.

6. The respondent authority is both the local planning authority for the relevant area and also the applicant for planning permission through its agent, Transport for South Hampshire, who submitted a planning application on 31 March 2009. Taking it very shortly, on 30 April 2009 Natural England (the Government's adviser on nature conservation) objected to the planning application in part because of their concerns about the impact of the development on bats (an objection reiterated on 29 June 2009). As a result the respondent authority commissioned an Updated Bat Survey (UBS) which was submitted on 9 July 2009. On 17 July 2009, largely as a result of the UBS, Natural England withdrew their objections. There then followed a Decision Report prepared by the respondent's planning officers, a further letter from Natural England dated 23 July 2009, an Addendum Decision Report from the officers, and on 29 July 2009 a three hour meeting of the respondent's Regulatory Committee which concluded with the grant of planning permission for the scheme by a majority of six to five with two abstentions.

7. The UBS is a document of some 70 pages. For present purposes, however, its main findings can be summarised as follows. No roosts were found on the site. The removal of trees and vegetation, however, would result in a loss of good quality bat foraging habitats. This would have a moderate adverse impact at local level on foraging bats for some nine years, the impact thereafter reducing, because of mitigating measures, to slight adverse/neutral. In addition the busway would sever a particular flight path followed by common pipistrelle bats, increasing their risk of collision with buses (without, however, given the proposed mitigation of this risk, a significant impact on bats at a local level).

8. The Officers' Decision Report (again a lengthy document) included these passages with regard to the bats:

> "3.7 Detailed ecological surveys have been undertaken across the site over the last eighteen months. . . . A number of bat species roost and forage along the corridor . . . Accordingly, a strategy to mitigate the impact on these species has been developed. The main principles of the strategy [include] enhancement of the habitat of the retained embankment to provide continued habitat for displaced species. Bat surveys have also been carried out to enable appropriate measures to be implemented.
>
> . . .
>
> 5.6 Natural England initially raised objections on the grounds that the application contains insufficient survey information to demonstrate whether or not the development would have an adverse effect on bats . . . which are [a] legally protected species. Further survey work was undertaken in response to this objection and provided to Natural England. Following receipt of this information Natural England are now satisfied that the necessary information has been provided and have withdrawn their objection. They recommend that if the council is minded to grant permission for this scheme conditions be attached requiring implementation of the mitigation and compensation measures set out in the reports.
>
> . . .
>
> Nature Conservation Impact
>
> 8.17 . . . the requirements of the Habitats Regulations need to be considered.
>
> . . .
>
> 8.19. . . The surveys also identified the presence of a diversity of bat species, which are protected, using the trees alongside the track for foraging. An Updated Bat Survey Method Statement and Mitigation Strategy has been submitted with measures to ensure there is no significant adverse impact to them from these proposals.

. . .

Conclusion

8.24 . . . suitable mitigation measures are proposed for . . . protected species . . . ”

The Addendum Report dealt specifically with the Habitat Regulations and repeated that Natural England, having initially objected to the application and required further survey information regarding protected species, were now satisfied and had withdrawn their objection.

9. Against this essential factual background I turn now to the two main issues arising.

*Issue 1 – the proper interpretation of article 12(1)(b) of the Habitat Directive*

Article 12(1)(b) must, of course, be interpreted in the light of the Directive as a whole. Included amongst the recitals in its preamble is this:

> “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 trans- boundary nature, it is necessary to take measures at Community level in order to conserve them”.

10. Article 1 is the definition article and defines “species of Community interest” in four categories, respectively “endangered”, “vulnerable”, “rare”, and “endemic and requiring particular attention [for various specified reasons]”. The six species of protected bats affected by the proposed busway fall variously into the second, third and fourth of those categories. Article 1(i) defines “conservation status of a species” to mean “the sum of the influences acting on the species concerned that may affect the long-term distribution and abundance of its populations”. It further provides:

> “The conservation status will be taken as ‘favourable’ when:

> population dynamics data on the species concerned indicate that it is maintaining itself on a long-term basis as a viable component of its natural habitats, and
>
> the natural range of the species is neither being reduced nor is likely to be reduced for the foreseeable future, and
>
> there is, and will probably continue to be, a sufficiently large habitat to maintain its populations on a long-term basis".

Article 2(2) provides that: "Measures taken pursuant to this Directive shall be designed to maintain or restore, at favourable conservation status, natural habitats and species of wild fauna and flora of Community Interest."

11. There then follow articles 3 to 11 under the head "Conservation of natural habitats and habitats of species". Within these provisions one should note article 6(2):

> "Member states shall take appropriate steps to avoid, in the special areas of conversation, 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."

12. Articles 12 to 16 inclusive then follow under the head "Protection of species". I have already set out article 12(1)(b). Article 16 provides for derogation and so far as material provides:

> "16(1) Provided that that there is no satisfactory alternative and the derogation is not detrimental to the maintenance of the populations of the species concerned at a favourable conservation status in their natural range, member states may derogate from the provisions of articles 12 . . . : . . . (c) in the interests of public health and public safety, or for other imperative reasons of overriding public interest, including those of a social or economic nature and beneficial consequences of primary importance for the environment".

13. Besides the issues now before us the Court of Appeal had to deal in addition with challenges based upon article 12(1)(d) of the Directive and upon the respondent's decision not to treat the proposal as an EIA development (matters

upon which this court refused leave to appeal). Ward LJ gave the only reasoned judgment, one of infinite care and thoughtfulness and, I may add, one of enormous assistance to this Court in its consideration of this further appeal.

14. As a background to deciding the meaning of article 12(1)(b), Ward LJ necessarily had regard to the European Commission's views upon the scope of the Directive, as set out in a Guidance document issued in February 2007 which include the following:

> "(37) Disturbance (e.g. by noise, source of light) does not necessarily directly affect the physical integrity of a species but can nevertheless have an indirect negative effect on the species (eg by forcing them to use lots of energy to flee; bats, for example, when disturbed during hibernation, heat up as a consequence and take flight, so are less likely to survive the winter due to high loss of energy resources). The intensity, duration and frequency of repetition of disturbances are important parameters when assessing their impact on a species. Different species will have different sensitivities or reactions to the same type of disturbance, which has to be taken into account in any meaningful protection system. Factors causing disturbance for one species might not create disturbance for another. Also, the sensitivity of a single species might be different depending on the season or on certain periods of its life cycle e.g. (breeding period). Article 12(1)(b) takes into account this possibility by stressing that disturbances should be prohibited particularly during the sensitive periods of breeding, rearing, hibernation and migration. Again, a species-by-species approach is needed to determine in detail the meaning of 'disturbance'.
>
> (38) The disturbance under article 12(1)(b) must be deliberate . . . and not accidental. On the other hand, while 'disturbance' under article 6(2) must be significant, this is not the case in article 12(1), where the legislator did not explicitly add this qualification. This does not exclude, however, some room for manoeuvre in determining what can be described as disturbance. It would also seem logical that for disturbance of a protected species to occur a certain negative impact likely to be detrimental must be involved.
>
> (39) In order to assess a disturbance, consideration must be given to its effect on the conservation status of the species at population level and biogeographic level in a member state . . .. For instance, any disturbing activity that affects the survival chances, the breeding success or the reproductive ability of a protected species or leads to a

> reduction in the occupied area should be regarded as a 'disturbance' in terms of article 12. On the other hand, sporadic disturbances without any likely negative impact on the species, such as for example scaring away a wolf from entering a sheep enclosure in order to prevent damage, should not be considered as disturbance under article 12. Once again, it has to be stressed that the case by case approach means that the competent authorities will have to reflect carefully on the level of disturbance to be considered harmful, taking into account the specific characteristics of the species concerned and the situation, as explained above."

No problem arises as to what is meant by "deliberate" in article 12(1)(b). As stated by the Commission in paragraph 33 of their Guidance:

> "'Deliberate' actions are to be understood as actions by a person who knows, in light of the relevant legislation that applies to the species involved, and the general information delivered to the public, that his action will most likely lead to an offence against the species, but intends this offence or, if not, consciously accepts the foreseeable results of his action."

Put more simply, a deliberate disturbance is an intentional act knowing that it will or may have a particular consequence, namely disturbance of the relevant protected species. The critical, and altogether more difficult, question is what precisely in this context is meant by "disturbance".

15. Having, as I too have sought to do, thus cleared the ground and recognised that the central difficulty in the case lies in determining the level of disturbance required to fall within the prohibition, Ward LJ rejected the appellant's contention that any disturbing activity save only that properly to be characterised as *de minimis* – too negligible for the law to be concerned with – constitutes disturbance within the article. As Ward LJ pointed out, the example given in paragraph 38 of the Commission's Guidance (scaring away a wolf from the sheep fold) "must be an *a fortiori*, rather than a typical one". The judgment then continues (and I make no apology for quoting it at some length):

> "35 . . . the disturbance does not have to be significant but, as para 38 of the guidance explains, there must be some room for manoeuvre which suggests the threshold is somewhere between de minimis and significant. It must be certain, that is to say, identifiable. It must be real, not fanciful. Something above a discernible disturbance, not necessarily a significant one, is required. Given that there is a

spectrum of activity, the decision-maker must exercise his or her judgment consistently with the aim to be achieved. Given the broad policy objective which I explored . . . above ['to ensure that the population of the species is maintained at a level which will ensure the species' conservation so as to protect the distribution and abundance of the species in the long term'], disturbing one bat, or even two or three, may or may not amount to disturbance of the species in the long term. It is a matter of fact and degree in each case.

36 [Counsel for the appellant] seizes on the words in para 38 . . . of the guidance, 'a certain negative impact likely to be detrimental must be involved and he elevates this statement into a test for establishing a disturbance. His difficulty is that that does not answer the critical question: when does the negative impact become detrimental? Para 39 seems to me to spell out the proper approach, namely to give consideration to the 'effect on the conservation status of the species at population level and bio-geographic level'. This in my judgment is an important refinement. The impact must be certain or real, it must be negative or adverse to the bats and it will be likely to be detrimental when it negatively or adversely effects the conservation status of the species. 'Conservation status of a species' is a term of art which . . . means the sum of the influences acting on the species concerned that may affect the long-term distribution and abundance of its population. That is why the guidance at para 39 makes the point that the disturbing activity must be such as 'affects the survival chances . . . of a protected species'. Furthermore, 'the competent authorities will have to reflect carefully on the level of disturbance to be considered harmful, taking into account the specific characteristics of the species concerned and the situation', to quote the concluding sentence of para 39. The summary in the guidance . . . has the same emphasis:

> 'Disturbance is detrimental for a protected species eg by reducing survival chances, breeding success or reproductive ability. A species-by-species approach needs to be taken as different species will react differently to potentially disturbing activities.'

37. Having regard to the aim and purpose of the Directive and of article 16 and having due consideration of the guidance, I am driven to conclude that for there to be disturbance within the meaning of article 12(1)(b) that disturbance must have a detrimental impact so as to affect the conservation status of the species at population level. . ..

. . .

39. In my judgment whether the disturbance will have a certain negative impact which is likely to be detrimental must be judged in the light of and having regard to the effect of the disturbance on the conservation status of the species, ie, how the disturbance affects the long-term distribution and abundance of the population of bats. I remind myself that according to the [Commission's] guidance . . . , 'favourable conservation status could be described as a situation where a . . . species is doing sufficiently well in terms of quality and quantity and has good prospects of continuing to do so in the future'. Whether there is a disturbance of the species must be judged in that light."

16. Finally, in a passage in the judgment headed Overall Conclusions, Ward LJ, expressing himself satisfied that the respondent's planning committee had due regard to the requirements of the Directive, said this:

"73. I have been troubled by the fact that the conclusion of the bat survey upon which such reliance was placed is to the effect that no *significant* impacts to bats are anticipated. The disturbance does not have to be significant and this is a misdirection or misunderstanding of . . . [article] 12(1)(b) . . . of the Habitats Directive. The question for me is, therefore, whether the conclusions can be upheld. I am satisfied that the decision of the planning committee should not be quashed.

74. I reach that conclusion for these reasons. I am satisfied that the loss of foraging habitat occasioned by cutting a swathe through the vegetation does not offend article 12(1)(b) which is concerned with protection of the species not with conservation of the species' natural habitats. I am satisfied that that bald statement that the bats have to travel further and expend more energy in foraging does not justify a conclusion that the conservation status of the bats is imperilled or at risk. There is no evidence which would allow the planning committee to conclude that the long-term distribution and abundance of the bat population is at risk. There is no evidence that they will lose so much energy (as they might when disturbed during hibernation) that the habitat will not still provide enough sustenance for their survival, or their survival would be in jeopardy. There is no evidence that the population of the species will not maintain itself on a long-term basis. There is therefore no evidence of any activity

> which would as a matter of law constitute a disturbance as the word has to [be] understood.
>
> 75. As I have already concluded, the risk of collision cannot amount to a disturbance and article 12(1)(b) is not engaged in that respect."

17. Mr George QC submits that the Court of Appeal were wrong to hold that article 12(1)(b) is breached only when the activity in question goes so far as to imperil the conservation status of the species at population level i.e. that only then does the activity amount to a "disturbance" of the species. This, he points out (and, indeed, Ward LJ himself recognised), puts the threshold for engaging the article higher than Mr Cameron QC for the respondent put it, Mr Cameron's main concern being that such a construction would sit uneasily with article 16 (1) (a provision which itself necessarily implies that article 12(1)(b) may need to be, and be capable of being, derogated from notwithstanding that this is only permissible where it is "not detrimental to the maintenance of the populations of the species concerned at a favourable conservation status"). The Court of Appeal's construction is also, submits Mr George, inconsistent with an Additional Reasoned Opinion addressed to the UK by the Commission dated 18 September 2008 with regard inter alia to what was then the new Regulation 39(1), inserted by the 2007 Amendment Regulations, providing for an offence where someone "deliberately disturbs wild animals of any species in such a way as to be likely significantly to affect (i) the ability of any significant group of animals of that species to survive, breed or rear or nurture their young . . .". The prohibition in the Directive, the Commission pointed out in their Opinion, "is not limited to *significant* disturbances of *significant groups* of animals". Article 12(1)(b) of the Directive, the Opinion later suggested, "covers all disturbance of protected species."

18. Whilst not actually conceding that the Court of Appeal approach is wrong, Mr Cameron contends now that the proper approach is to ask whether the activity in question produces "a certain negative impact likely to be detrimental to the species having regard to its effect on the conservation status of the species".

19. In my judgment certain broad considerations must clearly govern the approach to article 12(1)(b). First, that it is an article affording protection specifically to species and not to habitats, although obviously, as here, disturbance of habitats can also indirectly impact on species. Secondly, and perhaps more importantly, the prohibition encompassed in article 12(1)(b), in contrast to that in article 12(1)(a), relates to the protection of "species", not the protection of "specimens of these species". Thirdly, whilst it is true that the word "significant" is omitted from article 12(1)(b) – in contrast to article 6(2) and, indeed, article 12(4) which envisages accidental capture and killing having "a significant negative impact on the protected species" – that cannot preclude an assessment of the nature

and extent of the negative impact of the activity in question upon the species and, ultimately, a judgment as to whether that is sufficient to constitute a "disturbance" of the species. Fourthly, it is implicit in article 12(1)(b) that activity during the period of breeding, rearing, hibernation and migration is more likely to have a sufficient negative impact on the species to constitute prohibited "disturbance" than activity at other times.

20. Beyond noting these broad considerations it seems to me difficult to take the question of the proper interpretation and application of article 12(1)(b) much further than it is taken in the Commission's own Guidance document. (The Commission's suggestion in their September 2008 Additional Reasoned Opinion that article 12(1)(b) "covers all disturbance of protected species" in truth begs rather than answers the question as to what activity in fact constitutes such "disturbance" and cannot sensibly be thought to involve a departure from their 2007 Guidance.) Clearly the illustrations given in paragraph 39 of the Guidance – on the one hand "any disturbing activity that affects the survival chances, the breeding success or the reproductive ability of a protected species or leads to a reduction in the occupied area", on the other hand "scaring away a wolf from entering a sheep enclosure" – represent no more than the ends of the spectrum within which the question arises as to whether any given activity constitutes a disturbance. Equally clearly, to my mind, the suggestion in paragraph 39 that "consideration must be given to its effect [the effect of the activity in question] on the conservation status of the species at population level and biogeographic level" does not carry with it the implication that only activity which *does* have an effect on the conservation status of the species (i.e. which imperils its favourable conservation status) is sufficient to constitute "disturbance".

21. I find myself, therefore, in respectful disagreement with Ward LJ's conclusion (at para 37) "that for there to be disturbance within the meaning of article 12(1)(b) that disturbance must have a detrimental impact so as to affect the conservation status of the species at population level". Nor can I accept his view (at para 36) that "the guidance, at para 39, makes the point that the disturbing activity must be such as 'affects the survival chances . . . of a protected species'". On the contrary, as I have already indicated, para 39 of the guidance uses disturbing activity of that sort merely to illustrate one end of the spectrum. Rather the guidance explains that, within the spectrum, every case has to be judged on its own merits. A "species-by-species approach is needed" and, indeed, even with regard to a single species, the position "might be different depending on the season or on certain periods of its life cycle" (para 37 of the guidance). As para 39 of the guidance concludes: "it has to be stressed that the case-by-case approach means that the competent authorities will have to reflect carefully on the level of disturbance to be considered harmful, taking into account the specific characteristics of the species concerned and the situation, as explained above."

22. Two further considerations can, I think, usefully be identified to be borne in mind by the competent authorities deciding these cases (considerations which seem to me in any event implicit in the Commission's Guidance). First (and this I take from a letter recently written to the respondent by Mr Huw Thomas, Head of the Protected and Non-Native Species Policy at DEFRA, the Department responsible for policy with regard to the Directive): "Consideration should . . . be given to the rarity and conservation status of the species in question and the impact of the disturbance on the local population of a particular protected species. Individuals of a rare species are more important to a local population than individuals of more abundant species. Similarly, disturbance to species that are declining in numbers is likely to be more harmful than disturbance to species that are increasing in numbers."

23. Second (and this is now enshrined in Regulation 41(2) of the Conservation of Habitats and Species Regulations 2010 SI 2010/490):

> "41(2) . . . disturbance of animals includes in particular any disturbance which is likely (a) to impair their ability (i) to survive, to breed or reproduce, or to rear or nurture their young, or (ii) in the case of animals of a hibernating or migratory species, to hibernate or migrate; or (b) to affect significantly the local distribution or abundance of the species to which they belong."

Note, however, that disturbing activity likely to have these identified consequences is included "in particular" in the prohibition; it does not follow that other activity having an adverse impact on the species may not also offend the prohibition.

24. In summary, therefore, whilst I prefer Mr Cameron's suggested approach to this article (see para 18 above) than that adopted by the Court below or that contended for by Mr George, it seems to me in the last analysis somewhat simplistic. To say that regard must be had to the effect of the activity on the conservation status of the species is not to say that it is prohibited only if it *does* affect that status. And the rest of the formulation is hardly illuminating.

25. Tempting although in one sense it is to refer the whole question as to the proper interpretation and application of article 12(1)(b) to the Court of Justice of the European Union pursuant to article 267 of the Lisbon Treaty, I would not for my part do so. It seems to me unrealistic to suppose that the Court of Justice would feel able to provide any greater or different assistance than we have here sought to give.

*Issue Two – The proper application of Regulation 3(4) of the 1994 Regulations (as amended)*

26. I can deal with this issue altogether more briefly. Article 12(1) requires member states to "take the requisite measures to establish a system of strict protection for the animal species listed in Annex IV(a) in their natural range". Wisely or otherwise, the UK chose to implement the Directive by making a breach of the article 12 prohibition a criminal offence. Regulation 39 of the 1994 Regulations (as amended) provides that: "(1) a person commits an offence if he . . . (b) deliberately disturbs wild animals of any such species [i.e. a European protected species]". It is Natural England, we are told, who bear the primary responsibility for policing this provision.

27. It used to be the position that the implementation of a planning permission was a defence to a regulation 39 offence. That, however, is no longer so and to my mind this is an important consideration when it comes to determining the nature and extent of the regulation 3(4) duty on a planning authority deliberating whether or not to grant a particular planning permission.

28. Ward LJ dealt with this question in paragraph 61 of his judgment as follows:

> "61. The Planning Committee must grant or refuse planning permission in such a way that will 'establish a system of strict protection for the animal species listed in Annex IV(a) in their natural range . . .' If in this case the committee is satisfied that the development will not offend article 12(1)(b) or (d) it may grant permission. If satisfied that it will breach any part of article 12(1) it must then consider whether the appropriate authority, here Natural England, will permit a derogation and grant a licence under regulation 44. Natural England can only grant that licence if it concludes that (i) despite the breach of regulation 39 (and therefore of article 12) there is no satisfactory alternative; (ii) the development will not be detrimental to the maintenance of the population of bats at favourable conservation status and (iii) the development should be permitted for imperative reasons of overriding public importance. If the planning committee conclude that Natural England will not grant a licence it must refuse planning permission. If on the other hand it is likely that it will grant the licence then the planning committee may grant conditional planning permission. If it is uncertain whether or not a licence will be granted, then it must refuse planning permission."

29. In my judgment this goes too far and puts too great a responsibility on the Planning Committee whose only obligation under regulation 3(4) is, I repeat, to "have regard to the requirements of the Habitats Directive so far as [those requirements] may be affected by" their decision whether or not to grant a planning permission. Obviously, in the days when the implementation of such a permission provided a defence to the regulation 39 offence of acting contrary to article 12(1), the Planning Committee, before granting a permission, would have needed to be satisfied either that the development in question would not offend article 12(1) or that a derogation from that article would be permitted and a licence granted. Now, however, I cannot see why a planning permission (and, indeed, a full planning permission save only as to conditions necessary to secure any required mitigating measures) should not ordinarily be granted save only in cases where the Planning Committee conclude that the proposed development would both (a) be likely to offend article 12(1) and (b) be unlikely to be licensed pursuant to the derogation powers. After all, even if development permission is given, the criminal sanction against any offending (and unlicensed) activity remains available and it seems to me wrong in principle, when Natural England have the primary responsibility for ensuring compliance with the Directive, also to place a substantial burden on the planning authority in effect to police the fulfilment of Natural England's own duty.

30. Where, as here, Natural England express themselves satisfied that a proposed development will be compliant with article 12, the planning authority are to my mind entitled to presume that that is so. The Planning Committee here plainly had regard to the requirements of the Directive: they knew from the Officers' Decision Report and Addendum Report (see para 8 above and the first paragraph of the Addendum Report as set out in para 72 of Lord Kerr's judgment) not only that Natural England had withdrawn their objection to the scheme but also that necessary measures had been planned to compensate for the loss of foraging. For my part I am less troubled than Ward LJ appears to have been (see his para 73 set out at para 16 above) about the UBS's conclusions that "no *significant* impacts to bats are anticipated" – and, indeed, about the Decision Report's reference to "measures to ensure there is no significant adverse impact to [protected bats]". It is certainly not to be supposed that Natural England misunderstood the proper ambit of article 12(1)(b) nor does it seem to me that the planning committee were materially misled or left insufficiently informed about this matter. Having regard to the considerations outlined in para 29 above, I cannot agree with Lord Kerr's view, implicit in paras 75 and 76 of his judgment, that regulation 3(4) required the committee members to consider and decide for themselves whether the development would or would not occasion such disturbance to bats as in fact and in law to constitute a violation of article 12(1)(b) of the Directive.

31. Even, moreover, had the Planning Committee thought it necessary or appropriate to decide the question for themselves and applied to article 12(1)(b)

the less exacting test described above rather than Ward LJ's test of imperilling the bats' conservation status, there is no good reason to suppose that they would not have reached the same overall conclusion as expressed in paras 74 and 75 of Ward LJ's judgment (see para 16 above).

32. I would in the result dismiss this appeal.

**LORD WALKER**

33. For the reasons given in the judgment of Lord Brown, with which I agree, and for the further reasons given by Lady Hale and Lord Mance, I would dismiss this appeal.

**LADY HALE**

34. On the first issue, I have nothing to add to the judgment of Lord Brown, with which I agree. I also agree with him on the second issue, but add a few observations of my own because we are not all of the same mind.

35. The issue is whether the Regulatory Committee of Hampshire County Council (the planning authority for this purpose) complied with their duty to "have regard to the requirements of the Habitats Directive so far as they may be affected by the exercise" of their planning functions (Conservation (Natural Habitats etc) Regulations 1994, reg 3(4); see also Conservation and Species and Habitats Regulations 2010, reg 9(5)). It is, of course, always important that the legal requirements are properly complied with, perhaps the more so in cases such as this, where the County Council is both the applicant for planning permission and the planning authority deciding whether it should be granted.

36. Some may think this an unusual and even unsatisfactory situation, but it comes about because in this country planning decisions are taken by democratically elected councillors, responsible to, and sensitive to the concerns of, their local communities. As Lord Hoffmann put it in *R (Alconbury Developments Ltd and others) v Secretary of State for the Environment, Transport and the Regions* [2001] UKHL 23, [2003] 2 AC 295, para 69, "In a democratic country, decisions about what the general interest requires are made by democratically elected bodies or persons accountable to them." Democratically elected bodies go about their decision-making in a different way from courts. They have professional advisers who investigate and report to them. Those reports obviously have to be

clear and full enough to enable them to understand the issues and make up their minds within the limits that the law allows them. But the courts should not impose too demanding a standard upon such reports, for otherwise their whole purpose will be defeated: the councillors either will not read them or will not have a clear enough grasp of the issues to make a decision for themselves. It is their job, and not the court's, to weigh the competing public and private interests involved.

37. It is important to understand the chronology in this case. The planning application was dated 31 March 2009. Natural England was consulted. Their first reply is dated 30 April. In it they objected to the application on the ground that "that the application contains insufficient survey information to demonstrate whether or not the development would have an adverse effect on legally protected species". Specifically, they were concerned about the impact upon bats and great crested newts. Reference was made to "the impacts of the development and mitigation upon European Protected Species" and the council were reminded of, among other things, their duty under regulation 3(4). This objection was maintained in a letter dated 29 June 2009.

38. Further information on Great Crested Newts and the Updated Bat Survey were submitted in early July in response to this. Based on this information, Natural England wrote on 17 July 2009 withdrawing their objection, subject to recommendations about the conditions to be imposed if planning permission were granted. This letter also contained comments about common widespread reptiles and asking that these too be addressed although Natural England was not lodging an objection in relation to them.

39. Natural England wrote again on 23 July with their "final response" to the proposal. This dealt, first, with the fact that the site was close to the Portsmouth Harbour Site of Special Scientific Interest, itself part of the Portsmouth Harbour Special Protection Area and Ramsar site and gave their advice on the requirements of regulation 48(1)(a) of the Habitats Regulations. Regulation 48(1)(a) imposes a specific obligation on planning authorities, among others, to make an "appropriate assessment" of the implications for a European protected site before granting permission for a proposal which is likely to have a significant effect upon the site. The letter advised that, provided that specified avoidance measures were fully implemented, the proposal would not be likely to have a significant effect upon the protected sites. Thus they had no objection on this score and permission could be granted. The letter went on to deal with "Protected species and biodiversity" under a separate heading, repeated that they had withdrawn their objection subject to the implementation of all the recommended mitigation, but reminded the council that "whilst we have withdrawn our objection to the scheme in relation to European protected species, we have ongoing concerns regarding other legally protected species on site . . ." A separate paragraph went on to deal with biodiversity.

40. The Officer's Report was prepared for the Committee meeting, which was due to take place on 29 July 2009, before receipt of the letter of 23 July. It is 31 pages long. The executive summary lists "the main issues raised", including "concern at the procedure because this is a County Council scheme" and "nature conservation impact" (para 1.4). The account of the "Proposals" refers to the detailed ecological surveys undertaken, including the bat surveys "carried out to enable appropriate measures to be implemented"; but states that the impact on the designated sites would be negligible (para 3.7). The section on "Consultations" includes a paragraph explaining that Natural England had initially objected "on the grounds that the application contains insufficient survey information to demonstrate whether or not the development would have an adverse effect on bats and great crested newts which are legally protected species" but that they had withdrawn their objection after further survey work was undertaken (para 5.6).

41. The section on "Nature conservation impact" deals first with the proximity to the protected sites and points out that the requirements of the Habitats Regulations needed to be considered (para 8.17). This is a reference to the specific obligation in regulation 48(1)(a). It went on to explain why it was thought that an "appropriate assessment" was not needed, noting that Natural England had raised no concerns about any impact on these sites (para 8.18). The report then turns to the corridor itself, referring to the Environmental Report submitted with the application, which dealt with badgers, bats, great crested newts, and reptiles; on bats, it states that "An Updated Bat Survey Method Statement and Mitigation Strategy has been submitted with measures to ensure there is no significant adverse impact to them for these proposals" (para 8.19).

42. The report concludes by recommending that no appropriate assessment is required under the Habitats Regulations (para 9.2); that planning permission be granted (para 9.3); and that the proposed development accords with the Development Plan and the relevant Policies, because, among other things "suitable mitigation measures are proposed for badgers and protected species" (para 9.4). There is a cross reference to the annexed policy C18 on Protected Species, which states that "Development which would adversely affect species, or their habitats, protected by the Habitats Regulations 1994, the Wildlife and Countryside Act 1981 or other legislation will not be permitted unless measures can be undertaken which prevent harm to the species or damage to the habitats. Where appropriate, a permission will be conditioned or a legal agreement sought to secure the protection of the species or their [habitat]."

43. After receiving the letter from Natural England dated 23 July, an addendum to the report was prepared, dealing with three issues which had arisen since the report was finalised. Under the heading "Habitats Regulations" it deals first with the objections raised by Natural England "requiring additional survey information concerning potential for the presence of great crested newts and bats, which are

protected species". It points out that the survey work was undertaken and Natural England had withdrawn their objection. In two separate paragraphs, it goes on to explain that Natural England had now given specific advice on the requirements of regulation 48(1)(a) (thus reinforcing the recommendation made in para 9.2 of the main report).

44. It is quite clear from all of this that separate consideration was being given both to the effect upon European protected species and to the effect upon the protected sites, that both were being considered under the Habitats Regulations, and that the applicable Policy on Protected Species, which also refers to the Habitats Regulations 1994, was being applied. It is true that the report does not expressly mention either regulation 3(4) or article 12 of the Directive. In my view, it is quite unnecessary for a report such as this to spell out in detail every single one of the legal obligations which are involved in any decision. Councillors were being advised to consider whether the proposed development would have an adverse effect on species or habitats protected by the 1994 Regulations. That in my view is enough to demonstrate that they "had regard" to the requirements of the Habitats Directive for the purpose of regulation 3(4). That is all they have to do in this context, whereas regulation 48(1)(a) imposes a more specific obligation to make an "appropriate assessment" if a proposal is likely to have a significant effect upon a European site. It is not surprising, therefore, that the report deals more specifically with that obligation than it does with the more general obligation in regulation 3(4).

45. Furthermore, the United Kingdom has chosen to implement article 12 of the Directive by creating criminal offences. It is not the function of a planning authority to police those offences. Matters would, as Lord Brown points out, have been different if the grant of planning permission were an automatic defence. But it is so no longer. And it is the function of Natural England to enforce the Directive by prosecuting for these criminal offences (or granting licences to derogate from the requirements of the Directive). The planning authority were entitled to draw the conclusion that, having been initially concerned but having withdrawn their objection, Natural England were content that the requirements of the Regulations, and thus the Directive, were being complied with. Indeed, it seems to me that, if any complaint were to be made on this score, it should have been addressed to Natural England rather than to the planning authority. They were the people with the expertise to assess the meaning of the Updated Bat Survey and whether it did indeed meet the requirements of the Directive. The planning authority could perhaps have reached a different conclusion from Natural England but they were not required to make their own independent assessment.

46. But if I am wrong about this, and the planning authority did have to make an independent assessment in terms of article 12(1)(b), there is absolutely no reason to think that they would have reached a different conclusion and refused

planning permission on this account. They may have reached their decision by a majority of six votes to five. But the Minutes make it clear that there were a great many other problems to worry about with this scheme. While the "impact on nature" was among the many matters upon which members questioned officers, this was not one of their listed concerns. If this scheme was not going to get planning permission, it would be because of the local residents' concerns about the impact upon them rather than because of the members' concerns about the impact upon the bats.

47. I would therefore dismiss this appeal on both issues.

**LORD MANCE**

48. I agree with the reasoning and conclusions of Lord Brown and Lady Hale on each of the issues. I add only a few words because the court is divided on the second.

49. Lord Kerr's dissent on this issue is, I understand, based on the premise that (a) Natural England had not expressed a view that the proposal would not involve any breach of the Habitats Directive, and (b) if it had, the planning committee was not informed of this: see his paras 73 and 74.

50. For the reasons given in Lord Brown's and Lady Hale's judgments, I cannot agree with either aspect of this premise.

51. I add the following in relation to the suggestion that Natural England was, in its letter of 17 July 2009, "preoccupied with matters that were quite separate from the question whether there would be disturbance to bats such as would be in breach of article 12 of the Directive" or that the letter was "principally taken up with the question of possible impact on common widespread reptiles" (para 69 below).

52. It is true that the longer part of the text of the letter of 17 July related to the latter topic, in relation to which Natural England at the end of the letter made clear it was not lodging an objection, but was only asking that further attention be given and comments supplied. But the first, and in the circumstances obviously more significant, aspect of the letter consisted in its first three paragraphs. These withdrew Natural England's previous objection made on 30 April and reiterated on 29 June in relation to great crested newts and bats. The withdrawal was in the light of the information, including the Updated Bat Survey, which the Council had

earlier in July supplied. In withdrawing their objection, Natural England emphasised the importance of the mitigation procedures outlined in section 10 of the Survey, and added the further recommendation that the Council look closely at the requirement for night working and keep any periods of such working "to an absolute minimum". This confirms the attention it gave to the information supplied.

53. When making its objection in its letter dated 30 April, Natural England had said:

> "Our concerns relate specifically to the likely impact upon bats and Great Crested Newts. The protection afforded these species is explained in Part IV and Annex A of *Circular 06/2005 'biodiversity and Geological Conservation – Statutory Obligations and their Impact within the Planning System'*".

Part IV of Circular 06/2005 stated that the Habitats Regulations Conservation (Natural Habitats &c.) Regulations 1994 implemented the requirements of the Habitats Directive and that it was unlawful under regulation 39 deliberately to disturb a wild animal of a European protected species. Annex A identified all species of bats as wild animals of European protected species.

54. It is therefore clear that Natural England was, from the outset, focusing on the protected status of all species of bats under the Directive and domestic law; and that its withdrawal of its objection on 17 July was directly relevant to the planning committee's performance of its role under regulation 3(4) to "have regard to the requirements of" that Directive in the exercise of its functions. The planning officer's first report dated 29 July summarised the position for the planning committee in accurate terms. Thereafter, as Lord Brown and Lady Hale record, Natural England's further letter dated 23 July arrived, reiterating Natural England's as position stated in its letter dated 17 July. This too was again accurately summarised to the committee by the planning officer in his addendum dated 29 July to his previous report.

55. With regard to the Updated Bat Survey, there is no reason to believe that Natural England did not, when evaluating this, understand both the legal requirements and their general role and responsibilities at the stage at which they were approached by the Council. The Survey repays study as a whole, and I merely make clear that I do not share the scepticism which Lord Kerr feels about some of its statements or agree in all respects with his detailed account of its terms and their effect. The important point is, however, is that Natural England was well placed to evaluate this Survey, and, having done so, gave the advice they did. This

was, in substance, accurately communicated to the planning committee, in a manner to which the committee was entitled to have, and must be assumed to have had, regard.

56. In addition to my agreement with the other parts of Lord Brown's and Lady Hale's judgments, I confirm my specific agreement with Lady Hale's penultimate paragraph.

**LORD KERR**

57. As legislative provisions go, regulation 3 (4) of the Conservation (Natural Habitats, &c.) Regulations 1994 (the Habitats Regulations) is relatively straightforward. Its terms are uncomplicated and direct. It provides: -

> "(4) … every competent authority in the exercise of any of their functions, shall have regard to the requirements of the Habitats Directive so far as they may be affected by the exercise of those functions."

58. In plain language this means that if you are an authority contemplating a decision that might have an impact on what the Directive requires, you must take its requirements into account before you reach that decision. Of course, if you know that another agency has examined the question and has concluded that none of those requirements will be affected, and if you are confident that such agency is qualified to make that judgment, this may be sufficient to meet your obligation under the regulation. What lies at the heart of this appeal is whether the regulatory committee of Hampshire County Council, when it came to make the decision whether to grant the planning permission involved in this case, either had regard itself to the requirements of the Habitats Directive or had sufficient information to allow it to conclude that some other agency, in whose judgment it could repose trust, had done so and had concluded that no violation arose.

59. An old and currently disused railway line runs between Gosport and Fareham in South Hampshire. A section of this, between Redlands Lane, Fareham and Military Road, Gosport is some 4.7 kilometres in length. On 31 March 2009 Hampshire County Council, acting on behalf of Transport for South Hampshire, applied for planning permission to develop this section in order to create what is described as a "busway". Transport for South Hampshire is a name used to describe three local authorities, Hampshire County Council, Gosport Borough

Council and Fareham Borough Council. Planning permission was granted on 29 July 2009

60. At present there is serious congestion on the main road between Gosport and Fareham. It is planned that the busway should operate by allowing buses to join existing roads at various points along the route and that a fast, efficient and reliable public transport service will ensue. It will also be possible to cycle on the route. Local residents will be encouraged to use buses and bicycles in preference to their private vehicles and it is hoped that the congestion will thereby be relieved. The busway is to be constructed in two phases, 1A and 1B. Clearance work for the first of these is already underway and funding is available to complete this phase. The second phase does not yet have funding. Its future development is not assured.

61. The railway line along which the busway is to be developed was closed as a result of recommendations made in the Beeching report of 1963. It appears that closure did not finally take effect until June 1991, however. In that month the last train ran along the line. Since then the area has become overgrown. It is now regarded as "an ecological corridor for various flora and fauna". Several species of bats fly through and forage in the area but no bat roosts have been found on the planning application site itself. There are two bat roosts in proximity to the route, one in Savernake Close, near the southern section of Phase 1A, the other at Orange Grove which is close to the northern section of Phase 1B

62. All bats are European Protected Species, falling within Annex IV (a) of Council Directive 92/43/EEC (the Habitats Directive). Article 12 of this Directive requires Member States to "take the requisite measures to establish a system of strict protection for the animal species" listed in the annex. The Conservation (Natural Habitats, &c.) Regulations 1994 were made for the purpose of implementing the Habitats Directive. The regulations prescribe a number of measures (most notably in relation to this case, Regulation 39) which seek to achieve this level of protection. Derogation from these measures is permitted to those who obtain a licence from the appropriate authority. Natural England is the nature conservation body specified in the regulations as the licensing authority in relation to European protected species.

63. Although the issue of a licence is quite separate from the grant of planning permission, Natural England is regularly consulted on applications for development where the Habitats Directive and the regulations are likely to be in play and so it was that in April 2009 a letter was sent by the environment department of the Council seeking Natural England's views about the proposal. On 30 April 2009, Natural England replied, objecting to the scheme and recommending that planning permission be refused.

64. Bat surveys had been undertaken in 2008. These considered the suitability of the habitat for bats; they also examined how bats used the site and which species of bats were present. Clearly, however, the detail of the information yielded by these surveys was insufficient to satisfy Natural England's requirements for it stated that the application contained "insufficient survey information to demonstrate whether or not the development would have an adverse effect on legally protected species". The letter also recommended that the local planning authority should consider all the points made in an annex that was attached to the letter. This provided guidance on survey requirements and on how the authority should fulfil its duties on "biodiversity issues under [among others] … Regulation 3 (4) of *The Conservation (Natural Habitats &c.) Regulations 1994* … to ensure that the potential impact of the development on species and habitats of principal importance is addressed."

65. Amendments to the scheme were undertaken but these did not allay Natural England's concerns and their objection to the planning application was repeated in a letter of 29 June 2009.

66. An updated bat survey (leading to the publication of a report entitled "Survey Method Statement and Mitigation Strategy") was carried out on behalf of the Council. The survey identified two species of bat which had not been detected in the 2008 survey. Greater levels of foraging and commuting were also recorded along the disused railway. No roost sites were found but the presence of a common pipistrelle roost was confirmed approximately 40 metres from planned works. The report concluded that the works would result in the loss of a number of trees with low to moderate "roost potential" and approximately seven trees with moderate to high roost potential. Although no known roosts would be lost, because of the difficulty in identifying tree roosts, the Bat Conservation Trust recommends that it should be assumed that trees with high potential as roosts are *in fact* used as roosts. On this basis a number of roosts will be lost as a result of the works. Impact on commuting of bats between foraging habitats was also anticipated. It was felt that this could be restored in the longer term but, until restoration was complete, at least four species of bats that had been detected in the area would be affected. It was concluded that the removal of trees and vegetation would result in the loss of good quality habitats for foraging. Loss of foraging habitats would have an inevitable adverse impact on three species of local bats with one of these (Myotis sp) being more severely affected. This was characterised as a moderate impact at local level during the time that the vegetation was being re-established, a period estimated in the survey to be at least seven years. On the issue of the long term impact of the loss of foraging habitats the report was somewhat ambivalent. At one point it suggested that there would be a long term "slight adverse to neutral" impact. Later, it suggested that it was "probable" that the re-creation of good foraging habitats would result in an eventual neutral impact. The introduction of artificial lighting would affect the quality of foraging habitat by attracting insects

from unlit areas. Although this would favour some species, it would adversely affect others. Moreover, increased lighting can delay the emergence of bats from roosts and so reduce foraging opportunities. Lighting also constitutes a barrier to bats gaining access to foraging areas. Although the report is silent on the duration of these effects, it must be presumed that they will be permanent. In a somewhat bland claim, however, the authors assert that "with mitigation to reduce light spill and the selection of lights with a low UV output, the impact of lighting on bats is not anticipated to be significant". Increased noise levels would also have an adverse impact on some species of bats, the Brown long eared in particular. The report concludes at this point that is probable that there would be a slight adverse impact on foraging habitats from operational noise. Again, the report does not expressly state how long this would last but, since the noise source is the operation of the busway, it must be presumed to be permanent.

67. The overall conclusion of the report was that it was probable that there would be a short term moderate adverse impact on bats. (As Lord Brown has pointed out, this 'short term' impact is likely to continue for some nine years). If planned mitigation measures are successful, the long-term impact of the works was anticipated to be "slight adverse". On this basis the authors of the report concluded that no "significant impacts" to bats were anticipated. This general conclusion requires to be treated with some caution, in my opinion. There can be no doubt that effects which could not be described as insignificant *will* occur for some seven to nine years at least. Thereafter, while the long term impact may not be quantitatively substantial, it will be permanent.

68. The bat survey, together with further information, was sent to Natural England in July 2009. In consequence, the objection to the application was withdrawn. Natural England considered that planning permission could now be granted, albeit subject to certain conditions. The letter relaying the withdrawal of the objection contained the following: -

> "Natural England has reviewed the further information submitted (Great Crested Newt Survey Method Statement and Mitigation Strategy, June 2009 and Updated Bat Survey Method Statement and Mitigation Strategy, July 2009) and can now confirm that we are able to withdraw our objection of 30 April 2009, subject to the following comments: We recommend that should the Council be minded to grant permission for this scheme, conditions be attached requiring implementation of all the mitigation/compensation detailed within these reports. Particularly at Section 10 of the Bat Report and Section 6 of the Great Crested Newt Report. We would also recommend that the Council look closely at the requirement for night time working and associated flood lighting. Natural England would not advocate night time working for reasons of

> disturbance/disruption to the lifecycle of nocturnal wildlife and the Council should ensure these periods are kept to an absolute minimum."

69. The head of planning and development made a report (referred to as "the officer's decision report") to the regulatory committee of the Council which was to take the planning decision on 29 July 2009. The impact on nature conservation was one of the issues of concern identified in the report. Lord Brown has quoted in para 8 of his judgment many of the material parts of the report that touch on this issue and I will not repeat all of those here. It is important, however, I believe, to understand the context of the statement in para 8.17 (quoted in part by Lord Brown) that the Habitats Regulations needed to be considered. The full para reads as follows: -

> "The site is not within any designated sites of importance for nature conservation. However the site is within 30 metres, at its closest, to the Portsmouth Harbour Special Protection Area (SPA) and Portsmouth Harbour RAMSAR site. *Therefore* the requirements of the Habitats Regulations need to be considered." (my emphasis)

70. As Lord Brown has pointed out, the report in para 8.19 stated that the updated bat survey report contained "measures *to ensure* (emphasis added) there is no significant adverse impact" to bats from the proposals. This appears to me to be a gloss on what had in fact been said in the report. The actual claim made (itself, in my opinion, not free from controversy) was that it was *anticipated* that there would be no significant impacts on bats *if* the mitigation measures succeeded.

71. Two points about the decision officer's report should be noted, therefore. Firstly, the enjoinder to consider the Habitats Regulations was made because of the proximity of the works to sites requiring special protection rather than in relation to the need to avoid disturbance of bats in the ecological corridor itself. Secondly, it conveyed to the members of the regulatory committee the clear message that the updated bat survey report provided assurance that there would be no significant impact on bats. No reference was made to the moderate adverse impact that would occur over the seven to nine year period that regeneration of the forage areas would take nor to the permanent, albeit slight, impact that those measures could not eliminate.

72. Lord Brown has said that the addendum to the officer's report dealt specifically with the Habitats Regulations. It did, but the context again requires to be carefully noted. In order to do this, I believe that the entire section dealing with the regulations must be set out. It is in these terms: -

"Habitats Regulations

As stated in the report Natural England initially raised a holding objection to the application, requiring additional survey information concerning potential for the presence of great crested newts and bats, which are protected species. This survey work was undertaken and sent to Natural England, who are now satisfied and subsequently withdrew their objection.

As also stated in the report the application site lies close to habitats which form part of the Portsmouth Harbour Site of Special Scientific Interest (SSSI). This SSSI is part of the Portsmouth Harbour Special Protection Area (SPA) and Ramsar Site. Under the Conservation (Natural Habitats etc) Regulations 1994, as amended ('the Habitats Regulations') the County Council is the competent authority and has to make an assessment of the impacts of the proposal on this European site, therefore the second recommendation for the Committee is to agree that the proposal is unlikely to have a significant impact on the European site. It was implied that by withdrawing their objection Natural England did not consider there would be any significant impact, but they did not specifically give their advice.

Since the report was finalised Natural England have now given specific advice on the requirements of Regulation 48 (1) (a) of the "Habitats Regulations". They raise no objection subject to the avoidance measures included in the application being fully implemented and advise that their view is that either alone or in combination with other plans or projects, this proposal would not be likely to have a significant effect on the European site and the permission may be granted under the terms of the Habitats Regulations."

73. Regulation 48 (1) (a) requires a competent authority, before deciding to undertake, or give any consent, permission or other authorisation for, a plan or project which is likely to have a significant effect on a European site in Great Britain to make an appropriate assessment of the implications for the site in view of that site's conservation objectives. It has nothing to do with the need to ensure that there is no disturbance of species of bats. The addendum to the decision officer's report, therefore, offered no information whatever to the regulatory committee on the vital question whether the proposal would comply with article 12 of the Habitats Directive. Indeed, it is clear from an examination of the letter from Natural England of 17 July 2009 that it was preoccupied with matters that were

quite separate from the question whether there would be disturbance to bats such as would be in breach of article 12 of the Directive. The letter was principally taken up with the question of possible impact on common widespread reptiles. In so far as the letter dealt with the question of the impact on bats, its tone certainly did not convey a view that the planning committee need not consider that matter further. On the contrary, on a fair reading of the letter, Natural England was making it clear that this issue required to be addressed by the committee, not only in terms of the conditions to be applied but also as to whether night-time working would be unacceptable because of disturbance to wildlife.

74. The committee considered the report of the decision officer and the addendum to it and received an oral presentation from officers of the council. The minutes of their meeting record the following in relation to the oral presentation: -

> "In introducing the report, Officers informed Members that the proposal formed part of the strategy to improve the reliability and quality of public transport in South Hampshire and the access to Gosport and Fareham. A Traffic Regulation Order would be imposed on the bus way to allow only cycles, buses and emergency vehicles to use it. Members were advised that an Environmental Impact Assessment (EIA) was not required as the proposal was a freestanding project that did not give rise to 'significant environmental effects'. Notwithstanding that, the County Council considered that important nature conservation, amenity and traffic issues had to be properly addressed and reports on these matters had been taken into account. The addendum to the report provided reassurance that Natural England had no objection to the proposals and confirmed their view that an appropriate assessment under the Habitat Regulations was not required and provided further clarification about the application and the Issue of 'screening' under the EIA Regulations."

75. At best, this had the potential to mislead. A committee member might well think that Natural England had concluded that there would be no violation of article 39 (1) (b) of the 1994 Regulations (which forbids the deliberate disturbance of wild animals of a European protected species) or, more particularly, article 12 of the Habitats Directive. Of course the true position was that Natural England had expressed no explicit opinion whatever on that question. At most, it might be presumed that this was its view. Even if that presumption could be made, however, it does not affect the clear indication in the letter of 17 July 2009 that this matter was still one which required the committee's attention. I can find nothing in the letter which suggests that Natural England regarded this matter as closed. Nor do I believe that the letter could have been properly interpreted by the committee as relieving it of the need to consider the issue.

76. The critical issue on this appeal, therefore, is whether there is any evidence that the regulatory committee considered at all the duty that it was required to fulfil under regulation 3 (4) of the 1994 Regulations.

77. In addressing this question I should immediately say that I agree with Lord Brown on his analysis of the nature of the requirement in article 12 (1) (b) of the Habitats Directive. As he has observed, a number of broad considerations underlie the application of the article. It is designed to protect species (not specimens of species) and its focus is on the protection of species rather than habitats, although, naturally, if major intrusion on habitats is involved, that may have an impact on the protection of the species. Not every disturbance will constitute a breach of the article. The nature and extent of the disturbance must be assessed on a case by case basis.

78. The European Commission's guidance document of February 2007 contains a number of wise observations as to how the application of the article should be approached. While the word 'significant' has not been employed in article 12 (1) (b), a "certain negative impact likely to be detrimental must be involved". In making any evaluation of the level of disturbance, the impact on survival chances, breeding success or reproductive ability of the affected species are all obviously relevant factors. Like Lord Brown, I am sanguine about Mr Cameron QC's formulation of the test as one involving the question whether there has been "a certain negative impact likely to have been detrimental to the species, having regard to its effect on the conservation status of the species". And also like Lord Brown, I consider that the Court of Appeal pitched the test too high in saying that disturbance must have "a detrimental impact on the conservation status of the species at population level" or constitute a threat to the survival of the protected species.

79. Trying to refine the test beyond the broad considerations identified by Lord Brown and those contained in the Commission's guidance document is not only difficult, it is, in my view, pointless. In particular, I do not believe that the necessary examination is assisted by recourse to such expressions as *de minimis*. A careful investigation of the factors outlined in Lord Brown's judgment (as well as others that might bear on the question in a particular case) is required. The answer is not supplied by a pat conclusion as to whether the disturbance is more than trifling.

80. Ultimately, however, and with regret, where I must depart from Lord Brown is on his conclusion that the regulatory committee had regard to the requirements of the Habitats Directive. True it is, as Lord Brown says, that they knew that Natural England had withdrawn its objection. But that cannot substitute, in my opinion, for a consideration of the requirements of the Habitats Directive.

Regulation 3 (4) requires every competent authority to have regard to the Habitats Directive in the exercise of its functions. The regulatory committee was unquestionably a competent authority. It need scarcely be said that, in deciding whether to grant planning permission, it was performing a function. Moreover the discharge of that function clearly carried potential implications for an animal species for which the Habitats Directive requires strict protection.

81. Neither the written material submitted to the committee nor the oral presentation made by officers of the council referred to the Habitats Directive. The reference to Natural England's consideration of the Habitats Regulations, if it was properly understood, could only have conveyed to the committee that that consideration had been for a purpose wholly different from the need to protect bats. It could in no sense, therefore, substitute for a consideration of the Habitats Directive by the committee members whose decision might well directly contravene one of the directive's central requirements. It is for that reason that I have concluded that those requirements had to be considered by the committee members themselves.

82. It may well be that, if Natural England had unambiguously expressed the view that the proposal would not involve any breach of the Habitats Directive and the committee had been informed of that, it would not have been necessary for the committee members to go behind that view. But that had not happened. It was simply not possible for the committee to properly conclude that Natural England had said that the proposal would not be in breach of the Habitats Directive in relation to bats. Absent such a statement, they were bound to make that judgment for themselves and to consider whether, on the available evidence the exercise of their functions would have an effect on the requirements of the directive. I am afraid that I am driven to the conclusion that they plainly did not do so.

83. As I have said, Natural England (at the time that it was considering the Habitats Regulations in July 2009) had not explicitly addressed the question whether the disturbance of bats that the proposal would unquestionably entail would give rise to a violation of the directive. The main focus of the letter of 19 July was on an entirely different question. Lord Brown may well be correct when he says that it is not to be supposed that Natural England misunderstood the proper ambit of article 12 (1) (b), but the unalterable fact is that it did not say that it had concluded that no violation would be involved, much less that the planning committee did not need to consider the question.

84. It is, of course, tempting to reach one's own conclusion as to whether the undoubted impact on the various species of bats that will be occasioned by this development is sufficient – or not – to meet the requirement of disturbance within the meaning of article 12. But this is not the function of a reviewing court. Unless

satisfied that, on the material evidence, the deciding authority could have reached no conclusion other than that there would not be such a disturbance, it is no part of a court's duty to speculate on what the regulatory committee would have decided if it had received the necessary information about the requirements of the Habitats Directive, much less to reach its own view as to whether those requirements had been met. Since the planning permission was granted on a vote of six in favour and five against, with two abstentions, it is, in my view, quite impossible to say what the committee would have decided if it had been armed with the necessary knowledge to allow it to fulfil its statutory obligation. Other members of the court have expressed the view that this is what the committee would have decided. Had I felt it possible to do so, I would have been glad to be able to reach that conclusion. As it is, I simply cannot.

85. I would therefore allow the appeal and quash the planning permission.

PLANNING OBJECTIONS SCOTLAND

# POS_4.1.2_SPSO_ 201606059_Edinburgh City_Council (failure to take account of applicable development plan policy)

RTPI Chartered Town Planners

RTPI Member N .47188

RICS

# SPSO decision report

**Case:** **201606059, The City of Edinburgh Council**
**Sector:** local government
**Subject:** handling of application (complaints by opponents)
**Decision:** some upheld, recommendations


## Summary

Mr C complained about the council's handling of a planning application. In particular that the council had failed to consider their waterside development policy (policy Des 9), had failed to consult with the Scottish Environment Protection Agency (SEPA) and had unreasonably accepted that works for the planning application were initiated on time. Mr C also complained about the council's communication with him.

We took independent planning advice. We found that that policy Des 9 should have been referred to in the report of handling (a report containing information on a planning application). It was not possible to know whether this policy had been taken into consideration during the processing of the planning application, as was required. We also found that it was not possible to say whether consideration of policy Des 9 would have resulted in a different outcome. We upheld this aspect of the complaint.

We also found that SEPA should have been consulted and we upheld this aspect of the complaint.

We did not find any evidence that the council had unreasonably accepted that works for the planning application were initiated on time and we did not uphold this part of the complaint.

Regarding communication, we found that some of the issues raised by Mr C had been not been adequately addressed, however, other issues raised by him had been reasonably clarified. We were concerned that a further response letter had had to be issued to Mr C. The council had accepted that there had been a delay in responding and that Mr C should not have had to submit a formal complaint to prompt a full response to his enquiries. We upheld this aspect of the complaint.


## Recommendations

What we said should change to put things right in future:

- Development plan policies relevant to the processing of any particular application should be referenced in the report of handling.
- Where a statutory consultation appears to be required as part of the processing of a planning application, but has not taken place, this should be explained in the report of handling.

PLANNING OBJECTIONS SCOTLAND

# POS_4.1.3_SPSO_201605227 The_City_of_Edinburgh_Council (Policy and Material considerations)

RTPI Chartered Town Planners

RTPI Member N .47188

RICS

# SPSO decision report

**Case:** **201605227, The City of Edinburgh Council**
**Sector:** local government
**Subject:** handling of application (complaints by opponents)
**Decision:** upheld, recommendations


## Summary

Mr C complained about the council's handling of a planning application to extend a restaurant near his home. Mr C was concerned that a parking policy had not been taken into account when determining the application and that the planning service had not waited on a consultation response from the roads service at the council before approving the application. During their own consideration of the case, the council accepted that parking had not been covered in the planning officer's report for the application and they apologised for this failing.

We took independent advice from a planning adviser. We found that there was no evidence that the relevant policy for parking had been considered when determining the planning application. While there was no statutory requirement to await a roads service consultation response before determining the application, the advice we received highlighted that proceeding without all the relevant information was a key shortcoming. However, there was no evidence that proceeding without the consultation response made any difference to the council's decision to approve the application. On balance, we upheld the complaint. However, based on the advice we received, we did not consider that there was any further action that the council were required to take in respect of the application. We did make a recommendation to ensure that material considerations and relevant policies are taken into account when determining a planning application in the future.


## Recommendations

What we said should change to put things right in future:

- All material considerations should be taken into account when determining a planning application. The correct policies should be identified and referenced in the report of handling.

We have asked the organisation to provide us with evidence that they have implemented the recommendations we have made on this case by the deadline we set.

| Document Preparation | | |
|---|---|---|
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| Document Control | | |
|---|---|---|
| Issue | Date | Version |
| 1 | 10-03-2023 | Draft |
| 2 | 15-03-2023 | Final |

## 1.0 INTRODUCTION

1.1 Planning Objections Scotland has been instructed by Kelly and Neil Macleod (The owners of 2 Newhouse Cottages, Long Dalmahoy Road and Newhouse Livery Yard, Long Dalmahoy Road, Kirknewton, EH27 8EE) to review application 23/00663/FUL.

1.2 The review has been commissioned to ensure full details are provided by the applicant/agent as required by legislation and regulations to ensure the planning application can be assessed in a holistic manner, not only by the planning authority but to enable effective public engagement. Our clients have also asked us to comment on the proposal's relationship with the Local Development Plan as well as material considerations based on the information submitted to date.

1.3 It is clear from the review below that the application contains errors, omissions and lacks information. A comprehensive assessment of the application cannot be undertaken and, on this basis, alone the Planning Authority should either refuse or seek the withdrawal of the application. The proposal also results in conflicts with the adopted Local Development Plan.

1.4 For the avoidance of doubt, our clients' ability to make subsequent representation on any subsequent submissions are reserved.

## 2.0 THE APPLICATION - ERRORS, OMISSIONS AND LACK OF INFORMATION

2.1 The Heads of Planning Scotland (HOPS) – Validation Guidance Note sets out the national standard for the validation and determination of planning applications and other related consents. The application has been reviewed against this guidance note and it is clear that the submission falls below the required standards and as a consequence this application should not have been validated.

**Concerns with the Drawings**

Location Plan(s)

2.2 The HOPS validation standard on location plans (see section 4 paragraphs 4.1 to 4.5) confirms: -

2.3 *A single location plan produced to a scale of either 1:1250 or 1:2500 will normally be required to be submitted with your application. Depending on the location of your application a supplementary location plan may also be required to be submitted with your application.*

2.4 *The purpose of the location plan is to clearly define the extent of the application site in relation to its surroundings and also to provide sufficient detail in order for ourselves or any other interested party to be able to locate the application site and, as such, the plans submitted should typically be Ordnance Survey based.*

2.5 *If the submitted plan is Ordnance Survey based, it should contain the relevant copyright and licensing information to demonstrate that the plan has been legally sourced. If the submitted plan is not Ordnance Survey based it should be clearly stated on the plan and also contain an acknowledgement as to where it was sourced.*

2.6 *The location plan produced to either of these scales should show the following: -*

- *The application site boundary accurately outlined in RED*
- *Any other surrounding land under the same ownership as the application site outlined in BLUE*
- *Surrounding road names/numbers*
- *All surrounding property names/numbers*
- *The direction of north clearly indicated*
- *A copyright disclaimer/acknowledgement relating to the source of the plan*

- *An accurate scale bar*

2.7 The submitted location plan has been reviewed.

- There is no information acknowledging the source of the plan, whether it is Ordnance Survey based and no copyright disclaimer has been provided.
- Only a redline has been detailed on the location plan. A blue line has not been incorporated showing the applicant's ownership. This is at odds with the information presented on the (04) SITE LAYOUT PLAN which notes ‘ownership control’.

2.8 Updated Location plans are required.

Site Plan(s)/Block Plan(s)

2.9 The HOPS standard on Site Plan(s)/Block Plan(s) (see section 6 paragraphs 6.1 to 6.3) confirms: -

2.10 *A proposed site plan will be required in all instances where the proposals involve development on the ground regardless of their proposed purpose. Depending on the nature of the proposals it may also be required to submit a copy of an existing site plan. However, your local Planning office will be able to advise if this will be necessary. A site plan produced to a scale of 1:100, 1:200 or 1:500 will be acceptable. Site plans are required as they provide a more detailed and accurate overview of the application site in terms of the area to be occupied by your proposals and their relationship to their surroundings.*

2.11 *As noted above, the following list of what should be shown on your site plan will not be required in every case and as such reference should be made to the separate guidance available covering your particular type of proposal. The submission of part site plans may also be required under certain circumstance, such as large sites where the actual areas of works*

*are remote from each other. Contact with your local Planning office is highly recommended should you be considering submitting only a part site plan.*

2.12 *The following list along with the example plan shown in figure 9 on the next page indicates what may be asked for and how it should be shown:*

1. *Produced to a scale of either 1:100, 1:200 or 1:500*
2. *Application site boundary outlined in RED*
3. *Any surrounding land owned or controlled by the applicant outlined in BLUE*
4. *The direction of north*
5. *An accurate scale bar*
6. *All land and buildings located within a 20 metre radius of the application site boundary identified*
7. *The accurate footprint/roof plan profile of all existing and proposed buildings and structures located within the application site with appropriate annotation to identify them*
8. *The extent and type of any hard surfacing with the application site boundary identified. Where this is proposed rather than existing this should be clearly stated*
9. *A note of any boundary treatments such as walls and fences including their height. Where these are proposed rather than existing this should be clearly stated*
10. *The access arrangements (vehicular and pedestrian) to the application site should be clearly shown*
11. *A written dimension showing the distance from any part of your proposals to any part of the application site boundary. Note that if you are proposing multiple buildings or structures then a written dimension will be required from each*
12. *Areas of hard and soft landscaping clearly defined*
13. *If connection to an existing private water supply or private drainage system is proposed then the connection point to the*

*supply or system should be clearly annotated within the application site outlined in RED*

14. *Where a completely new private water supply or private drainage system is proposed then the full details of the supply or system should be clearly annotated within the application site outlined in RED. This is also the case for alterations/upgrading works to such supplies or systems*

2.13 The submitted block plan and site layout plans have been reviewed and they fail to meet the above validation criteria: -

(02) BLOCK PLAN

- The full extent of the site is not outlined in red.
- A blue line has not been incorporated showing the applicant's ownership. This is at odds with the information presented on the (04) SITE LAYOUT PLAN which notes 'ownership control'.
- The direction of North is not shown in this plan.
- All land and buildings located within a 20 metre radius of the application site boundary has not been identified.
- The extent and type of any hard surfacing with the application site boundary has not been identified. Existing and proposed block plans should be provided to clearly identify the extent and type of hard surfacing.
- A note of any boundary treatments such as walls and fences including their height has not been provided. Existing and proposed block plans should be provided to clearly identify the extent of new walls and fencing incorporated within the layout.
- There are no written dimensions showing the distance from any part of the proposal to any part of the application site boundary.
- Areas of hard and soft landscaping are not clearly defined.
- Details of the private drainage system have not been clearly annotated within the application site.

(04) SITE LAYOUT PLAN

- All land and buildings located within a 20 metre radius of the application site boundary has not been identified.
- The extent and type of any hard surfacing with the application site boundary has not been identified. Existing and proposed block plans should be provided to clearly identify the extent and type of hard surfacing.
- A note of any boundary treatments such as walls and fences including their height has not been provided. Existing and proposed block plans should be provided to clearly identify the extent of new walls and fencing incorporated within the layout.
- There are no written dimensions showing the distance from any part of the proposal to any part of the application site boundary.
- Areas of hard and soft landscaping are not clearly defined.
- Details of the private drainage system have not been clearly annotated within the application site.

2.14 It is also worth noting that the requirement for accurate dimensions to be shown on plans is discussed in the following Scottish Public Services Ombudsman investigation of Glasgow City Council (see Appendix POS 2.1.2).

Concerns with the Application Redline Boundary

2.15 The HOPS validation document confirms within section 5 that: -

2.16 *Where the application relates to new build proposals the whole area required to accommodate the proposals should be outlined in RED. This includes any area which is required for vehicular and pedestrian access, parking, landscaping, garden ground, private water supply and drainage facilities, SUDS, visibility splays or any other part of the proposals which would constitute development should be contained within the single site outlined in RED.*

2.17 With regards to drainage arrangements:-

2.18 *Proposals which incorporate either new private water supply and drainage arrangements or connection to existing ones require to be shown in a certain way. The area of land required for such proposals should be included within the application site boundary shown on the location and site plans.*

2.19 Based on Planning Objections Scotland's review the drainage arrangements have not been appropriately detailed to meet the HOPS validation requirements. The burn outfall location has not been incorporated into the redline boundary of the site.

2.20 Planning Objections Scotland note that the inclusion of this additional area of land would require a fresh application (with a further neighbour notification exercise undertaken due to the revised boundary). The revised boundary may also have ramifications for the land ownership certificate/declaration that has currently been served, this would require updating to confirm the owner(s) of additional areas of land have been notified correctly.

Elevations

2.21 The HOPS document on Elevations (see section 7) provides details of the validation standards for existing elevations as well as proposed elevations. With regards to proposed elevations: -

2.22 *Proposed elevations will be required in the majority of cases where proposed alterations or extensions will affect the external appearance of the existing property or structure which is the subject of the planning application. These plans should show all elevations of the proposals and should be produced to a scale of either 1:50 or 1:100. The plans should be sufficiently detailed to give a true representation of the detailing of the*

*building or structure as it stands at the moment. Details of the proposed external finishes should also be shown on the plans. For clarity this means any visible underbuild, walls, roof, windows, doors and in certain instances rainwater goods. An accurate scale bar should also be included on your plans along with written dimensions noting height to eaves and roof ridge and the overall length and breadth of the proposals.*

2.23 The proposed elevations have been reviewed and they fall below the standard prescribed in the HOPS validation standards: -

- There are no written dimensions noting height to eaves and roof ridge and the overall length and breadth of the proposals.

2.24 It is also worth noting that the requirement for accurate dimensions to be shown on plans is discussed in the following Scottish Public Services Ombudsman investigation of Glasgow City Council (see Appendix POS 2.1.2).

Sections and Levels Plans

2.25 The HOPS validation standards on sections and level plans is covered in (section 10), this stipulates: -

2.26 *In certain circumstance and depending on what is being proposed the planning authority may require additional section or levels plans, these may be requested as either existing or proposed or both. Site sections and site levels plans may be required where your proposals involve a change in ground level or when you are proposing to develop an uneven site in order for us to determine how your proposals will interact with their surroundings. Section plans may be required as either site sections or building sections. Typically site sections are only requested where there are significant changes in ground levels proposed to give an accurate indication of how the site will look compared to how it is at present. Building sections will typically be required where a new build is proposed*

*in order to show finished floor levels in order for us to determine the impact of your proposals on their surroundings. Below you will find some further information on each of these plan types.*

2.27 *Where existing and proposed site sections are required they should be produced to a scale of either 1:100 or 1:200, the number and location of where the sections should be taken will depend on the nature of your proposals. These plans should also contain an accurate scale bar.*

2.28 *Where existing and proposed building sections are required they should be produced to a scale of either 1:50 or 1:100, typically only one section will be required showing a cross section through each of the existing and proposed buildings with finished floor levels clearly indicated although this will depend on the nature of your proposals. These plan should also contain an accurate scale bar*

2.29 *Where existing and proposed site levels plans are required they should be produced to a scale of either 1:200 or 1:500. These plans should contain an accurate scale bar along with showing the direction of north and clearly identifying a fixed off-site datum point. Generally, contours should be shown at 0.5m intervals*

2.30 From Planning Objections Scotland review the submission is substandard for the following reasons: -

- There are no existing or proposed site level/topographical plans with a fixed off-site datum point detailed to illustrate the extent of cut and fill that will be undertaken at the site. The topography of this site is a potential development constraint. This information should form part of this application to confirm that the envisaged layout and relationship to neighbouring properties is acceptable.
- No site cross-section plans have been provided. Existing and proposed cross-section plans should be provided to clearly illustrate how the proposed development will relate to the site's existing

topography.

2.31 It is also worth noting that the requirement for accurate information on site levels and sections has been raised before in the Scottish Public Services Ombudsman case which investigated Aberdeenshire Council (see Appendix POS 2.1.4).

2.32 Planning Objections Scotland's review of the submission thus far has illustrated a number of shortcomings and based on the HOPS document the application should not have been validated by the Planning Authority. It is worth noting that the submission also falls short of the information required SG Annex D Circular 3/2022 (see Appendix POS 2.1.1).

**Concerns with the Application Form**

Accurate Description of proposed Development

2.33 It is important that the applicant/agent provides an accurate description of the proposed development on the application form and this reflects the proposed development on the drawings as per Cumming v Secretary of State for Scotland 1993.

2.34 The description associated with the application is as follows:- Application for 2 dwellings, access, and landscaping.

2.35 There is no reference to the drainage infrastructure. The description of the development is misleading and requires rectification.

## 3.0 OTHER DOCUMENTATION THAT SHOULD BE SOUGHT TO FULLY ASSESS THE APPLICATION

### Requirement for Ecological and Protected Species Survey(s)

3.1 When determining a planning application, the planning authority is required to have regard to the Habitats Directive and the Habitats Regulations. Consideration of how European Protected Species (EPS) are affected must be included as part of the consent process, not as an issue to be dealt with at a later stage. Three tests must be satisfied before the Scottish Government can issue a licence under regulation 44(2) of the Habitats Regulations so as to permit otherwise prohibited acts.

3.2 The application site (incorporating the drainage arrangements to the burn) could be utilised by European Protected Species. A preliminary ecological survey is required to confirm whether this proposal will have any adverse impact on biodiversity and protected species.

3.3 To enable the Planning Authority to comply with the Habitats Directive and the Habitats Regulations survey work is required as clarified by the Scottish Government's Chief Planner letter (see Appendix POS 3.1.1) and the Woolley and Morge Court Cases (see Appendix POS 3.1.2 and POS 3.1.3).

### Requirement for Drainage/Hydrology Assessment

3.4 With the proposed addition of two houses at the site to fully understand the hydrology/drainage implications a Drainage Assessment is required to detail the private foul and surface water drainage arrangements.

## 4.0 LEGAL REQUIREMENTS ASSOCIATED WITH THE PLANNING APPLICATION ASSESSMENT

4.1 Sections 25 and 37(2) of the Town and Country Planning (Scotland) Act 1997 require that planning decisions be made in accordance with the development plan unless material considerations indicate otherwise.

4.2 The operation of section 25 of the Act was given consideration in The House of Lord's judgement on City of Edinburgh Council v the Secretary of State for Scotland (1998). If a proposal accords with the development plan and there are no material considerations indicating that it should be refused, permission should be granted. If the proposal does not accord with the development plan, it should be refused unless there are material considerations indicating that it should be granted. The judgement also set out the following approach to deciding an application:

- Identify any provisions of the development plan which are relevant to the decision,
- Interpret them carefully, looking at the aims and objectives of the plan as well as detailed wording of policies,
- Consider whether or not the proposal accords with the development plan,
- Identify and consider relevant material considerations for and against the proposal, and
- Assess whether these considerations warrant a departure from the development plan.

**The Development Plan**

4.3 Sections 25 and 37(2) of the Town & Country Planning (Scotland) Act 1997 (as amended) require the determination of the proposal to be made in accordance with the provisions of the Development Plan, unless material considerations indicate otherwise. The Development Plan comprises NPF4 and the Edinburgh Local Development Plan 2016. The

applicable policies associated with this proposal are as follows:-

National planning Framework 4 (NPF 4)

- 1. Tackling the climate and nature crises
- 2. Climate mitigation and adaptation
- 3. Biodiversity
- 5. Soils
- 8. Green belts
- 14. Design, quality and place
- 17. Rural homes
- 22. Flood risk and water management

Edinburgh Local Development Plan 2016

- Policy Des 1 Design Quality and Context
- Policy Des 4 - Development Design – Impact on Setting
- Policy Des 5 Development Design – Amenity
- Policy Des 7 - Layout Design
- Policy Hou 4 - Housing Density
- Policy Env 10 - Development in the Green Belt and Countryside

**Material Considerations**

4.4 From a review of case law there are two main tests in deciding whether a consideration is material and relevant:

- It should serve or be related to the purpose of planning. It should therefore relate to the development and use of land, and
- It should relate to the particular application.

4.5 The following material considerations are applicable in the assessment of the Planning Application: -

- PAN 72: Housing in the Countryside
- PAN 79 Water and Drainage
- British Code of Practice – Flows and Loads 4 – Sizing criteria, treatment capacity for small waste water treatment systems

4.6 The case officer's Report of Handling should detail and assess all the relevant planning policies as well as the material considerations as required by the House of Lord Judgement and as detailed in the following maladministration cases POS 4.1.2 and POS 4.1.3.

4.7 To fully comment on the proposal's relationship with the Development Plan and associated material considerations further information is required as discussed in section 2 and 3 of this report. Obtaining this additional information is particularly important due to the proximity of neighbouring residential land uses.

4.8 Planning Objections Scotland's view, based on the information submitted to date, is the proposed residential development will have an adverse impact on the Green Belt, landscape and residential amenity. It clearly conflicts with the Development Plan.

NPF 4 - 1. Tackling the climate and nature crises

4.9 When considering all development proposals significant weight will be given to the global climate and nature crises. This proposal has not taken account of the potential biodiversity resource at the site and therefore has not taken account of the nature crisis. The application does not comply with NPF4 - 1. Tackling the climate and nature crises.

NPF 4 - 2. Climate mitigation and adaptation

4.10 The policy intent is to encourage, promote and facilitate development that minimises emissions and adapts to the current and future impacts of climate change. The development of this site is not in a sustainable

location and will not reduce , minimise or avoid green house gas emissions. It does not result in compact urban growth and is not in a location where rural revitalisation is required. It fails to comply with NPF4 Policy 2.

NPF 4 - 3. Biodiversity

4.11 Proposals for local development require to include appropriate measures to conserve, restore and enhance biodiversity, in accordance with national and local guidance. Measures should be proportionate to the nature and scale of development. The proposal has not taken account of the potential biodiversity resource at the site and incorporates no measures to conserve, restore and enhance biodiversity contrary to NPF4 - 3(c). Biodiversity.

NPF 4 - 5. Soils

4.12 The proposal results in encroachment onto undeveloped Class 2 (Prime) Agricultural Land. It meets none of the criteria contained within NPF4 - Policy 5 b) warranting this encroachment. Accordingly, the proposal is contrary to this policy and should be resisted.

NPF 4 - 8. Green belts

4.13 The proposal intrudes into the designated Greenbelt. It meets none of the criteria contained within NPF4 - Policy 8 where this intrusion would be warranted. It will clearly have an adverse visual impact on the greenbelt landscape and should be resisted.

NPF 4 - 14. Design, quality and place

4.14 Policy 14 criterion a) confirms that development proposals should be designed to improve the quality of an area whether in urban or rural locations and regardless of scale. The proposed dwellings extend

development into an open field. It has no regard to the existing built fabric or the rural landscape.

4.15 It is not considered to meet the aims identified in the ‘six qualities of successful places’ contrary to criterion (b) and (c). The inappropriate backland style development that encroaches past the rear curtilages of Tui Steading and Newhouse Cottages is not considered to create a ‘pleasant’ and attractive built space. It is not well connected, it does not improve accessibility and will be car dependent. It is not ‘distinctive’ and has not taken account of local architectural styles or interpreted in a way to reinforce local identity, it is not ‘sustainable’ by integrating nature positive and biodiversity solutions.

NPF 4 - 17. Rural homes

4.16 The proposal doesn’t meet any of the criteria associated with Policy 17a) Rural Homes. Due to the site's relationship to Edinburgh the development of residential dwellings I also fails to meet criterion b,c and d of Policy 17.

NPF 4 - 22. Flood risk and water management

4.17 Further hydrology and drainage information is required to illustrate compliance with the aims of Policy 22c) which seeks to minimise the area of impermeable surfaces, minimise risk of surface water flooding by managing all rain and surface water through sustainable urban drainage systems which should form part of and be integrated with existing blue/green infrastructure.

Policy Des 1 Design Quality and Context

4.18 This policy seeks innovation in the design and layout of new buildings, streets and spaces, provided that the existing quality and character of the immediate and wider environment are respected and enhanced and local distinctiveness is generated. As discussed under paragraph 4.14-4.15,

which related to NPF4 the proposal is not considered to meet the ‘six qualities of successful places’. The proposal does not create or contribute towards a sense of place. The layout and siting of the development is clearly at odds with the green belt and landscape. The residential scheme would damage the character and appearance of the area contrary to Policy Des 1 Design Quality and Context.

Policy Des 4 - Development Design – Impact on Setting

4.19 This Policy confirms that planning permission will be granted for development where it is demonstrated that it will have a positive impact on its surroundings, including the character of the wider townscape and landscape, and impact on existing views. In this case the positioning of the two dwellings is an inappropriate appendage which is clearly at odds with the wider landscape character.

Policy Des 5 Development Design – Amenity

4.20 Criterion a) confirms that the amenity of neighbouring developments is not adversely affected and that future occupiers have acceptable levels of amenity in relation to noise, daylight, sunlight, privacy or immediate outlook

4.21 Due to a lack of information, no meaningful assessment on overshadowing, daylight, sunlight, privacy or immediate outlook can be undertaken.

4.22 The proposed layout results in the formation of an access road along the full side boundary of Tui Steading as well as properties yet to be built. This backland style access will result in vehicular traffic squeezing past private rear curtilages resulting in noise which in turn will reduce residential amenity.

Policy Des 7 - Layout Design

4.23 The proposed layout does not demonstrate a comprehensive and integrated approach to the layout of buildings, streets, footpaths, cycle paths, public and private open spaces, services or SUDS. The proposal is clearly an inappropriate ad hoc addition to an already convoluted residential layout.

Policy Hou 4 - Housing Density

4.24 This further addition does not respect the existing characteristics of built development on Long Dalmahoy Road and will result in the further erosion and unacceptable damage to local character, environment quality and residential amenity.

Policy Env 10 - Development in the Green Belt and Countryside

4.25 The proposal intrudes into the designated Greenbelt. It doesn't meet the criteria contained within Policy Env 10 which limits development to the re-use of existing buildings or new buildings for agriculture, woodland and forestry, horticulture or countryside recreation, or where a countryside location is essential. It is clear the two dwellings would detract from the landscape quality and rural character of the area.

## 5.0 HUMAN RIGHT IMPLICATIONS

5.1 This proposal has potential Human Right implications for neighbours in terms of alleged interference with privacy, home or family life (Article 8) and peaceful enjoyment of their possessions (First Protocol, Article 1).

5.2 Planning Objections Scotland is of the view that refusal of the application or withdrawal are the only measures that can be deployed to ensure compliance with the Human Right Act. Proceeding on this basis would constitute a justified and proportionate control of the use of property and

is necessary in the public interest to ensure there is no interference with Article 8 and First Protocol, Article 1.

## 6.0 CONCLUSION

6.1 The lack of information associated with this submission means the application should be withdrawn or refused.

6.2 Notwithstanding the lack of information, taking account of the issues identified within section 4 of this report the planning application also fails to comply with NPF4 and the adopted Edinburgh Local Development Plan 2016. Furthermore there are no material considerations that would warrant approval of the application.

6.3 Clarity, openness and fairness are essential elements of the planning process, not opening up any amended plans or additional information to scrutiny would be a failure of the system, local democracy and natural justice. Our clients reserve the right to make commentary on any further submissions by the developer.

PLANNING OBJECTIONS SCOTLAND

**POS REFERENCE: -**

**POS-P-0045**

# OBJECTION TO PLANNING APPLICATION ON BEHALF OF MR THOMAS BROWN

**REFERENCE: - 23/00663/FUL**

**ADDRESS: - Anderson Transport Newhouse Farm Long Dalmahoy Road Dalmahoy Kirknewton EH27 8EE**

**APPLICATION DESCRIPTION: - Application for 2 dwellings, access, and landscaping.**

RICS

RTPI Chartered Town Planners

| Document Preparation | | |
|---|---|---|
| Prepared for | Contact Details | |
| Thomas Brown | 1 Newhouse Cottages,<br>Long Dalmahoy Road,<br>Kirknewton,<br>EH27 8EE | |

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| Document Control | | |
|---|---|---|
| Issue | Date | Version |
| 1 | 10-03-2023 | Draft |
| 2 | 15-03-2023 | Final |

## 1.0 INTRODUCTION

1.1 Planning Objections Scotland has been instructed by Thomas Brown (The owner of 1 Newhouse Cottages, Long Dalmahoy Road) to review application 23/00663/FUL.

1.2 The review has been commissioned to ensure full details are provided by the applicant/agent as required by legislation and regulations to ensure the planning application can be assessed in a holistic manner, not only by the planning authority but to enable effective public engagement. Our client has also asked us to comment on the proposal's relationship with the Local Development Plan as well as material considerations based on the information submitted to date.

1.3 It is clear from the review below that the application contains errors, omissions and lacks information. A comprehensive assessment of the application cannot be undertaken and, on this basis, alone the Planning Authority should either refuse or seek the withdrawal of the application. The proposal also results in conflicts with the adopted Local Development Plan.

1.4 For the avoidance of doubt, our client's ability to make subsequent representation on any subsequent submissions are reserved.

## 2.0 THE APPLICATION - ERRORS, OMISSIONS AND LACK OF INFORMATION

2.1 The Heads of Planning Scotland (HOPS) – Validation Guidance Note sets out the national standard for the validation and determination of planning applications and other related consents. The application has been reviewed against this guidance note and it is clear that the submission falls below the required standards and as a consequence this application should not have been validated.

**Concerns with the Drawings**

Location Plan(s)

2.2 The HOPS validation standard on location plans (see section 4 paragraphs 4.1 to 4.5) confirms: -

2.3 *A single location plan produced to a scale of either 1:1250 or 1:2500 will normally be required to be submitted with your application. Depending on the location of your application a supplementary location plan may also be required to be submitted with your application.*

2.4 *The purpose of the location plan is to clearly define the extent of the application site in relation to its surroundings and also to provide sufficient detail in order for ourselves or any other interested party to be able to locate the application site and, as such, the plans submitted should typically be Ordnance Survey based.*

2.5 *If the submitted plan is Ordnance Survey based, it should contain the relevant copyright and licensing information to demonstrate that the plan has been legally sourced. If the submitted plan is not Ordnance Survey based it should be clearly stated on the plan and also contain an acknowledgement as to where it was sourced.*

2.6 *The location plan produced to either of these scales should show the following: -*

- *The application site boundary accurately outlined in RED*
- *Any other surrounding land under the same ownership as the application site outlined in BLUE*
- *Surrounding road names/numbers*
- *All surrounding property names/numbers*
- *The direction of north clearly indicated*
- *A copyright disclaimer/acknowledgement relating to the source of the plan*

- *An accurate scale bar*

2.7 The submitted location plan has been reviewed.

- There is no information acknowledging the source of the plan, whether it is Ordnance Survey based and no copyright disclaimer has been provided.
- Only a redline has been detailed on the location plan. A blue line has not been incorporated showing the applicant's ownership. This is at odds with the information presented on the (04) SITE LAYOUT PLAN which notes ‘ownership control’.

2.8 Updated Location plans are required.

Site Plan(s)/Block Plan(s)

2.9 The HOPS standard on Site Plan(s)/Block Plan(s) (see section 6 paragraphs 6.1 to 6.3) confirms: -

2.10 *A proposed site plan will be required in all instances where the proposals involve development on the ground regardless of their proposed purpose. Depending on the nature of the proposals it may also be required to submit a copy of an existing site plan. However, your local Planning office will be able to advise if this will be necessary. A site plan produced to a scale of 1:100, 1:200 or 1:500 will be acceptable. Site plans are required as they provide a more detailed and accurate overview of the application site in terms of the area to be occupied by your proposals and their relationship to their surroundings.*

2.11 *As noted above, the following list of what should be shown on your site plan will not be required in every case and as such reference should be made to the separate guidance available covering your particular type of proposal. The submission of part site plans may also be required under certain circumstance, such as large sites where the actual areas of works*

*are remote from each other. Contact with your local Planning office is highly recommended should you be considering submitting only a part site plan.*

2.12 *The following list along with the example plan shown in figure 9 on the next page indicates what may be asked for and how it should be shown:*

1. *Produced to a scale of either 1:100, 1:200 or 1:500*
2. *Application site boundary outlined in RED*
3. *Any surrounding land owned or controlled by the applicant outlined in BLUE*
4. *The direction of north*
5. *An accurate scale bar*
6. *All land and buildings located within a 20 metre radius of the application site boundary identified*
7. *The accurate footprint/roof plan profile of all existing and proposed buildings and structures located within the application site with appropriate annotation to identify them*
8. *The extent and type of any hard surfacing with the application site boundary identified. Where this is proposed rather than existing this should be clearly stated*
9. *A note of any boundary treatments such as walls and fences including their height. Where these are proposed rather than existing this should be clearly stated*
10. *The access arrangements (vehicular and pedestrian) to the application site should be clearly shown*
11. *A written dimension showing the distance from any part of your proposals to any part of the application site boundary. Note that if you are proposing multiple buildings or structures then a written dimension will be required from each*
12. *Areas of hard and soft landscaping clearly defined*
13. *If connection to an existing private water supply or private drainage system is proposed then the connection point to the*

*supply or system should be clearly annotated within the application site outlined in RED*

14. *Where a completely new private water supply or private drainage system is proposed then the full details of the supply or system should be clearly annotated within the application site outlined in RED. This is also the case for alterations/upgrading works to such supplies or systems*

2.13 The submitted block plan and site layout plans have been reviewed and they fail to meet the above validation criteria: -

(02) BLOCK PLAN

- The full extent of the site is not outlined in red.
- A blue line has not been incorporated showing the applicant's ownership. This is at odds with the information presented on the (04) SITE LAYOUT PLAN which notes 'ownership control'.
- The direction of North is not shown in this plan.
- All land and buildings located within a 20 metre radius of the application site boundary has not been identified.
- The extent and type of any hard surfacing with the application site boundary has not been identified. Existing and proposed block plans should be provided to clearly identify the extent and type of hard surfacing.
- A note of any boundary treatments such as walls and fences including their height has not been provided. Existing and proposed block plans should be provided to clearly identify the extent of new walls and fencing incorporated within the layout.
- There are no written dimensions showing the distance from any part of the proposal to any part of the application site boundary.
- Areas of hard and soft landscaping are not clearly defined.
- Details of the private drainage system have not been clearly annotated within the application site.

(04) SITE LAYOUT PLAN

- All land and buildings located within a 20 metre radius of the application site boundary has not been identified.
- The extent and type of any hard surfacing with the application site boundary has not been identified. Existing and proposed block plans should be provided to clearly identify the extent and type of hard surfacing.
- A note of any boundary treatments such as walls and fences including their height has not been provided. Existing and proposed block plans should be provided to clearly identify the extent of new walls and fencing incorporated within the layout.
- There are no written dimensions showing the distance from any part of the proposal to any part of the application site boundary.
- Areas of hard and soft landscaping are not clearly defined.
- Details of the private drainage system have not been clearly annotated within the application site.

2.14 It is also worth noting that the requirement for accurate dimensions to be shown on plans is discussed in the following Scottish Public Services Ombudsman investigation of Glasgow City Council (see Appendix POS 2.1.2).

Concerns with the Application Redline Boundary

2.15 The HOPS validation document confirms within section 5 that: -

2.16 *Where the application relates to new build proposals the whole area required to accommodate the proposals should be outlined in RED. This includes any area which is required for vehicular and pedestrian access, parking, landscaping, garden ground, private water supply and drainage facilities, SUDS, visibility splays or any other part of the proposals which would constitute development should be contained within the single site outlined in RED.*

2.17 With regards to drainage arrangements:-

2.18 *Proposals which incorporate either new private water supply and drainage arrangements or connection to existing ones require to be shown in a certain way. The area of land required for such proposals should be included within the application site boundary shown on the location and site plans.*

2.19 Based on Planning Objections Scotland's review the drainage arrangements have not been appropriately detailed to meet the HOPS validation requirements. The burn outfall location has not been incorporated into the redline boundary of the site.

2.20 Planning Objections Scotland note that the inclusion of this additional area of land would require a fresh application (with a further neighbour notification exercise undertaken due to the revised boundary). The revised boundary may also have ramifications for the land ownership certificate/declaration that has currently been served, this would require updating to confirm the owner(s) of additional areas of land have been notified correctly.

Elevations

2.21 The HOPS document on Elevations (see section 7) provides details of the validation standards for existing elevations as well as proposed elevations. With regards to proposed elevations: -

2.22 *Proposed elevations will be required in the majority of cases where proposed alterations or extensions will affect the external appearance of the existing property or structure which is the subject of the planning application. These plans should show all elevations of the proposals and should be produced to a scale of either 1:50 or 1:100. The plans should be sufficiently detailed to give a true representation of the detailing of the*

*building or structure as it stands at the moment. Details of the proposed external finishes should also be shown on the plans. For clarity this means any visible underbuild, walls, roof, windows, doors and in certain instances rainwater goods. An accurate scale bar should also be included on your plans along with written dimensions noting height to eaves and roof ridge and the overall length and breadth of the proposals.*

2.23 The proposed elevations have been reviewed and they fall below the standard prescribed in the HOPS validation standards: -

- There are no written dimensions noting height to eaves and roof ridge and the overall length and breadth of the proposals.

2.24 It is also worth noting that the requirement for accurate dimensions to be shown on plans is discussed in the following Scottish Public Services Ombudsman investigation of Glasgow City Council (see Appendix POS 2.1.2).

Sections and Levels Plans

2.25 The HOPS validation standards on sections and level plans is covered in (section 10), this stipulates: -

2.26 *In certain circumstance and depending on what is being proposed the planning authority may require additional section or levels plans, these may be requested as either existing or proposed or both. Site sections and site levels plans may be required where your proposals involve a change in ground level or when you are proposing to develop an uneven site in order for us to determine how your proposals will interact with their surroundings. Section plans may be required as either site sections or building sections. Typically site sections are only requested where there are significant changes in ground levels proposed to give an accurate indication of how the site will look compared to how it is at present. Building sections will typically be required where a new build is proposed*

*in order to show finished floor levels in order for us to determine the impact of your proposals on their surroundings. Below you will find some further information on each of these plan types.*

2.27 *Where existing and proposed site sections are required they should be produced to a scale of either 1:100 or 1:200, the number and location of where the sections should be taken will depend on the nature of your proposals. These plans should also contain an accurate scale bar.*

2.28 *Where existing and proposed building sections are required they should be produced to a scale of either 1:50 or 1:100, typically only one section will be required showing a cross section through each of the existing and proposed buildings with finished floor levels clearly indicated although this will depend on the nature of your proposals. These plan should also contain an accurate scale bar*

2.29 *Where existing and proposed site levels plans are required they should be produced to a scale of either 1:200 or 1:500. These plans should contain an accurate scale bar along with showing the direction of north and clearly identifying a fixed off-site datum point. Generally, contours should be shown at 0.5m intervals*

2.30 From Planning Objections Scotland review the submission is substandard for the following reasons: -

- There are no existing or proposed site level/topographical plans with a fixed off-site datum point detailed to illustrate the extent of cut and fill that will be undertaken at the site. The topography of this site is a potential development constraint. This information should form part of this application to confirm that the envisaged layout and relationship to neighbouring properties is acceptable.
- No site cross-section plans have been provided. Existing and proposed cross-section plans should be provided to clearly illustrate how the proposed development will relate to the site's existing

topography.

2.31 It is also worth noting that the requirement for accurate information on site levels and sections has been raised before in the Scottish Public Services Ombudsman case which investigated Aberdeenshire Council (see Appendix POS 2.1.4).

2.32 Planning Objections Scotland's review of the submission thus far has illustrated a number of shortcomings and based on the HOPS document the application should not have been validated by the Planning Authority. It is worth noting that the submission also falls short of the information required SG Annex D Circular 3/2022 (see Appendix POS 2.1.1).

**Concerns with the Application Form**

Accurate Description of proposed Development

2.33 It is important that the applicant/agent provides an accurate description of the proposed development on the application form and this reflects the proposed development on the drawings as per Cumming v Secretary of State for Scotland 1993.

2.34 The description associated with the application is as follows:- Application for 2 dwellings, access, and landscaping.

2.35 There is no reference to the drainage infrastructure. The description of the development is misleading and requires rectification.

## 3.0 OTHER DOCUMENTATION THAT SHOULD BE SOUGHT TO FULLY ASSESS THE APPLICATION

### Requirement for Ecological and Protected Species Survey(s)

3.1 When determining a planning application, the planning authority is required to have regard to the Habitats Directive and the Habitats Regulations. Consideration of how European Protected Species (EPS) are affected must be included as part of the consent process, not as an issue to be dealt with at a later stage. Three tests must be satisfied before the Scottish Government can issue a licence under regulation 44(2) of the Habitats Regulations so as to permit otherwise prohibited acts.

3.2 The application site (incorporating the drainage arrangements to the burn) could be utilised by European Protected Species. A preliminary ecological survey is required to confirm whether this proposal will have any adverse impact on biodiversity and protected species.

3.3 To enable the Planning Authority to comply with the Habitats Directive and the Habitats Regulations survey work is required as clarified by the Scottish Government's Chief Planner letter (see Appendix POS 3.1.1) and the Woolley and Morge Court Cases (see Appendix POS 3.1.2 and POS 3.1.3).

### Requirement for Drainage/Hydrology Assessment

3.4 With the proposed addition of two houses at the site to fully understand the hydrology/drainage implications a Drainage Assessment is required to detail the private foul and surface water drainage arrangements.

## 4.0 LEGAL REQUIREMENTS ASSOCIATED WITH THE PLANNING APPLICATION ASSESSMENT

4.1 Sections 25 and 37(2) of the Town and Country Planning (Scotland) Act 1997 require that planning decisions be made in accordance with the development plan unless material considerations indicate otherwise.

4.2 The operation of section 25 of the Act was given consideration in The House of Lord's judgement on City of Edinburgh Council v the Secretary of State for Scotland (1998). If a proposal accords with the development plan and there are no material considerations indicating that it should be refused, permission should be granted. If the proposal does not accord with the development plan, it should be refused unless there are material considerations indicating that it should be granted. The judgement also set out the following approach to deciding an application:

- Identify any provisions of the development plan which are relevant to the decision,
- Interpret them carefully, looking at the aims and objectives of the plan as well as detailed wording of policies,
- Consider whether or not the proposal accords with the development plan,
- Identify and consider relevant material considerations for and against the proposal, and
- Assess whether these considerations warrant a departure from the development plan.

**The Development Plan**

4.3 Sections 25 and 37(2) of the Town & Country Planning (Scotland) Act 1997 (as amended) require the determination of the proposal to be made in accordance with the provisions of the Development Plan, unless material considerations indicate otherwise. The Development Plan comprises NPF4 and the Edinburgh Local Development Plan 2016. The

applicable policies associated with this proposal are as follows:-

National planning Framework 4 (NPF 4)

- 1. Tackling the climate and nature crises
- 2. Climate mitigation and adaptation
- 3. Biodiversity
- 5. Soils
- 8. Green belts
- 14. Design, quality and place
- 17. Rural homes
- 22. Flood risk and water management

Edinburgh Local Development Plan 2016

- Policy Des 1 Design Quality and Context
- Policy Des 4 - Development Design – Impact on Setting
- Policy Des 5 Development Design – Amenity
- Policy Des 7 - Layout Design
- Policy Hou 4 - Housing Density
- Policy Env 10 - Development in the Green Belt and Countryside

**Material Considerations**

4.4 From a review of case law there are two main tests in deciding whether a consideration is material and relevant:

- It should serve or be related to the purpose of planning. It should therefore relate to the development and use of land, and
- It should relate to the particular application.

4.5 The following material considerations are applicable in the assessment of the Planning Application: -

- PAN 72: Housing in the Countryside
- PAN 79 Water and Drainage
- British Code of Practice – Flows and Loads 4 – Sizing criteria, treatment capacity for small waste water treatment systems

4.6 The case officer's Report of Handling should detail and assess all the relevant planning policies as well as the material considerations as required by the House of Lord Judgement and as detailed in the following maladministration cases POS 4.1.2 and POS 4.1.3.

4.7 To fully comment on the proposal's relationship with the Development Plan and associated material considerations further information is required as discussed in section 2 and 3 of this report. Obtaining this additional information is particularly important due to the proximity of neighbouring residential land uses.

4.8 Planning Objections Scotland's view, based on the information submitted to date, is the proposed residential development will have an adverse impact on the Green Belt, landscape and residential amenity. It clearly conflicts with the Development Plan.

<u>NPF 4 - 1. Tackling the climate and nature crises</u>

4.9 When considering all development proposals significant weight will be given to the global climate and nature crises. This proposal has not taken account of the potential biodiversity resource at the site and therefore has not taken account of the nature crisis. The application does not comply with NPF4 - 1. Tackling the climate and nature crises.

<u>NPF 4 - 2. Climate mitigation and adaptation</u>

4.10 The policy intent is to encourage, promote and facilitate development that minimises emissions and adapts to the current and future impacts of climate change. The development of this site is not in a sustainable

location and will not reduce , minimise or avoid green house gas emissions. It does not result in compact urban growth and is not in a location where rural revitalisation is required. It fails to comply with NPF4 Policy 2.

NPF 4 - 3. Biodiversity

4.11 Proposals for local development require to include appropriate measures to conserve, restore and enhance biodiversity, in accordance with national and local guidance. Measures should be proportionate to the nature and scale of development. The proposal has not taken account of the potential biodiversity resource at the site and incorporates no measures to conserve, restore and enhance biodiversity contrary to NPF4 - 3(c). Biodiversity.

NPF 4 - 5. Soils

4.12 The proposal results in encroachment onto undeveloped Class 2 (Prime) Agricultural Land. It meets none of the criteria contained within NPF4 - Policy 5 b) warranting this encroachment. Accordingly, the proposal is contrary to this policy and should be resisted.

NPF 4 - 8. Green belts

4.13 The proposal intrudes into the designated Greenbelt. It meets none of the criteria contained within NPF4 - Policy 8 where this intrusion would be warranted. It will clearly have an adverse visual impact on the greenbelt landscape and should be resisted.

NPF 4 - 14. Design, quality and place

4.14 Policy 14 criterion a) confirms that development proposals should be designed to improve the quality of an area whether in urban or rural locations and regardless of scale. The proposed dwellings extend

development into an open field. It has no regard to the existing built fabric or the rural landscape.

4.15 It is not considered to meet the aims identified in the ‘six qualities of successful places’ contrary to criterion (b) and (c). The inappropriate backland style development that encroaches past the rear curtilages of Tui Steading and Newhouse Cottages is not considered to create a ‘pleasant’ and attractive built space. It is not well connected, it does not improve accessibility and will be car dependent. It is not ‘distinctive’ and has not taken account of local architectural styles or interpreted in a way to reinforce local identity, it is not ‘sustainable’ by integrating nature positive and biodiversity solutions.

NPF 4 - 17. Rural homes

4.16 The proposal doesn’t meet any of the criteria associated with Policy 17a) Rural Homes. Due to the site's relationship to Edinburgh the development of residential dwellings I also fails to meet criterion b,c and d of Policy 17.

NPF 4 - 22. Flood risk and water management

4.17 Further hydrology and drainage information is required to illustrate compliance with the aims of Policy 22c) which seeks to minimise the area of impermeable surfaces, minimise risk of surface water flooding by managing all rain and surface water through sustainable urban drainage systems which should form part of and be integrated with existing blue/green infrastructure.

Policy Des 1 Design Quality and Context

4.18 This policy seeks innovation in the design and layout of new buildings, streets and spaces, provided that the existing quality and character of the immediate and wider environment are respected and enhanced and local distinctiveness is generated. As discussed under paragraph 4.14-4.15,

which related to NPF4 the proposal is not considered to meet the ‘six qualities of successful places’. The proposal does not create or contribute towards a sense of place. The layout and siting of the development is clearly at odds with the green belt and landscape. The residential scheme would damage the character and appearance of the area contrary to Policy Des 1 Design Quality and Context.

Policy Des 4 - Development Design – Impact on Setting

4.19 This Policy confirms that planning permission will be granted for development where it is demonstrated that it will have a positive impact on its surroundings, including the character of the wider townscape and landscape, and impact on existing views. In this case the positioning of the two dwellings is an inappropriate appendage which is clearly at odds with the wider landscape character.

Policy Des 5 Development Design – Amenity

4.20 Criterion a) confirms that the amenity of neighbouring developments is not adversely affected and that future occupiers have acceptable levels of amenity in relation to noise, daylight, sunlight, privacy or immediate outlook

4.21 Due to a lack of information, no meaningful assessment on overshadowing, daylight, sunlight, privacy or immediate outlook can be undertaken.

4.22 The proposed layout results in the formation of an access road along the full side boundary of Tui Steading as well as properties yet to be built. This backland style access will result in vehicular traffic squeezing past private rear curtilages resulting in noise which in turn will reduce residential amenity.

Policy Des 7 - Layout Design

4.23 The proposed layout does not demonstrate a comprehensive and integrated approach to the layout of buildings, streets, footpaths, cycle paths, public and private open spaces, services or SUDS. The proposal is clearly an inappropriate ad hoc addition to an already convoluted residential layout.

Policy Hou 4 - Housing Density

4.24 This further addition does not respect the existing characteristics of built development on Long Dalmahoy Road and will result in the further erosion and unacceptable damage to local character, environment quality and residential amenity.

Policy Env 10 - Development in the Green Belt and Countryside

4.25 The proposal intrudes into the designated Greenbelt. It doesn't meet the criteria contained within Policy Env 10 which limits development to the re-use of existing buildings or new buildings for agriculture, woodland and forestry, horticulture or countryside recreation, or where a countryside location is essential. It is clear the two dwellings would detract from the landscape quality and rural character of the area.

## 5.0 HUMAN RIGHT IMPLICATIONS

5.1 This proposal has potential Human Right implications for neighbours in terms of alleged interference with privacy, home or family life (Article 8) and peaceful enjoyment of their possessions (First Protocol, Article 1).

5.2 Planning Objections Scotland is of the view that refusal of the application or withdrawal are the only measures that can be deployed to ensure compliance with the Human Right Act. Proceeding on this basis would constitute a justified and proportionate control of the use of property and

is necessary in the public interest to ensure there is no interference with Article 8 and First Protocol, Article 1.

## 6.0 CONCLUSION

6.1 The lack of information associated with this submission means the application should be withdrawn or refused.

6.2 Notwithstanding the lack of information, taking account of the issues identified within section 4 of this report the planning application also fails to comply with NPF4 and the adopted Edinburgh Local Development Plan 2016. Furthermore there are no material considerations that would warrant approval of the application.

6.3 Clarity, openness and fairness are essential elements of the planning process, not opening up any amended plans or additional information to scrutiny would be a failure of the system, local democracy and natural justice. Our client reserves the right to make commentary on any further submissions by the developer.

PLANNING OBJECTIONS SCOTLAND

# POS_2.1.1_SG_Annex_D_Circular_3_2022

RTPI Chartered Town Planners

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## Annex D

## Plans and Drawings

1. All applications should be accompanied by a location plan and almost all will require a site plan. Where the applicant owns some or all of the "neighbouring land" (see paragraph 4.15 of the main circular), a plan showing such land must be included. The following are not statutory requirements but an indication of what planning authorities can reasonably expect by way of a minimum of information on these plans. Planning authorities may also publish their own guidance in this regard.

   **Location plan** – this must identify the land to which the proposal relates and its situation in relation to the locality: in particular in relation to neighbouring land. Location plans should be a scale of 1:2500 or smaller.

   **Neighbouring land owned by the applicant** – where required, this could be incorporated into the above plan or on a separate plan of similar scale.

   **Site Plan** – this should be of a scale of 1:500 or smaller and should show:

   - The direction of North;
   - General access arrangements, landscaping, car parking and open areas around buildings;
   - The proposed development in relation to the site boundaries and other existing buildings on the site, with written dimensions including those to the boundaries;
   - Where possible, all the buildings, roads and footpaths on land adjoining the site including access arrangements;
   - The extent and type of any hard surfacing; and
   - Boundary treatment including walls or fencing where this is proposed.

2. The range of other plans and drawings will depend on the scale, nature and location of the proposal. Planning authorities should consider providing guidance on the levels of information expected in different types of case. The following plans and drawings will not be required in every case, but the list indicates the sort of minimum information which should be included where necessary:

   **Existing and proposed elevations** (at a scale of 1:50 or 1:100) which should:

   - show the proposed works in relation to what is already there;
   - show all sides of the proposal;
   - indicate, where possible, the proposed building materials and the style, materials and finish of windows and doors;
   - include blank elevations (if only to show that this is in fact the case);
   - where a proposed elevation adjoins another building or is in close proximity, the drawings should clearly show the relationship between the buildings, and detail the positions of the openings on each property.

**Existing and proposed floor plans** (at a scale of 1:50 or 1:100) which should:

- explain the proposal in detail;
- show where existing buildings or walls are to be demolished;
- show details of the existing building(s) as well as those for the proposed development; and
- show new buildings in context with adjacent buildings (including property numbers where applicable).

**Existing and proposed site sections and finished floor and site levels** (at a scale of 1:50 or 1:100) which should:

- show a cross section(s) through the proposed building(s);
- where a proposal involves a change in ground levels, show both existing and finished levels to include details of foundations and eaves and how encroachment onto adjoining land is to be avoided;
- include full information to demonstrate how proposed buildings relate to existing site levels and neighbouring development; and
- show existing site levels and finished floor levels (with levels related to a fixed datum point off site), and also show the proposals in relation to adjoining buildings (unless, in the case of development of an existing house, the levels are evident from floor plans and elevations).

**Roof plans** (at a scale of 1:50 or 1:100) to show the shape of the roof and specifying details such as the roofing material, vents and their location.

PLANNING OBJECTIONS SCOTLAND

# POS_2.1.2_SPSO_201605668_Glasgow_City _Council_(dimensions, scale on plans)

RTPI Chartered Town Planners

RTPI Member N .47188

RICS

# SPSO decision report

**Case:** **201605668, Glasgow City Council**
**Sector:** local government
**Subject:** handling of application (complaints by opponents)
**Decision:** some upheld, recommendations


## Summary

Mr C lives in a conservation area. An application for planning permission for external alterations to a property neighbouring his was submitted to the council. The proposal was to increase the height of the roof of an existing utility building and associated works to create additional living space. Mr C submitted objections to the proposal. The council produced a report of handling of the application and granted full planning permission subject to conditions. The first of these was that the development had to be implemented in accordance with the approved drawings.

Mr C was concerned that the council's decision had been procedurally flawed and based on inaccurate information. He complained to the council about this. At both stages of the council's complaints procedure the responses stated their conclusions that the decision had been taken properly and on the basis of accurate information. Mr C was dissatisfied with these responses and raised his complaints with us.

We upheld Mr C's complaints that statements in the report were inaccurate (specifically statements that the pitch of the roof 'will match' the main house and that the rooflights will be 'invisible from a public area'); that the approved drawings associated with the application did not contain sufficient written dimensions to ensure that the precise location and scale of what was being proposed was clear; and that the council did not respond reasonably to some of Mr C's complaints. We did not uphold complaints that the evaluation of the application against relevant guidance was unreasonable or that the inadequacies of the report of handling meant that the decision on the application was unreasonable.


## Recommendations

What we asked the organisation to do in this case:

- Apologise to Mr C that they did not respond reasonably to some of his complaints about the handling of the application.
- Provide Mr C with a direct response to his complaint.
- Amend the approved drawings for the application to ensure the precise location and scale of what was being proposed, and has been approved, is clear.

What we said should change to put things right in future:

- Relevant council staff should be reminded that statements of fact in reports of handling should be accurate.
- Relevant council staff should be reminded that approved drawings should be adequately dimensioned to ensure the precise location and scale of what is being proposed is clear.

In relation to complaints handling, we recommended:

- Relevant council staff should be reminded that issues raised in complaints should be directly responded to.

We have asked the organisation to provide us with evidence that they have implemented the recommendations we have made on this case by the deadline we set.

PLANNING OBJECTIONS SCOTLAND

# POS_2.1.4_SPSO_201508154 Aberdeenshire_Council (finished floor level inaccuracies)

RTPI Chartered Town Planners

RTPI Member N .47188

RICS

# SPSO decision report

**Case:** **201508154, Aberdeenshire Council**
**Sector:** local government
**Subject:** handling of application (complaints by opponents)
**Outcome:** upheld, recommendations


## Summary

Mr and Mrs C raised concerns about the council's handling of various planning applications for a site, including their home. In particular, they said that certain applications failed to protect their home by ensuring that its floor level and that of its neighbour were built to a similar level. As a consequence of this, they said that the council failed to assess the impact of their neighbour's sun lounge on their amenity and privacy.

We made enquiries to the council who confirmed that they had since established that the levels of the properties concerned were not in accord with the applications granted and the houses were not built as envisaged. The difference in levels had led to Mr and Mrs C's property being overlooked.

We took independent planning advice and we found that one of the properties concerned was too high, whereas, the other was too low. The consequence of this was that overlooking of Mr and Mrs C's house was unavoidable. The council were largely responsible for this. Similarly, because the floor levels were incorrect, the council would not have been able to properly assess the impact of the neighbours' sun lounge on Mr and Mrs C's property. We upheld the complaint.


## Recommendations

We recommended that the council:

- make a formal apology to recognise the situation;
- review the staff guidance notes to include the treatment of window alterations during the course of development as consent variations or as permitted development;
- make a formal apology for their inability to assess the impact of the sun lounge;
- be prepared to meet the costs of any agreed solution; and
- review staff guidance notes on planning application handling with regard to successive permissions issued for the same site; the consistency of conditions which require to be carried through from one permission to any future permission; consideration of site levels and especially any proposed changes for residential amenity and overlooking.

PLANNING OBJECTIONS SCOTLAND

# POS_3.1.1_EPS letter from John O'Brien Planning Scottish Executive [2006]

RTPI Chartered Town Planners

RTPI Member N .47188

RICS

SCOTTISH EXECUTIVE

Development Department
Planning Division

Victoria Quay
Edinburgh EH6 6QQ

[redacted]

http://www.scotland.gov.uk

Heads of Planning
Planning Authorities

Your ref:
Our ref:

16 May 2006

Dear Sir/Madam

**EC DIRECTIVE 92/43/EEC ON THE CONSERVATION OF NATURAL HABITATS AND OF WILD FLORA AND FAUNA ("THE HABITATS DIRECTIVE")**

**THE CONSERVATION (NATURAL HABITATS &c) REGULATIONS 1994 ("THE 1994 REGULATIONS")**

**EUROPEAN PROTECTED SPECIES, DEVELOPMENT SITES AND THE PLANNING SYSTEM: INTERIM GUIDANCE FOR LOCAL AUTHORITIES ON LICENSING ARRANGEMENTS ("THE GUIDANCE")**

It has come to our attention that some planning authorities are attaching suspensive conditions to planning permissions instead of fully ascertaining, prior to the determination of the planning application, whether a European Protected Species (EPS) is present on a site, or what the effect might be of such a species being present on a site. An example of this is a condition requiring that a development should not commence until a survey has been undertaken to determine whether bats, otters etc are present.

This letter is to remind planning authorities of the terms of the above Guidance; for ease of reference here is a link to the Guidance: http://www.scotland.gov.uk/library3/environment/epsg-00.asp. The main paragraph that I would draw to your attention is paragraph 29. It states "*it is clearly essential that planning permission is not granted without the planning authority having satisfied itself that the proposed development either will not impact adversely on any European protected species on the site or that, in its opinion, all three tests necessary for the eventual grant of a Regulation 44* (the 1994 Regulations) *licence are likely to be satisfied. To do otherwise would be to risk breaching the requirements of the* (Habitats) *Directive and Regulation 3(4). It would also present the very real danger that the developer of the site would be unable to make practical use of the planning permission which had been granted, because no Regulation 44 licence would be forthcoming. Such a situation is in the interests of no-one*." Case law has reinforced the general message that the EPS requirements must be met with the European Commission showing itself willing to pursue Member States where the process is not properly followed.

Accordingly, to ensure that all decisions are compliant with the Habitats Directive and the Regulations and the above mentioned Guidance, planning authorities should fully ascertain whether

protected species are on site and what the implications of this might be before considering whether to approve an application or not.

It should be noted that, if any future applications notified to the Scottish Ministers are found to have such conditions attached, they will be returned to the planning authority to (a) arrange for any necessary survey etc action to be carried out, and (b) reconsider the proposal in the light of the results.

SNH have reminded its staff of the requirements of this Guidance.

Yours faithfully

[redacted]

**JOHN O'BRIEN**

POS Reference:-3.1.1

PLANNING OBJECTIONS SCOTLAND

# POS_3.1.2_Woolley v Cheshire East Borough Council [2009]

RTPI Chartered Town Planners

RTPI Member N .47188

RICS

Neutral Citation Number: 2009 EWHC 1227 (Admin)

Case No: CO/2820/2008

**IN THE HIGH COURT OF JUSTICE**
**QUEEN'S BENCH DIVISION**
**ADMINISTRATIVE COURT SITTING AT MANCHESTER**

Before :
**HIS HONOUR JUDGE WAKSMAN QC**
**(sitting as a Judge of the High Court)**

Between:
**THE QUEEN**
**(on the application of SIMON WOOLLEY)**
**Claimant**

**and**

**CHESHIRE EAST BOROUGH COUNCIL**
**Defendant**

**and**

**MILLENNIUM ESTATES LIMITED**
**Interested Party**

Richard Harwood (instructed by DLA Piper, Solicitors) for the Claimant
Martin Carter (instructed by Cobbetts LLP Solicitors) for the Defendant
The Interested Party did not appear and was not represented

**Hearing dates: 21 and 22 May 2009**

# Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

His Honour Judge Waksman QC :

## INTRODUCTION

1. This is the hearing of a substantive application for judicial review of the grant of planning permission by the Defendant, now known as Cheshire East Council ("the Council") for the demolition of a property known as Bryancliffe in Wilmslow, Cheshire and its replacement by a larger property consisting of 3 apartments. The planning permission itself was granted on 15 February 2008. That followed a resolution of the Council's Planning Sub-Committee to grant permission subject to conditions and the making of a s106 agreement, on 24 October 2007.

## BACKGROUND

2. The site in question abuts land running down to the River Bollin. See the plan at p261 of the Bundle and the photographs at pp148-153. The area surrounding the river is a designated Area of Special County Value (ASCV) although the site itself is not. The site was largely hidden from the river by a row of mature trees. The developer which bought the site in 2003 ("Millennium" the Interested Party in this case) cut down those trees shortly after acquisition. They were not protected and it was entitled to do so.

3. Millennium first applied for planning permission on 15 April 2005 but it was refused on 15 June. On 9 October 2006 a planning appeal against that refusal was dismissed by the Inspector. A second application was made on 22 December 2006 but later withdrawn after an adverse committee report. A third (and the ultimately successful) application was made on 16 August 2007. On 25 September, the Claimant in this case, the owner of an adjoining property called Bollinholme made representations through his solicitors. On around 14 October, the operative planning officer's report was produced for consideration by the Planning Sub-Committee on 24 October.

4. After the Planning Sub-Committee promulgated its resolution of 24 October, Mr Woolley's solicitors sent a pre-action protocol letter to the Council dated 7 November 2007, threatening judicial review unless its resolution was set aside and the matter returned to the Planning Sub-Committee. This was refused and the formal planning decision letter of 15 February 2008 later followed.

5. In very broad terms, the reason why the appeal failed in 2006 was because the Inspector found that the view of the proposed property from the river (unmasked by trees) was an unacceptable visual intrusion onto the ASCV. Millennium had proposed the planting of trees so as (once more) to mask the property but because of the then layout and location of the flats, the Inspector held that the owners were likely subsequently to obtain permission to remove them.

6. It was also the case before the Inspector that a small bat roost had been found at the existing property. A bat assessment (divider 13) dealt with the evidence

as to the existing roost and put forward proposals for adequate mitigation compensation and enhancement for the local bat population. The Inspector found that the proposal would not result in significant harm to biodiversity interests as set out in paragraph 1 of national policy statement PPS 9.

**THE PLANNING OFFICER'S REPORT**

7. The report referred to the land lying to the North of the site as within the Bollin Valley where special conservation policies applied and also within the Green Belt and an ASCV. The key issues concerned the impact on the visual amenity of the Bollin Valley, the impact on protected trees at the site and the impact on the neighbours' residential amenities. It noted that Millennium had now improved the siting, design and orientation of the new building and had also proposed a wider tree belt along the northern side of the site. It had also amended the bank profile to raise the height of the bank to form an even slope.

8. The existing villa was itself an intrusive urban feature visible from the Bollin River. The new building would be significantly larger than Bryancliffe in terms of footprint mass and scale and would be 1-2 metres higher although 4 metres further away from the valley bank than Bryancliffe. The new building would have a significant visual impact on the valley until the proposed tree belt matured sufficiently to screen and filter views.

9. At p6 the report stated that the most relevant structure and local planning policies included a list of various numbered policies. The Inspector's report on the appeal on the previous planning refusal was said to be a significant material consideration. At p7 the Inspector's concern at the visual intrusion of the proposed new apartments was set out in detail. He had concluded that due to its elevated position the development would be an unduly prominent urban intrusion and that its "unacceptably urbanising effect on the open rural character and visual amenities of the Bollin Valley" was in conflict with SP Policies R2, GEN 3 and NE 1 among others. As already noted he also found that the proposed tree planting plan before him would not provide a solution.

10. The report noted that the main improvement now was that the new building would be set further back from the valley allowing a belt of woodland to be planted and the regrading to the embankment would increase the height of the planting. The result of the resiting of the apartments meant that any new trees would not be under threat of removal by future residents.

11. Although the new building would be much more prominent than the existing one, it would become gradually screened over the 20 years it would take for the new trees to be fully established. At that point the resulting view from the Bollin Valley would be improved from the existing situation. Hence "the main issue for members to determine is whether the potential longer-term improvements outweigh the harm to the visual amenities of the Bollin Valley that would result in the earlier years following development.".

12. The report concluded thus: "Taking into account all representations made, the proposed development is considered acceptable in terms of design the impact on the living conditions of the occupiers of adjoining property the impact on housing supply in the Borough, the interests of nature conservation the impact on protected trees and highway considerations. It is also considered though, that the proposed development will introduce an intrusive building into the landscape when viewed from the Bollin Valley which is characterised by its wooded sides and limited views of buildings. However, on balance, subject to the introduction of a comprehensive and long term landscaping plan, it is considered that the negative impacts of the development can be adequate mitigated and hence overcome the concerns with the previously dismissed appeal. The application is therefore recommended for approval."

13. The report also said that a condition would have to be imposed to secure a method statement concerning the mitigation for the bats.

14. I will deal with other aspects of the report, in context, below.

15. The Council agreed with the recommendation in the report on 24 October, as noted above. It delegated the matter to the Corporate Manager Planning and Development for approval subject to the completion of a s106 agreement to include reference to the fact that any planting must take place prior to the commencement of building works and the conditions set out in the report.

## THE PRESENT POSITION

16. It is common ground, for the reasons set out below, that where demolition was proposed in relation to a site containing a bat roost a licence from Natural England was required. Such a licence was acquired by Millennium on 16 July 2008. In August 2008, it demolished the old building. But in January 2009 it went into administration. So there is now, no longer, any intrusive urban view impacting upon the valley of the River Bollin. The site with the benefit (or otherwise) of the now-challenged planning permission is currently up for sale. The administrators took no part in this hearing.

## THE ISSUES GENERALLY

17. The planning permission is challenged on a total of 7 grounds. I deal with each in the order taken by Counsel at the hearing. It is common ground that subject to the decision of the House of Lords in *Berkeley v SSE* [2001] 2 AC 603, dealing with obligations under EC law, if the permission is found by me to have been unlawful in any way, then it should be quashed provided that the outcome, if there had been no unlawfulness, may or might have been different. Mr Woolley does not have to show that it necessarily, or even probably, would have been. See *Simplex v SSE* (1989) 57 P & CR 306, 327. That deals with the hypothetical position at the time of the original permission. If there might have been a difference at that time, however, Mr Harwood for Mr Woolley accepted that he would also have to show that there might also be a difference if the Council were to make a fresh decision now. There was no issue about

that. Mr Carter for the Council conceded that it might well have done, which is hardly surprising given the change of circumstances referred to above.

18. I deal with the EC law aspect of this in the context in which it arises, Ground 1, to which I now turn.

## GROUND 1: FAILURES IN CONNECTION WITH THE EC HABITATS DIRECTIVE

### Legal Materials

19. Art. 12 (1) of the EC Habitats Directive requires Member States to take requisite measures to establish a system of strict protection of certain animal species prohibiting the deterioration or destruction of breeding sites or resting places. It is common ground that the pipistrelle bats who had their roost at Bryancliffe are so protected. Art. 16 then provides that if there is no satisfactory alternative and the derogation is not detrimental to the maintenance of the populations of the species at a favourable conservation status in their natural range, then Member States may derogate "in the interests of public health and public safety or for other imperative reasons of overriding public interest, including those of a social and economic nature and beneficial consequences of primary importance for the environment" among other reasons.

20. All derogations have to be reported to the European Commission every two years and in *Commission v Finland* C-342/05 the ECJ held that Member States were to ensure that all action affecting the protected species was authorised only on the basis of decisions containing a clear and sufficient statement of reasons referring to the reasons conditions and requirements of Art. 16 (1).

21. This directive is then implemented by the Conservation (Natural Habitats etc) Regulations 1994 ("the Regulations"). The Regulations set up a licensing regime dealing with the requirements for derogation under Art. 16 and this function is now carried out by Natural England. However, Regulation 3(4) provides that local planning (among other) authorities must "have regard to the requirements of the Habitats Directive so far as they may be affected by the exercise of those functions."

22. The critical issue which arises under this Ground is how a local authority such as the Council here should have regard to the Directive. The most pertinent and direct guidance is given by ODPM Circular 06/05 which accompanied and is complementary to PPS 9. Paragraph 98 thereof refers to protected species generally, stating that they are a material consideration for planning permission purposes and that local authorities should consult English Nature before granting planning permission. It then refers to the "further strict provisions" for those species governed by the Habitats Regulations.

23. Paragraph 103 then refers to the licensing regime pointing out that planning permission does not absolve the relevant party from obtaining a licence.

24. Paragraph 116 provides as follows:

> "When dealing with cases where a European protected species may be affected, a planning authority … has a statutory duty under regulation 3(4) to have regard to the requirements of the Habitats Directive in the exercise of its functions. So the Directive's provisions are clearly relevant in reaching planning decisions, and these should be made in a manner which takes them fully into account. The Directive's requirements include a strict system of protection for European protected species prohibiting deliberate killing catching or disturbing of species and damage to or destruction of their breeding sites or resting places. Derogations from this strict protection are only allowed in certain limited circumstances and subject to certain tests being met. Planning authorities should give due weight to the presence of a European protected species on a development site to reflect these requirements, in reaching planning decisions and this may potentially justify a refusal of planning permission."

25. DEFRA Circular 2/2002 is also relevant. It deals with the duties of local planning authorities to provide information to the licensing authority then dealing with a licence application under the Regulations. This is not of direct relevance to the question of their duties when considering a planning application itself. However, it is worth noting that on p2 it is said that authorities will typically be asked to provide information as to whether the tests specified in Art. 16 (1) of the Directive and Regulation 44 of the Regulations have been met. This will include an assessment of the importance attached to the development against the background of national planning policy guidance and regional and local development plans including material considerations. This shows that local planning authorities are expected to have the knowledge to assist in the exercise of whether the Art. 16 (1) tests (see paragraph 20 above) are met.

**The Relevant Duty at the planning stage**

26. Mr Carter submits that the only duty imposed by Regulation 3 (4) on an authority at the planning stage is to note the existence of the Directive and Regulations and to note the existence of the relevant bats. And beyond perhaps also stating that the applicant for permission needs a licence, the authority need not go.

27. I disagree. That approach disregards the very clear guidance set out in paragraph 116 of ODPM Circular 06/05 which (a) refers to the giving of weight "to reflect these requirements" and (b) contemplates that as a result of taking account of the Directive the authority might refuse permission altogether. Indeed, Mr Carter conceded, as he was bound to do in order to give any meaning to the last part of paragraph 116, that in a serious enough case, like an application to build a supermarket on a brownfield site which would involve considerable disruption to a local bat population, the authority might refuse permission where there was adequate space somewhere else on the brownfield site. But if that is right, it recognises that the local authority should engage with the provisions of the Directive. In my view that engagement involves a consideration by the authority of those provisions and considering whether the derogation requirements might be met. This exercise is in no way a substitute for the licence application which will follow if permission is

given. But it means that if it is clear or perhaps very likely that the requirements of the Directive cannot be met because there is a satisfactory alternative or because there are no conceivable "other imperative reasons of overriding public interest" then the authority should act upon that, and refuse permission. On the other hand if it seems that the requirements are likely to be met, then the authority will have discharged its duty to have regard to the requirements and there would be no impediment to planning permission on that ground. If it is unclear to the authority whether the requirements will be met it will just have to take a view whether in all the circumstances it should affect the grant or not. But the point is that it is only by engaging in this kind of way that the authority can be said to have any meaningful regard for the Directive. The very attenuated duty suggested by Mr Carter for the Council is in truth, no duty at all.

28. I have considered whether the Council could discharge its duty simply by making the obtaining of a licence a condition of the grant of permission. But that is not sufficient. After all, if no licence is obtained it is a criminal offence so there is a clear incentive to obtain one anyway. And the making of a condition is not in truth engaging with the Directive.

**Was the Council in breach of Regulation 3(4) here?**

29. In my view it clearly was. Indeed it is not suggested that the Council embarked upon the kind of exercise referred to above. The Planning Officer's report made no mention of the Directive or the Regulations. It referred to the need to have a condition for the mitigation of disturbance to the bats but that in effect assumes that the A16 (1) requirements could otherwise be met. It is true that the bat assessment on Bryancliffe which was referred to in the Planning Officer's report itself makes reference to the Regulations and the need for a licence together with a limited reference to OPDM Circular 06/05. But that does not amount to consideration by the Council.

30. Mr Woolley's solicitors' pre-action protocol letter dated 7 November 2007 expressly referred the Council to the relevant provisions of the Regulation and ODPM Circular 06/05, including paragraph 116. Following this letter the Council had sought to consult with Natural England. And Natural England's response was in effect that it did not have sufficient resources to provide a detailed commentary on the proposed development. But the points made in the letter about the Council's duty under paragraph 116 were not taken up or dealt with in Cobbett's response to that letter. That duty can be fulfilled without input from Natural England.

31. The Planning Permission itself stated in reason 6 that the proposal had an acceptable impact on European protected species. But that is not the question posed by the Directive and Regulation 3 (4) which concerns the requirements to be met before any derogation can take place at all. Equally a reference at the end of the Permission to the existence of the regulations and the need for a licence cannot discharge the Council's duty. The Planning Officer should have specifically raised this rather specialised duty upon the Council in his report so

that the Planning Sub-Committee could then seek to discharge it. As there was no reference to any of the relevant materials it is hardly surprising that the Council gave them no consideration.

32. Accordingly, it is clear that the Council was in breach of Regulation 3 (4).

**Consequences**

33. Mr Carter accepted that if I reached this conclusion as to the nature of the Council's duty and its consequent breach, the unlawfulness on its part had to be seen as a substantive breach of European Law. On that basis, since it is not suggested that the breach was *de minimis*, the principles enunciated by Lord Bingham and Lord Hoffmann in *Berkeley* (supra at pages 608, 613 and 615) come into play. In such a case the unlawful decision should be quashed without more. The Court does not even inquire as to whether it could be said that the impugned decision would have been the same in any event.

34. In any event, given the strict requirements for any derogation I would be very reluctant to hold that the outcome would have been the same in any event. And the fact that a licence was ultimately obtained (and based upon what appear to be some questionable assertions about the existing property and its ability to be used in the future) does not alter that conclusion. Indeed at the Inquiry Millennium's planning witness agreed that imperative reasons of overriding public importance did not arise and that there was a suitable alternative to demolition which was to retain Bryancliffe.

35. The planning permission must therefore be quashed on this ground alone. Strictly, it is not necessary for me to deal with the other grounds in the light of this conclusion. But in deference to the arguments made, I will deal with them briefly below.

**GROUND 5: FAILURE TO TAKE ACCOUNT OF CERTAIN APPLICABLE POLICIES**

**The Law**

36. Section 70 (2) of the Town and Country Planning Act 1990 requires the planning authority to have regard to the development plan so far as is material to the application and to any other material consideration. Section 38 (6) of the Planning and Compulsory Purchase Act 1994 states that if regard is to be had to the development plan, the determination must be made in accordance with the plan unless material considerations indicate otherwise.

37. It is accepted by Mr Harwood that if in substance the planning authority has considered the application, taking into account the provisions of a particular policy the fact that no specific mention is made of it does not render the decision unlawful. One example of that would be where several policies in effect say the same thing but only one is mentioned.

38. A planning officer also has a duty to provide sufficient information and guidance to the planning sub-committee to enable it to reach a decision applying the relevant statutory criteria. See *Lowther v Durham County Council* [2001] 3 PLR 83 at p105.

**The Relevant Policies**

39. Mr Woolley contends that the Council failed to have regard to a number of policies. They are referred to in paragraph 98 of Mr Harwood's Skeleton Argument. It seemed to me that the only two policies which (a) have real relevance and (b) whose provisions might have altered the approach taken by the Council are Structure Plan R1 and GEN 3. Both of them were stated in the Planning Permission to be relevant. R1 did not feature at all in the Planning Officer's Report. GEN 3 did, not as one of the listed relevant polices but as one which the Inspector had relied upon in the appeal when he upheld the refusal.

*R1*

40. At one stage it was contended that this policy was not actually relevant at all. That was a somewhat surprising submission in the light of the fact that the Planning Permission (issued after Mr Woolley's Pre-action protocol letter) said that it was. In any event I find that it was. It refers to loss or damage to particular sites including ASCV's. This includes, in my judgment, interference with its setting. That in turn can include the view to be had from the site which forms part of its overall value.

41. In the highlighted section of the first part of R1 it is stated that:

> "Where, exceptionally, because of other overriding considerations, unavoidable loss or damage to a site or feature or its setting is likely as a result of a proposed development measures of mitigation..will be required."

42. And paragraph 5.24 says that R1 acknowledges that

> "a development which would damage a heritage site or feature may exceptionally be allowed because of other overriding considerations. These considerations relate to the need for the development and whether there are alternatives to the proposal. Alternatives include a reduction in scale or redesign of the development and whether it can be accommodated on a suitable site elsewhere."

*GEN 3*

43. This states that all developments will be required to minimise adverse impacts on the beauty, heritage value and amenity of its site and surroundings. Also a development which has a major adverse impact on adjacent areas particularly ASCV's, should not be allowed.

**Was the Council in breach?**

*R1*

44. There can be no question but that the Council must have regarded its task on this application as essentially balancing two conflicting considerations – the adverse visual impact from the point of view of the river valley, caused by the erection of a new much larger building on the one hand, and the ultimate benefit of the screen provided by the new trees on the other. But R1 suggests that damage to the setting should only be permitted exceptionally. In a case where on any view the competing considerations were finely balanced and against a background of two prior failed applications at the same site, an appreciation of the need to show an exceptional case was of significance as were the other points made in paragraph 5.24.. In my judgment, the Council should have been alerted by the Planning Officer specifically to R1 for that reason. They were not and did not have it in mind.

*GEN 3*

45. This was of course mentioned in the report as being a policy relied upon by the Inspector. But what does not clearly emerge from that is the stipulation that if the development causes a major adverse impact on an adjacent ASCV it should not be allowed. Of course that it not an absolute but it is a strong indicator. That feature of GEN 3 was not set out in terms and in my judgment it should have been.

*Timing of the impact*

46. Mr Carter contends that there is a real question about the extent at least of the application of R1 and GEN3 since any interference would be for the limited period of 20 years at most and decreasing before then. I take that point and obviously the Council had the 20 year period in mind. But that does not alter the fact that they should have considered these policies head-on as it were and then within that they could consider the ameliorating tendencies of the fact that the impact was not to last for a lifetime.

*Conclusion*

47. Accordingly I find that there was unlawfulness here as well. And given the fine balancing exercise in any event performed here, it is impossible to say that the result would have been the same if the Council had considered these two policies directly.

**GROUND 4: FAILURE OF THE REPORT TO SAY WHETHER THERE WAS COMPLIANCE WITH THE POLICIES IN THE DEVELOPMENT PLAN OR NOT**

48. The Planning Permission states that the proposal did not comply with all relevant policies in the Development Plan, but it was considered acceptable because of the long term landscape mitigation. While the report clearly addressed the competing considerations for the Planning Sub-Committee it did not address directly the question of compliance or otherwise with the

Development Plan. Although often policies within a Development Plan as it affects a proposal might pull in different directions (eg housing or employment need as against conservation of the landscape) it is not clear that there were conflicting policies as such here. The proposal manifestly had nothing to do with employment and the Council had a moratorium on more housing at the time so that policy pulled in the same direction as conservation.

49. Given the debate before me as to whether, for example, policies R1 or GEN 3 were truly engaged at all, I take the view that the report should have expressed a view about non-compliance or otherwise with the relevant policies (or the Development Plan as a whole) so that the Council had a clear view of the legal framework within which they were to operate given the terms of s38 (6). This was all the more important where the matter was a finely balanced one. The fact that the Planning Permission expressly stated that there was non-compliance but this was outweighed here itself shows the relevance of the question of compliance or otherwise.

50. Mr Carter submits that it might not be possible for the Planning Officer to come to a clear view on compliance because here it could be said that the temporary nature of the intrusion meant there was compliance or alternatively there was not but there were other material considerations. But that possible ambiguity does not prevent the Planning Officer from taking a view and setting these matters out. And in any event an officer at some stage prior to the Planning Permission (but not the Planning Committee it would seem) took the view that there was non-compliance hence the statement in the Permission itself.

51. As with Ground 5, to which this ground is in truth closely allied, it is not at all clear that the Council would inevitably have come to the same view had the question of compliance been brought to the Committees' attention and addressed head-on. So this is another ground for quashing the Permission.

**GROUND 2: FAILURE TO CONSIDER ALTERNATIVES**

52. As ultimately refined the allegation here was that before the Council agreed that the benefit of a new row of trees screening the proposed building outweighed the visual intrusion for the first 20 years, it should have considered what might have happened if no permission was granted. The existing owner might have decided to plant trees in front of the river valley anyway so that the desired screen would emerge in any event. Then the supposed virtue of this development would in truth have been no virtue because the development was not needed in order to provide the screen.

53. In my judgment there was nothing in this point. The Council was not required to indulge in speculation about what this or some future owner of the site might do in terms of trees, or at all events it was well entitled to decide not to. Millennium might be thought to be unlikely to plant outside of a permission since it had cut the original trees down in the first place. And the position of any purchaser from it was simply unknown. An owner may have preferred an

uninterrupted view of the river. And even if an owner at some point in the future were to plant trees, that process would be starting later than any planting to be undertaken first off as a condition of this Planning Permission.

54. This ground of challenge therefore fails.

**GROUND 3: THE PROPOSED SWAP OF UNITS BETWEEN BRYANCLIFFE AND MACCLESFIELD ROAD/DAVEYLANDS SITES WAS IRRELEVANT AND CONTRARY TO CIRCULAR 05/05**

55. The Council's then policy was against any net increase to the housing supply in the area which of course this development was. Millennium however had planning permission for the building or conversion of up to 15 apartments at another site. It agreed to enter into a s106 obligation whereby that permission would not be put into effect if it built according to a permission for the apartments at Bryancliffe. The Council agreed to this "swap" so that the net housing supply was not increased as a result of the development at Bryancliffe.

56. Circular 05/05 emphasises that planning obligations should be linked to the proposed development with a functional or geographical link between the development and the item being provided by the obligation. In *Tesco v SSE* [1995] 1 WLR 759 Lord Keith stated that an offered planning application that had nothing to do with the development apart from the fact that it was offered by the developer will plainly not be a material consideration and could be regarded as an attempt to buy planning permission. If it had some connection with the proposed development which was not *de minimis,* then regard should be had to it.

57. Here it is said that there was no connection between an offer not to implement a planning permission at some other site in order to obtain permission on this site. And in any event the Council failed to consider whether that other permission might have expired before being implemented anyway.

58. I do not accept this. First, it seems to me that there is a proper functional linkage between what was offered and this development. Specific objection was taken on the basis that without more, housing supply would increase in contravention of Council policy for the area. That consideration by definition deals with a general matter (housing in the area) rather than something specific to the site itself. If the developer is in a position to avoid any net increase to housing supply in the area by giving up another permission, there is a direct connection with one of the policy considerations affecting the planning permission sought. It is not the same as "buying" the instant permission.

59. Moreover, it was not for the Council to speculate as to whether the other permission would in fact be implemented. That would have been an impossible task and it was entitled to assume that as it had been sought, the likelihood was that it would be implemented.

60. In paragraph 34 of his Decision, the Inspector reached the same view and he was right to do so.

61. Accordingly this ground of challenge fails.

**GROUND 6: NO AUTHORITY TO ISSUE THE PLANNING PERMISSION AS THE DECISION NOTICE DID NOT INCLUDE A CONDITION REQUIRING A METHOD STATEMENT FOR PLANTING ON THE SLOPE OR LANDSCAPE AND IMPLEMENTATION CONDITIONS**

62. The report recommended approval subject to a list of conditions which included the submission of details and approval of all landscaping (A01LS) and implementation of landscaping (A04LS). There should also be a method statement for planting on the slope. See Conditions 6, 7 and 24. However such conditions were not included within the Planning Permission. It is said that they were omitted without authority from the Council and accordingly the Planning Permission as a whole was unauthorised and should be quashed for that reason. The original Ground 6 referred only to the omission in the Planning Permission of a condition in relation to the Method Statement.

63. The minutes of the Planning Sub-Committee state that this application was to be delegated to the Corporate manager for Planning for "approval subject to the completion of a Section 106 Agreement to include reference to the fact that any planting must take place prior to the commencement of building works and that any damaged verges must be reinstated, the conditions set out in the report and additional conditions relating to the provision of a wheelwash and the gate post being protected and reinstated." On the face of it, therefore, the Council appeared to want all the conditions recommended by the Planning Officer as well as the s106 Agreement to include planting to take place before commencement of the building works.

64. However, paragraph 3 of the letter from Cobbetts dated 13 March 2008 states that the Council members considered that the grading works should be undertaken before the building works commenced and this was included in the s106 agreement. Accordingly there was no further requirement for the condition and it was omitted from the decision notice. This explanation was no doubt given on the instructions of the Council and it suggests that whatever the minutes might say the intention was that the Condition dealing with a method statement was no longer needed. Certainly, if it was intended to deal with some aspect of the grading works in the s106 agreement it would seem very odd if other aspects still fell to be dealt with by conditions. So although the minutes referred to the conditions generally, there was no intention in fact to retain a condition for the Method Statement.

65. Paragraph 1.5 of Schedule 1 to the s106 agreement provides that a "Detailed Planting Plan and Method Statement will be submitted to the Council for approval prior to the Commencement of the Bryancliffe Permission such consent not to be unreasonably withheld or delayed."

66. Paragraph 1.6 requires Millennium to "implement the On-Site Landscaping Scheme prior to the Commencement of the Bryancliffe Permission.."

67. The Detailed Planting Plan refers to a plan giving details of what was to be planted and where. The Method Statement was defined to mean a method statement for the construction and detail of the retaining walls on the Site, the formation of any banks, the planting of any trees and details of any irrigation scheme.

68. The On-Site Landscaping Scheme meant the Method Statement, Detailed Planting Plan and Drawing No. M1445.01G as annexed to the agreement.

69. In my judgment the effect of all of that was that Millennium had to submit its proposed Method Statement and Planting Plans to the Council for approval prior to commencing the development and that approval had to be given before such work commenced. That is my interpretation of paragraph 1.5. Then, under paragraph 1.6 all of the landscaping work (as approved under paragraph 1.5) had to be completed prior to the commencement of the development. I do not read "implement" as meaning "start". I take Mr Harwood's point that my interpretation might mean that some (but by no means all) of the soft landscaping could not easily be done before the building works started or might be at risk of disruption once they were. Some relaxation of this obligation might be needed in practice. But this potential problem does not to my mind impel a reading of the word "implement" which is contrary to its normal sense. Moreover, to read it as meaning "start" deprives the obligation of much of its effect and would run counter to the Council's clear intention expressed at the meeting.

70. Accordingly, as far as the Method Statement for the grading works is concerned, I do not consider that there was in truth any departure from what the Council authorised in the meeting of the Planning sub-committee.

71. As for soft landscaping other than that involved in the regrading works, I accept that there is a technical difference between placing an obligation within a condition and simply making it part of the s106 agreement. Breach of condition can lead to the issue of an enforcement notice claiming that the development is unlawful, with the possibility of a criminal sanction if not rectified. And while an injunction can be sought on the grounds of a breach of a s106 notice, the Council has the power to seek an injunction in relation to the non-fulfilment of a condition.

72. But given that the Council clearly wanted a very important aspect of landscaping (to do with regrading) covered in the s106 Agreement it is far from obvious to me that in truth it was still insisting on other aspects of soft landscaping remaining as conditions as opposed to being put into the agreement as well. As interpreted by me paragraphs 1.5 and 1.6 well cover all the soft landscaping points. The amendment to Ground 6 to include complaints about the lack of conditions dealing with soft landscaping came very late in

the day. And although Mr Carter was sensibly prepared to deal with them, there was not the same opportunity for the Council to deal with them as it had had when the Method Statement point was raised in DLA Piper's letter of 29 February 2008. Given that the Council might well in fact have been intending that all landscaping should now be in the s106 agreement, which provides for it comprehensively, I am not prepared to find on the materials before me that the officer drawing up the Planning Permission had no authority to deal with that question in the way that he did.

73. Accordingly, Ground 6 fails.

**GROUND 7: FAILURE ADEQUATELY TO SUMMARISE THE RELEVANT POLICIES**

74. Art. 22 (1) (b) of the Town and Country Planning (General Development Procedure) Order 1995 requires decision notices to include a summary of the relevant policies.

75. As noted above the Planning Permission makes reference to a number of polices. It does so by citing their number and then in brackets, what they are about. See p382 of the Bundle. It is said that a fuller description should have been given so as to refer to the particular parts of them that had a bearing on the decision. Reference was made to the decision of Collins J in *Tratt v Horsham District Council* [2007] EWHC 1485 (Admin) in which he stated that it would be insufficient to identify a policy without indicating what it concerns (as occurred in that case). A summary of the relevant policies was required. It need be no more than a few words identifying the relevant aspect of the policy. In *Mid-Counties Co-operative v Forest of Dean District Council* [2007] EWHC 1714 (Admin) Collins J said that all that was needed was an indication of what the policy deals with insofar as it is material to the permission in question.

76. In my judgment, the summaries given in the Planning Permission here were sufficient especially bearing in mind the relatively narrow compass of the issues arising.

77. Accordingly, this final ground of challenge fails also.

**CONCLUSION**

78. However because of my determination of Grounds 1, 4 and 5 in favour of Mr Woolley, this application for judicial review succeeds and the decision which granted planning permission dated 15 February 2008 must be quashed.

79. I am indebted to both Counsel for their excellent and helpful oral and written submissions. I will hear from them hereafter, if necessary, on any consequential matters which cannot be agreed.

PLANNING OBJECTIONS SCOTLAND

# POS_3.1.3_Morge v Hampshire County Council [2011]

RTPI Chartered Town Planners

RTPI Member N .47188

RICS

**Hilary Term**
**[2011] UKSC 2**
*On appeal from: 2010 EWCA Civ 608*

# JUDGMENT

# Morge (FC) (Appellant) *v* Hampshire County Council (Respondent)

**before**

**Lord Walker**
**Lady Hale**
**Lord Brown**
**Lord Mance**
**Lord Kerr**

## JUDGMENT GIVEN ON

## 19 January 2011

**Heard on 8 November 2010**

| *Appellant* | *Respondent* |
| --- | --- |
| Charles George QC<br>Gregory Jones<br>Sarah Sackman<br>(Instructed by Swain & Co Solicitors) | Neil Cameron QC<br>Sasha White<br><br>(Instructed by Hampshire County Council Legal Services) |

**LORD BROWN**

1. This appeal concerns a planning permission granted on 29 July 2009 for a proposed three mile (4.7km) stretch of roadway to provide a rapid bus service between Fareham and Gosport in South East Hampshire. The permission was challenged on environmental grounds including not least its likely impact on several species of European protected bats inhabiting the general area around the proposed busway. The challenge having failed before Judge Bidder QC (sitting as a Deputy High Court judge) on 17 November 2009 – [2009] EWHC 2940 (Admin) – and before the Court of Appeal (Ward, Hughes and Patten LJJ) on 10 June 2010 – [2010] EWCA Civ 608, [2010] PTSR 1882 – this Court on 27 July 2010 gave the appellant limited permission to appeal so as to raise two issues of some general importance.

2. Issue one concerns the proper interpretation of article 12 (1)(b) of the Habitat's Directive 92/43/EEC which provides that:

> "Member States shall take the requisite measures to establish a system of strict protection for the animal species listed [the protected species] in their natural range, prohibiting . . . (b) deliberate disturbance of these species, particularly during the period of breeding, rearing, hibernation and migration; . . ."

3. Issue two concerns the proper application of regulation 3(4) of the Conservation (Natural Habitats, etc) Regulations 1994 SI 1994/2716 (as amended first by the Amendment Regulations 2007 and then the Amendment Regulations 2009), by which domestic effect is given to the Directive:

> "3(4) . . . every competent authority in the exercise of any of their functions, shall have regard to the requirements of the Habitats Directive so far as they [the requirements] may be affected by the exercise of those functions."

With that briefest of introductions let me turn to the essential factual context in which these issues now arise, noting as I do so that altogether fuller descriptions of the facts can be found in the judgments below.

4. The proposed new rapid busway – the first and larger phase of which is already substantially under way, applications for interlocutory relief to stay its continuance having been refused by the Court of Appeal and refused by this Court on granting leave to appeal – runs along the path of an old railway line, last used in 1991. The scheme provides for buses to be able to join existing roads at various points along the route. It will create a new and efficient form of public transport to the benefit of many residents, workers and visitors to the region. Central Government has committed £20m to it.

5. Although most of the scheme lies within a built-up area, there are a number of designated nature conservation sites nearby and, unsurprisingly, once the railway line ceased to be used, the surrounding area became thickly overgrown with vegetation and an ecological corridor for various flora and fauna. Although, therefore, the scheme was widely supported, it also attracted a substantial number of objectors one of whom is Mrs Morge, the appellant, who lives close by.

6. The respondent authority is both the local planning authority for the relevant area and also the applicant for planning permission through its agent, Transport for South Hampshire, who submitted a planning application on 31 March 2009. Taking it very shortly, on 30 April 2009 Natural England (the Government's adviser on nature conservation) objected to the planning application in part because of their concerns about the impact of the development on bats (an objection reiterated on 29 June 2009). As a result the respondent authority commissioned an Updated Bat Survey (UBS) which was submitted on 9 July 2009. On 17 July 2009, largely as a result of the UBS, Natural England withdrew their objections. There then followed a Decision Report prepared by the respondent's planning officers, a further letter from Natural England dated 23 July 2009, an Addendum Decision Report from the officers, and on 29 July 2009 a three hour meeting of the respondent's Regulatory Committee which concluded with the grant of planning permission for the scheme by a majority of six to five with two abstentions.

7. The UBS is a document of some 70 pages. For present purposes, however, its main findings can be summarised as follows. No roosts were found on the site. The removal of trees and vegetation, however, would result in a loss of good quality bat foraging habitats. This would have a moderate adverse impact at local level on foraging bats for some nine years, the impact thereafter reducing, because of mitigating measures, to slight adverse/neutral. In addition the busway would sever a particular flight path followed by common pipistrelle bats, increasing their risk of collision with buses (without, however, given the proposed mitigation of this risk, a significant impact on bats at a local level).

8. The Officers' Decision Report (again a lengthy document) included these passages with regard to the bats:

> "3.7 Detailed ecological surveys have been undertaken across the site over the last eighteen months. . . . A number of bat species roost and forage along the corridor . . . Accordingly, a strategy to mitigate the impact on these species has been developed. The main principles of the strategy [include] enhancement of the habitat of the retained embankment to provide continued habitat for displaced species. Bat surveys have also been carried out to enable appropriate measures to be implemented.
>
> . . .
>
> 5.6 Natural England initially raised objections on the grounds that the application contains insufficient survey information to demonstrate whether or not the development would have an adverse effect on bats . . . which are [a] legally protected species. Further survey work was undertaken in response to this objection and provided to Natural England. Following receipt of this information Natural England are now satisfied that the necessary information has been provided and have withdrawn their objection. They recommend that if the council is minded to grant permission for this scheme conditions be attached requiring implementation of the mitigation and compensation measures set out in the reports.
>
> . . .
>
> Nature Conservation Impact
>
> 8.17 . . . the requirements of the Habitats Regulations need to be considered.
>
> . . .
>
> 8.19. . . The surveys also identified the presence of a diversity of bat species, which are protected, using the trees alongside the track for foraging. An Updated Bat Survey Method Statement and Mitigation Strategy has been submitted with measures to ensure there is no significant adverse impact to them from these proposals.

. . .

Conclusion

8.24 . . . suitable mitigation measures are proposed for . . . protected species . . . ”

The Addendum Report dealt specifically with the Habitat Regulations and repeated that Natural England, having initially objected to the application and required further survey information regarding protected species, were now satisfied and had withdrawn their objection.

9. Against this essential factual background I turn now to the two main issues arising.

*Issue 1 – the proper interpretation of article 12(1)(b) of the Habitat Directive*

Article 12(1)(b) must, of course, be interpreted in the light of the Directive as a whole. Included amongst the recitals in its preamble is this:

> “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 trans- boundary nature, it is necessary to take measures at Community level in order to conserve them”.

10. Article 1 is the definition article and defines “species of Community interest” in four categories, respectively “endangered”, “vulnerable”, “rare”, and “endemic and requiring particular attention [for various specified reasons]”. The six species of protected bats affected by the proposed busway fall variously into the second, third and fourth of those categories. Article 1(i) defines “conservation status of a species” to mean “the sum of the influences acting on the species concerned that may affect the long-term distribution and abundance of its populations”. It further provides:

> “The conservation status will be taken as ‘favourable’ when:

> population dynamics data on the species concerned indicate that it is maintaining itself on a long-term basis as a viable component of its natural habitats, and
>
> the natural range of the species is neither being reduced nor is likely to be reduced for the foreseeable future, and
>
> there is, and will probably continue to be, a sufficiently large habitat to maintain its populations on a long-term basis".

Article 2(2) provides that: "Measures taken pursuant to this Directive shall be designed to maintain or restore, at favourable conservation status, natural habitats and species of wild fauna and flora of Community Interest."

11. There then follow articles 3 to 11 under the head "Conservation of natural habitats and habitats of species". Within these provisions one should note article 6(2):

> "Member states shall take appropriate steps to avoid, in the special areas of conversation, 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."

12. Articles 12 to 16 inclusive then follow under the head "Protection of species". I have already set out article 12(1)(b). Article 16 provides for derogation and so far as material provides:

> "16(1) Provided that that there is no satisfactory alternative and the derogation is not detrimental to the maintenance of the populations of the species concerned at a favourable conservation status in their natural range, member states may derogate from the provisions of articles 12 . . . : . . . (c) in the interests of public health and public safety, or for other imperative reasons of overriding public interest, including those of a social or economic nature and beneficial consequences of primary importance for the environment".

13. Besides the issues now before us the Court of Appeal had to deal in addition with challenges based upon article 12(1)(d) of the Directive and upon the respondent's decision not to treat the proposal as an EIA development (matters

upon which this court refused leave to appeal). Ward LJ gave the only reasoned judgment, one of infinite care and thoughtfulness and, I may add, one of enormous assistance to this Court in its consideration of this further appeal.

14. As a background to deciding the meaning of article 12(1)(b), Ward LJ necessarily had regard to the European Commission's views upon the scope of the Directive, as set out in a Guidance document issued in February 2007 which include the following:

> "(37) Disturbance (e.g. by noise, source of light) does not necessarily directly affect the physical integrity of a species but can nevertheless have an indirect negative effect on the species (eg by forcing them to use lots of energy to flee; bats, for example, when disturbed during hibernation, heat up as a consequence and take flight, so are less likely to survive the winter due to high loss of energy resources). The intensity, duration and frequency of repetition of disturbances are important parameters when assessing their impact on a species. Different species will have different sensitivities or reactions to the same type of disturbance, which has to be taken into account in any meaningful protection system. Factors causing disturbance for one species might not create disturbance for another. Also, the sensitivity of a single species might be different depending on the season or on certain periods of its life cycle e.g. (breeding period). Article 12(1)(b) takes into account this possibility by stressing that disturbances should be prohibited particularly during the sensitive periods of breeding, rearing, hibernation and migration. Again, a species-by-species approach is needed to determine in detail the meaning of 'disturbance'.
>
> (38) The disturbance under article 12(1)(b) must be deliberate . . . and not accidental. On the other hand, while 'disturbance' under article 6(2) must be significant, this is not the case in article 12(1), where the legislator did not explicitly add this qualification. This does not exclude, however, some room for manoeuvre in determining what can be described as disturbance. It would also seem logical that for disturbance of a protected species to occur a certain negative impact likely to be detrimental must be involved.
>
> (39) In order to assess a disturbance, consideration must be given to its effect on the conservation status of the species at population level and biogeographic level in a member state . . .. For instance, any disturbing activity that affects the survival chances, the breeding success or the reproductive ability of a protected species or leads to a

> reduction in the occupied area should be regarded as a 'disturbance' in terms of article 12. On the other hand, sporadic disturbances without any likely negative impact on the species, such as for example scaring away a wolf from entering a sheep enclosure in order to prevent damage, should not be considered as disturbance under article 12. Once again, it has to be stressed that the case by case approach means that the competent authorities will have to reflect carefully on the level of disturbance to be considered harmful, taking into account the specific characteristics of the species concerned and the situation, as explained above."

No problem arises as to what is meant by "deliberate" in article 12(1)(b). As stated by the Commission in paragraph 33 of their Guidance:

> "'Deliberate' actions are to be understood as actions by a person who knows, in light of the relevant legislation that applies to the species involved, and the general information delivered to the public, that his action will most likely lead to an offence against the species, but intends this offence or, if not, consciously accepts the foreseeable results of his action."

Put more simply, a deliberate disturbance is an intentional act knowing that it will or may have a particular consequence, namely disturbance of the relevant protected species. The critical, and altogether more difficult, question is what precisely in this context is meant by "disturbance".

15. Having, as I too have sought to do, thus cleared the ground and recognised that the central difficulty in the case lies in determining the level of disturbance required to fall within the prohibition, Ward LJ rejected the appellant's contention that any disturbing activity save only that properly to be characterised as *de minimis* – too negligible for the law to be concerned with – constitutes disturbance within the article. As Ward LJ pointed out, the example given in paragraph 38 of the Commission's Guidance (scaring away a wolf from the sheep fold) "must be an *a fortiori*, rather than a typical one". The judgment then continues (and I make no apology for quoting it at some length):

> "35 . . . the disturbance does not have to be significant but, as para 38 of the guidance explains, there must be some room for manoeuvre which suggests the threshold is somewhere between de minimis and significant. It must be certain, that is to say, identifiable. It must be real, not fanciful. Something above a discernible disturbance, not necessarily a significant one, is required. Given that there is a

spectrum of activity, the decision-maker must exercise his or her judgment consistently with the aim to be achieved. Given the broad policy objective which I explored . . . above ['to ensure that the population of the species is maintained at a level which will ensure the species' conservation so as to protect the distribution and abundance of the species in the long term'], disturbing one bat, or even two or three, may or may not amount to disturbance of the species in the long term. It is a matter of fact and degree in each case.

36 [Counsel for the appellant] seizes on the words in para 38 . . . of the guidance, 'a certain negative impact likely to be detrimental must be involved and he elevates this statement into a test for establishing a disturbance. His difficulty is that that does not answer the critical question: when does the negative impact become detrimental? Para 39 seems to me to spell out the proper approach, namely to give consideration to the 'effect on the conservation status of the species at population level and bio-geographic level'. This in my judgment is an important refinement. The impact must be certain or real, it must be negative or adverse to the bats and it will be likely to be detrimental when it negatively or adversely effects the conservation status of the species. 'Conservation status of a species' is a term of art which . . . means the sum of the influences acting on the species concerned that may affect the long-term distribution and abundance of its population. That is why the guidance at para 39 makes the point that the disturbing activity must be such as 'affects the survival chances . . . of a protected species'. Furthermore, 'the competent authorities will have to reflect carefully on the level of disturbance to be considered harmful, taking into account the specific characteristics of the species concerned and the situation', to quote the concluding sentence of para 39. The summary in the guidance . . . has the same emphasis:

> 'Disturbance is detrimental for a protected species eg by reducing survival chances, breeding success or reproductive ability. A species-by-species approach needs to be taken as different species will react differently to potentially disturbing activities.'

37. Having regard to the aim and purpose of the Directive and of article 16 and having due consideration of the guidance, I am driven to conclude that for there to be disturbance within the meaning of article 12(1)(b) that disturbance must have a detrimental impact so as to affect the conservation status of the species at population level. . ..

. . .

39. In my judgment whether the disturbance will have a certain negative impact which is likely to be detrimental must be judged in the light of and having regard to the effect of the disturbance on the conservation status of the species, ie, how the disturbance affects the long-term distribution and abundance of the population of bats. I remind myself that according to the [Commission's] guidance . . . , 'favourable conservation status could be described as a situation where a . . . species is doing sufficiently well in terms of quality and quantity and has good prospects of continuing to do so in the future'. Whether there is a disturbance of the species must be judged in that light."

16. Finally, in a passage in the judgment headed Overall Conclusions, Ward LJ, expressing himself satisfied that the respondent's planning committee had due regard to the requirements of the Directive, said this:

"73. I have been troubled by the fact that the conclusion of the bat survey upon which such reliance was placed is to the effect that no *significant* impacts to bats are anticipated. The disturbance does not have to be significant and this is a misdirection or misunderstanding of . . . [article] 12(1)(b) . . . of the Habitats Directive. The question for me is, therefore, whether the conclusions can be upheld. I am satisfied that the decision of the planning committee should not be quashed.

74. I reach that conclusion for these reasons. I am satisfied that the loss of foraging habitat occasioned by cutting a swathe through the vegetation does not offend article 12(1)(b) which is concerned with protection of the species not with conservation of the species' natural habitats. I am satisfied that that bald statement that the bats have to travel further and expend more energy in foraging does not justify a conclusion that the conservation status of the bats is imperilled or at risk. There is no evidence which would allow the planning committee to conclude that the long-term distribution and abundance of the bat population is at risk. There is no evidence that they will lose so much energy (as they might when disturbed during hibernation) that the habitat will not still provide enough sustenance for their survival, or their survival would be in jeopardy. There is no evidence that the population of the species will not maintain itself on a long-term basis. There is therefore no evidence of any activity

> which would as a matter of law constitute a disturbance as the word has to [be] understood.
>
> 75. As I have already concluded, the risk of collision cannot amount to a disturbance and article 12(1)(b) is not engaged in that respect."

17. Mr George QC submits that the Court of Appeal were wrong to hold that article 12(1)(b) is breached only when the activity in question goes so far as to imperil the conservation status of the species at population level i.e. that only then does the activity amount to a "disturbance" of the species. This, he points out (and, indeed, Ward LJ himself recognised), puts the threshold for engaging the article higher than Mr Cameron QC for the respondent put it, Mr Cameron's main concern being that such a construction would sit uneasily with article 16 (1) (a provision which itself necessarily implies that article 12(1)(b) may need to be, and be capable of being, derogated from notwithstanding that this is only permissible where it is "not detrimental to the maintenance of the populations of the species concerned at a favourable conservation status"). The Court of Appeal's construction is also, submits Mr George, inconsistent with an Additional Reasoned Opinion addressed to the UK by the Commission dated 18 September 2008 with regard inter alia to what was then the new Regulation 39(1), inserted by the 2007 Amendment Regulations, providing for an offence where someone "deliberately disturbs wild animals of any species in such a way as to be likely significantly to affect (i) the ability of any significant group of animals of that species to survive, breed or rear or nurture their young . . .". The prohibition in the Directive, the Commission pointed out in their Opinion, "is not limited to *significant* disturbances of *significant groups* of animals". Article 12(1)(b) of the Directive, the Opinion later suggested, "covers all disturbance of protected species."

18. Whilst not actually conceding that the Court of Appeal approach is wrong, Mr Cameron contends now that the proper approach is to ask whether the activity in question produces "a certain negative impact likely to be detrimental to the species having regard to its effect on the conservation status of the species".

19. In my judgment certain broad considerations must clearly govern the approach to article 12(1)(b). First, that it is an article affording protection specifically to species and not to habitats, although obviously, as here, disturbance of habitats can also indirectly impact on species. Secondly, and perhaps more importantly, the prohibition encompassed in article 12(1)(b), in contrast to that in article 12(1)(a), relates to the protection of "species", not the protection of "specimens of these species". Thirdly, whilst it is true that the word "significant" is omitted from article 12(1)(b) – in contrast to article 6(2) and, indeed, article 12(4) which envisages accidental capture and killing having "a significant negative impact on the protected species" – that cannot preclude an assessment of the nature

and extent of the negative impact of the activity in question upon the species and, ultimately, a judgment as to whether that is sufficient to constitute a "disturbance" of the species. Fourthly, it is implicit in article 12(1)(b) that activity during the period of breeding, rearing, hibernation and migration is more likely to have a sufficient negative impact on the species to constitute prohibited "disturbance" than activity at other times.

20. Beyond noting these broad considerations it seems to me difficult to take the question of the proper interpretation and application of article 12(1)(b) much further than it is taken in the Commission's own Guidance document. (The Commission's suggestion in their September 2008 Additional Reasoned Opinion that article 12(1)(b) "covers all disturbance of protected species" in truth begs rather than answers the question as to what activity in fact constitutes such "disturbance" and cannot sensibly be thought to involve a departure from their 2007 Guidance.) Clearly the illustrations given in paragraph 39 of the Guidance – on the one hand "any disturbing activity that affects the survival chances, the breeding success or the reproductive ability of a protected species or leads to a reduction in the occupied area", on the other hand "scaring away a wolf from entering a sheep enclosure" – represent no more than the ends of the spectrum within which the question arises as to whether any given activity constitutes a disturbance. Equally clearly, to my mind, the suggestion in paragraph 39 that "consideration must be given to its effect [the effect of the activity in question] on the conservation status of the species at population level and biogeographic level" does not carry with it the implication that only activity which *does* have an effect on the conservation status of the species (i.e. which imperils its favourable conservation status) is sufficient to constitute "disturbance".

21. I find myself, therefore, in respectful disagreement with Ward LJ's conclusion (at para 37) "that for there to be disturbance within the meaning of article 12(1)(b) that disturbance must have a detrimental impact so as to affect the conservation status of the species at population level". Nor can I accept his view (at para 36) that "the guidance, at para 39, makes the point that the disturbing activity must be such as 'affects the survival chances . . . of a protected species'". On the contrary, as I have already indicated, para 39 of the guidance uses disturbing activity of that sort merely to illustrate one end of the spectrum. Rather the guidance explains that, within the spectrum, every case has to be judged on its own merits. A "species-by-species approach is needed" and, indeed, even with regard to a single species, the position "might be different depending on the season or on certain periods of its life cycle" (para 37 of the guidance). As para 39 of the guidance concludes: "it has to be stressed that the case-by-case approach means that the competent authorities will have to reflect carefully on the level of disturbance to be considered harmful, taking into account the specific characteristics of the species concerned and the situation, as explained above."

22. Two further considerations can, I think, usefully be identified to be borne in mind by the competent authorities deciding these cases (considerations which seem to me in any event implicit in the Commission's Guidance). First (and this I take from a letter recently written to the respondent by Mr Huw Thomas, Head of the Protected and Non-Native Species Policy at DEFRA, the Department responsible for policy with regard to the Directive): "Consideration should . . . be given to the rarity and conservation status of the species in question and the impact of the disturbance on the local population of a particular protected species. Individuals of a rare species are more important to a local population than individuals of more abundant species. Similarly, disturbance to species that are declining in numbers is likely to be more harmful than disturbance to species that are increasing in numbers."

23. Second (and this is now enshrined in Regulation 41(2) of the Conservation of Habitats and Species Regulations 2010 SI 2010/490):

> "41(2) . . . disturbance of animals includes in particular any disturbance which is likely (a) to impair their ability (i) to survive, to breed or reproduce, or to rear or nurture their young, or (ii) in the case of animals of a hibernating or migratory species, to hibernate or migrate; or (b) to affect significantly the local distribution or abundance of the species to which they belong."

Note, however, that disturbing activity likely to have these identified consequences is included "in particular" in the prohibition; it does not follow that other activity having an adverse impact on the species may not also offend the prohibition.

24. In summary, therefore, whilst I prefer Mr Cameron's suggested approach to this article (see para 18 above) than that adopted by the Court below or that contended for by Mr George, it seems to me in the last analysis somewhat simplistic. To say that regard must be had to the effect of the activity on the conservation status of the species is not to say that it is prohibited only if it *does* affect that status. And the rest of the formulation is hardly illuminating.

25. Tempting although in one sense it is to refer the whole question as to the proper interpretation and application of article 12(1)(b) to the Court of Justice of the European Union pursuant to article 267 of the Lisbon Treaty, I would not for my part do so. It seems to me unrealistic to suppose that the Court of Justice would feel able to provide any greater or different assistance than we have here sought to give.

*Issue Two – The proper application of Regulation 3(4) of the 1994 Regulations (as amended)*

26. I can deal with this issue altogether more briefly. Article 12(1) requires member states to "take the requisite measures to establish a system of strict protection for the animal species listed in Annex IV(a) in their natural range". Wisely or otherwise, the UK chose to implement the Directive by making a breach of the article 12 prohibition a criminal offence. Regulation 39 of the 1994 Regulations (as amended) provides that: "(1) a person commits an offence if he . . . (b) deliberately disturbs wild animals of any such species [i.e. a European protected species]". It is Natural England, we are told, who bear the primary responsibility for policing this provision.

27. It used to be the position that the implementation of a planning permission was a defence to a regulation 39 offence. That, however, is no longer so and to my mind this is an important consideration when it comes to determining the nature and extent of the regulation 3(4) duty on a planning authority deliberating whether or not to grant a particular planning permission.

28. Ward LJ dealt with this question in paragraph 61 of his judgment as follows:

> "61. The Planning Committee must grant or refuse planning permission in such a way that will 'establish a system of strict protection for the animal species listed in Annex IV(a) in their natural range . . .' If in this case the committee is satisfied that the development will not offend article 12(1)(b) or (d) it may grant permission. If satisfied that it will breach any part of article 12(1) it must then consider whether the appropriate authority, here Natural England, will permit a derogation and grant a licence under regulation 44. Natural England can only grant that licence if it concludes that (i) despite the breach of regulation 39 (and therefore of article 12) there is no satisfactory alternative; (ii) the development will not be detrimental to the maintenance of the population of bats at favourable conservation status and (iii) the development should be permitted for imperative reasons of overriding public importance. If the planning committee conclude that Natural England will not grant a licence it must refuse planning permission. If on the other hand it is likely that it will grant the licence then the planning committee may grant conditional planning permission. If it is uncertain whether or not a licence will be granted, then it must refuse planning permission."

29. In my judgment this goes too far and puts too great a responsibility on the Planning Committee whose only obligation under regulation 3(4) is, I repeat, to "have regard to the requirements of the Habitats Directive so far as [those requirements] may be affected by" their decision whether or not to grant a planning permission. Obviously, in the days when the implementation of such a permission provided a defence to the regulation 39 offence of acting contrary to article 12(1), the Planning Committee, before granting a permission, would have needed to be satisfied either that the development in question would not offend article 12(1) or that a derogation from that article would be permitted and a licence granted. Now, however, I cannot see why a planning permission (and, indeed, a full planning permission save only as to conditions necessary to secure any required mitigating measures) should not ordinarily be granted save only in cases where the Planning Committee conclude that the proposed development would both (a) be likely to offend article 12(1) and (b) be unlikely to be licensed pursuant to the derogation powers. After all, even if development permission is given, the criminal sanction against any offending (and unlicensed) activity remains available and it seems to me wrong in principle, when Natural England have the primary responsibility for ensuring compliance with the Directive, also to place a substantial burden on the planning authority in effect to police the fulfilment of Natural England's own duty.

30. Where, as here, Natural England express themselves satisfied that a proposed development will be compliant with article 12, the planning authority are to my mind entitled to presume that that is so. The Planning Committee here plainly had regard to the requirements of the Directive: they knew from the Officers' Decision Report and Addendum Report (see para 8 above and the first paragraph of the Addendum Report as set out in para 72 of Lord Kerr's judgment) not only that Natural England had withdrawn their objection to the scheme but also that necessary measures had been planned to compensate for the loss of foraging. For my part I am less troubled than Ward LJ appears to have been (see his para 73 set out at para 16 above) about the UBS's conclusions that "no *significant* impacts to bats are anticipated" – and, indeed, about the Decision Report's reference to "measures to ensure there is no significant adverse impact to [protected bats]". It is certainly not to be supposed that Natural England misunderstood the proper ambit of article 12(1)(b) nor does it seem to me that the planning committee were materially misled or left insufficiently informed about this matter. Having regard to the considerations outlined in para 29 above, I cannot agree with Lord Kerr's view, implicit in paras 75 and 76 of his judgment, that regulation 3(4) required the committee members to consider and decide for themselves whether the development would or would not occasion such disturbance to bats as in fact and in law to constitute a violation of article 12(1)(b) of the Directive.

31. Even, moreover, had the Planning Committee thought it necessary or appropriate to decide the question for themselves and applied to article 12(1)(b)

the less exacting test described above rather than Ward LJ's test of imperilling the bats' conservation status, there is no good reason to suppose that they would not have reached the same overall conclusion as expressed in paras 74 and 75 of Ward LJ's judgment (see para 16 above).

32. I would in the result dismiss this appeal.

**LORD WALKER**

33. For the reasons given in the judgment of Lord Brown, with which I agree, and for the further reasons given by Lady Hale and Lord Mance, I would dismiss this appeal.

**LADY HALE**

34. On the first issue, I have nothing to add to the judgment of Lord Brown, with which I agree. I also agree with him on the second issue, but add a few observations of my own because we are not all of the same mind.

35. The issue is whether the Regulatory Committee of Hampshire County Council (the planning authority for this purpose) complied with their duty to "have regard to the requirements of the Habitats Directive so far as they may be affected by the exercise" of their planning functions (Conservation (Natural Habitats etc) Regulations 1994, reg 3(4); see also Conservation and Species and Habitats Regulations 2010, reg 9(5)). It is, of course, always important that the legal requirements are properly complied with, perhaps the more so in cases such as this, where the County Council is both the applicant for planning permission and the planning authority deciding whether it should be granted.

36. Some may think this an unusual and even unsatisfactory situation, but it comes about because in this country planning decisions are taken by democratically elected councillors, responsible to, and sensitive to the concerns of, their local communities. As Lord Hoffmann put it in *R (Alconbury Developments Ltd and others) v Secretary of State for the Environment, Transport and the Regions* [2001] UKHL 23, [2003] 2 AC 295, para 69, "In a democratic country, decisions about what the general interest requires are made by democratically elected bodies or persons accountable to them." Democratically elected bodies go about their decision-making in a different way from courts. They have professional advisers who investigate and report to them. Those reports obviously have to be

clear and full enough to enable them to understand the issues and make up their minds within the limits that the law allows them. But the courts should not impose too demanding a standard upon such reports, for otherwise their whole purpose will be defeated: the councillors either will not read them or will not have a clear enough grasp of the issues to make a decision for themselves. It is their job, and not the court's, to weigh the competing public and private interests involved.

37. It is important to understand the chronology in this case. The planning application was dated 31 March 2009. Natural England was consulted. Their first reply is dated 30 April. In it they objected to the application on the ground that "that the application contains insufficient survey information to demonstrate whether or not the development would have an adverse effect on legally protected species". Specifically, they were concerned about the impact upon bats and great crested newts. Reference was made to "the impacts of the development and mitigation upon European Protected Species" and the council were reminded of, among other things, their duty under regulation 3(4). This objection was maintained in a letter dated 29 June 2009.

38. Further information on Great Crested Newts and the Updated Bat Survey were submitted in early July in response to this. Based on this information, Natural England wrote on 17 July 2009 withdrawing their objection, subject to recommendations about the conditions to be imposed if planning permission were granted. This letter also contained comments about common widespread reptiles and asking that these too be addressed although Natural England was not lodging an objection in relation to them.

39. Natural England wrote again on 23 July with their "final response" to the proposal. This dealt, first, with the fact that the site was close to the Portsmouth Harbour Site of Special Scientific Interest, itself part of the Portsmouth Harbour Special Protection Area and Ramsar site and gave their advice on the requirements of regulation 48(1)(a) of the Habitats Regulations. Regulation 48(1)(a) imposes a specific obligation on planning authorities, among others, to make an "appropriate assessment" of the implications for a European protected site before granting permission for a proposal which is likely to have a significant effect upon the site. The letter advised that, provided that specified avoidance measures were fully implemented, the proposal would not be likely to have a significant effect upon the protected sites. Thus they had no objection on this score and permission could be granted. The letter went on to deal with "Protected species and biodiversity" under a separate heading, repeated that they had withdrawn their objection subject to the implementation of all the recommended mitigation, but reminded the council that "whilst we have withdrawn our objection to the scheme in relation to European protected species, we have ongoing concerns regarding other legally protected species on site . . ." A separate paragraph went on to deal with biodiversity.

40. The Officer's Report was prepared for the Committee meeting, which was due to take place on 29 July 2009, before receipt of the letter of 23 July. It is 31 pages long. The executive summary lists "the main issues raised", including "concern at the procedure because this is a County Council scheme" and "nature conservation impact" (para 1.4). The account of the "Proposals" refers to the detailed ecological surveys undertaken, including the bat surveys "carried out to enable appropriate measures to be implemented"; but states that the impact on the designated sites would be negligible (para 3.7). The section on "Consultations" includes a paragraph explaining that Natural England had initially objected "on the grounds that the application contains insufficient survey information to demonstrate whether or not the development would have an adverse effect on bats and great crested newts which are legally protected species" but that they had withdrawn their objection after further survey work was undertaken (para 5.6).

41. The section on "Nature conservation impact" deals first with the proximity to the protected sites and points out that the requirements of the Habitats Regulations needed to be considered (para 8.17). This is a reference to the specific obligation in regulation 48(1)(a). It went on to explain why it was thought that an "appropriate assessment" was not needed, noting that Natural England had raised no concerns about any impact on these sites (para 8.18). The report then turns to the corridor itself, referring to the Environmental Report submitted with the application, which dealt with badgers, bats, great crested newts, and reptiles; on bats, it states that "An Updated Bat Survey Method Statement and Mitigation Strategy has been submitted with measures to ensure there is no significant adverse impact to them for these proposals" (para 8.19).

42. The report concludes by recommending that no appropriate assessment is required under the Habitats Regulations (para 9.2); that planning permission be granted (para 9.3); and that the proposed development accords with the Development Plan and the relevant Policies, because, among other things "suitable mitigation measures are proposed for badgers and protected species" (para 9.4). There is a cross reference to the annexed policy C18 on Protected Species, which states that "Development which would adversely affect species, or their habitats, protected by the Habitats Regulations 1994, the Wildlife and Countryside Act 1981 or other legislation will not be permitted unless measures can be undertaken which prevent harm to the species or damage to the habitats. Where appropriate, a permission will be conditioned or a legal agreement sought to secure the protection of the species or their [habitat]."

43. After receiving the letter from Natural England dated 23 July, an addendum to the report was prepared, dealing with three issues which had arisen since the report was finalised. Under the heading "Habitats Regulations" it deals first with the objections raised by Natural England "requiring additional survey information concerning potential for the presence of great crested newts and bats, which are

protected species". It points out that the survey work was undertaken and Natural England had withdrawn their objection. In two separate paragraphs, it goes on to explain that Natural England had now given specific advice on the requirements of regulation 48(1)(a) (thus reinforcing the recommendation made in para 9.2 of the main report).

44. It is quite clear from all of this that separate consideration was being given both to the effect upon European protected species and to the effect upon the protected sites, that both were being considered under the Habitats Regulations, and that the applicable Policy on Protected Species, which also refers to the Habitats Regulations 1994, was being applied. It is true that the report does not expressly mention either regulation 3(4) or article 12 of the Directive. In my view, it is quite unnecessary for a report such as this to spell out in detail every single one of the legal obligations which are involved in any decision. Councillors were being advised to consider whether the proposed development would have an adverse effect on species or habitats protected by the 1994 Regulations. That in my view is enough to demonstrate that they "had regard" to the requirements of the Habitats Directive for the purpose of regulation 3(4). That is all they have to do in this context, whereas regulation 48(1)(a) imposes a more specific obligation to make an "appropriate assessment" if a proposal is likely to have a significant effect upon a European site. It is not surprising, therefore, that the report deals more specifically with that obligation than it does with the more general obligation in regulation 3(4).

45. Furthermore, the United Kingdom has chosen to implement article 12 of the Directive by creating criminal offences. It is not the function of a planning authority to police those offences. Matters would, as Lord Brown points out, have been different if the grant of planning permission were an automatic defence. But it is so no longer. And it is the function of Natural England to enforce the Directive by prosecuting for these criminal offences (or granting licences to derogate from the requirements of the Directive). The planning authority were entitled to draw the conclusion that, having been initially concerned but having withdrawn their objection, Natural England were content that the requirements of the Regulations, and thus the Directive, were being complied with. Indeed, it seems to me that, if any complaint were to be made on this score, it should have been addressed to Natural England rather than to the planning authority. They were the people with the expertise to assess the meaning of the Updated Bat Survey and whether it did indeed meet the requirements of the Directive. The planning authority could perhaps have reached a different conclusion from Natural England but they were not required to make their own independent assessment.

46. But if I am wrong about this, and the planning authority did have to make an independent assessment in terms of article 12(1)(b), there is absolutely no reason to think that they would have reached a different conclusion and refused

planning permission on this account. They may have reached their decision by a majority of six votes to five. But the Minutes make it clear that there were a great many other problems to worry about with this scheme. While the "impact on nature" was among the many matters upon which members questioned officers, this was not one of their listed concerns. If this scheme was not going to get planning permission, it would be because of the local residents' concerns about the impact upon them rather than because of the members' concerns about the impact upon the bats.

47. I would therefore dismiss this appeal on both issues.

**LORD MANCE**

48. I agree with the reasoning and conclusions of Lord Brown and Lady Hale on each of the issues. I add only a few words because the court is divided on the second.

49. Lord Kerr's dissent on this issue is, I understand, based on the premise that (a) Natural England had not expressed a view that the proposal would not involve any breach of the Habitats Directive, and (b) if it had, the planning committee was not informed of this: see his paras 73 and 74.

50. For the reasons given in Lord Brown's and Lady Hale's judgments, I cannot agree with either aspect of this premise.

51. I add the following in relation to the suggestion that Natural England was, in its letter of 17 July 2009, "preoccupied with matters that were quite separate from the question whether there would be disturbance to bats such as would be in breach of article 12 of the Directive" or that the letter was "principally taken up with the question of possible impact on common widespread reptiles" (para 69 below).

52. It is true that the longer part of the text of the letter of 17 July related to the latter topic, in relation to which Natural England at the end of the letter made clear it was not lodging an objection, but was only asking that further attention be given and comments supplied. But the first, and in the circumstances obviously more significant, aspect of the letter consisted in its first three paragraphs. These withdrew Natural England's previous objection made on 30 April and reiterated on 29 June in relation to great crested newts and bats. The withdrawal was in the light of the information, including the Updated Bat Survey, which the Council had

earlier in July supplied. In withdrawing their objection, Natural England emphasised the importance of the mitigation procedures outlined in section 10 of the Survey, and added the further recommendation that the Council look closely at the requirement for night working and keep any periods of such working "to an absolute minimum". This confirms the attention it gave to the information supplied.

53. When making its objection in its letter dated 30 April, Natural England had said:

> "Our concerns relate specifically to the likely impact upon bats and Great Crested Newts. The protection afforded these species is explained in Part IV and Annex A of *Circular 06/2005 'biodiversity and Geological Conservation – Statutory Obligations and their Impact within the Planning System'*".

Part IV of Circular 06/2005 stated that the Habitats Regulations Conservation (Natural Habitats &c.) Regulations 1994 implemented the requirements of the Habitats Directive and that it was unlawful under regulation 39 deliberately to disturb a wild animal of a European protected species. Annex A identified all species of bats as wild animals of European protected species.

54. It is therefore clear that Natural England was, from the outset, focusing on the protected status of all species of bats under the Directive and domestic law; and that its withdrawal of its objection on 17 July was directly relevant to the planning committee's performance of its role under regulation 3(4) to "have regard to the requirements of" that Directive in the exercise of its functions. The planning officer's first report dated 29 July summarised the position for the planning committee in accurate terms. Thereafter, as Lord Brown and Lady Hale record, Natural England's further letter dated 23 July arrived, reiterating Natural England's as position stated in its letter dated 17 July. This too was again accurately summarised to the committee by the planning officer in his addendum dated 29 July to his previous report.

55. With regard to the Updated Bat Survey, there is no reason to believe that Natural England did not, when evaluating this, understand both the legal requirements and their general role and responsibilities at the stage at which they were approached by the Council. The Survey repays study as a whole, and I merely make clear that I do not share the scepticism which Lord Kerr feels about some of its statements or agree in all respects with his detailed account of its terms and their effect. The important point is, however, is that Natural England was well placed to evaluate this Survey, and, having done so, gave the advice they did. This

was, in substance, accurately communicated to the planning committee, in a manner to which the committee was entitled to have, and must be assumed to have had, regard.

56. In addition to my agreement with the other parts of Lord Brown's and Lady Hale's judgments, I confirm my specific agreement with Lady Hale's penultimate paragraph.

**LORD KERR**

57. As legislative provisions go, regulation 3 (4) of the Conservation (Natural Habitats, &c.) Regulations 1994 (the Habitats Regulations) is relatively straightforward. Its terms are uncomplicated and direct. It provides: -

> "(4) … every competent authority in the exercise of any of their functions, shall have regard to the requirements of the Habitats Directive so far as they may be affected by the exercise of those functions."

58. In plain language this means that if you are an authority contemplating a decision that might have an impact on what the Directive requires, you must take its requirements into account before you reach that decision. Of course, if you know that another agency has examined the question and has concluded that none of those requirements will be affected, and if you are confident that such agency is qualified to make that judgment, this may be sufficient to meet your obligation under the regulation. What lies at the heart of this appeal is whether the regulatory committee of Hampshire County Council, when it came to make the decision whether to grant the planning permission involved in this case, either had regard itself to the requirements of the Habitats Directive or had sufficient information to allow it to conclude that some other agency, in whose judgment it could repose trust, had done so and had concluded that no violation arose.

59. An old and currently disused railway line runs between Gosport and Fareham in South Hampshire. A section of this, between Redlands Lane, Fareham and Military Road, Gosport is some 4.7 kilometres in length. On 31 March 2009 Hampshire County Council, acting on behalf of Transport for South Hampshire, applied for planning permission to develop this section in order to create what is described as a "busway". Transport for South Hampshire is a name used to describe three local authorities, Hampshire County Council, Gosport Borough

Council and Fareham Borough Council. Planning permission was granted on 29 July 2009

60. At present there is serious congestion on the main road between Gosport and Fareham. It is planned that the busway should operate by allowing buses to join existing roads at various points along the route and that a fast, efficient and reliable public transport service will ensue. It will also be possible to cycle on the route. Local residents will be encouraged to use buses and bicycles in preference to their private vehicles and it is hoped that the congestion will thereby be relieved. The busway is to be constructed in two phases, 1A and 1B. Clearance work for the first of these is already underway and funding is available to complete this phase. The second phase does not yet have funding. Its future development is not assured.

61. The railway line along which the busway is to be developed was closed as a result of recommendations made in the Beeching report of 1963. It appears that closure did not finally take effect until June 1991, however. In that month the last train ran along the line. Since then the area has become overgrown. It is now regarded as "an ecological corridor for various flora and fauna". Several species of bats fly through and forage in the area but no bat roosts have been found on the planning application site itself. There are two bat roosts in proximity to the route, one in Savernake Close, near the southern section of Phase 1A, the other at Orange Grove which is close to the northern section of Phase 1B

62. All bats are European Protected Species, falling within Annex IV (a) of Council Directive 92/43/EEC (the Habitats Directive). Article 12 of this Directive requires Member States to "take the requisite measures to establish a system of strict protection for the animal species" listed in the annex. The Conservation (Natural Habitats, &c.) Regulations 1994 were made for the purpose of implementing the Habitats Directive. The regulations prescribe a number of measures (most notably in relation to this case, Regulation 39) which seek to achieve this level of protection. Derogation from these measures is permitted to those who obtain a licence from the appropriate authority. Natural England is the nature conservation body specified in the regulations as the licensing authority in relation to European protected species.

63. Although the issue of a licence is quite separate from the grant of planning permission, Natural England is regularly consulted on applications for development where the Habitats Directive and the regulations are likely to be in play and so it was that in April 2009 a letter was sent by the environment department of the Council seeking Natural England's views about the proposal. On 30 April 2009, Natural England replied, objecting to the scheme and recommending that planning permission be refused.

64. Bat surveys had been undertaken in 2008. These considered the suitability of the habitat for bats; they also examined how bats used the site and which species of bats were present. Clearly, however, the detail of the information yielded by these surveys was insufficient to satisfy Natural England's requirements for it stated that the application contained "insufficient survey information to demonstrate whether or not the development would have an adverse effect on legally protected species". The letter also recommended that the local planning authority should consider all the points made in an annex that was attached to the letter. This provided guidance on survey requirements and on how the authority should fulfil its duties on "biodiversity issues under [among others] … Regulation 3 (4) of *The Conservation (Natural Habitats &c.) Regulations 1994* … to ensure that the potential impact of the development on species and habitats of principal importance is addressed."

65. Amendments to the scheme were undertaken but these did not allay Natural England's concerns and their objection to the planning application was repeated in a letter of 29 June 2009.

66. An updated bat survey (leading to the publication of a report entitled "Survey Method Statement and Mitigation Strategy") was carried out on behalf of the Council. The survey identified two species of bat which had not been detected in the 2008 survey. Greater levels of foraging and commuting were also recorded along the disused railway. No roost sites were found but the presence of a common pipistrelle roost was confirmed approximately 40 metres from planned works. The report concluded that the works would result in the loss of a number of trees with low to moderate "roost potential" and approximately seven trees with moderate to high roost potential. Although no known roosts would be lost, because of the difficulty in identifying tree roosts, the Bat Conservation Trust recommends that it should be assumed that trees with high potential as roosts are *in fact* used as roosts. On this basis a number of roosts will be lost as a result of the works. Impact on commuting of bats between foraging habitats was also anticipated. It was felt that this could be restored in the longer term but, until restoration was complete, at least four species of bats that had been detected in the area would be affected. It was concluded that the removal of trees and vegetation would result in the loss of good quality habitats for foraging. Loss of foraging habitats would have an inevitable adverse impact on three species of local bats with one of these (Myotis sp) being more severely affected. This was characterised as a moderate impact at local level during the time that the vegetation was being re-established, a period estimated in the survey to be at least seven years. On the issue of the long term impact of the loss of foraging habitats the report was somewhat ambivalent. At one point it suggested that there would be a long term "slight adverse to neutral" impact. Later, it suggested that it was "probable" that the re-creation of good foraging habitats would result in an eventual neutral impact. The introduction of artificial lighting would affect the quality of foraging habitat by attracting insects

from unlit areas. Although this would favour some species, it would adversely affect others. Moreover, increased lighting can delay the emergence of bats from roosts and so reduce foraging opportunities. Lighting also constitutes a barrier to bats gaining access to foraging areas. Although the report is silent on the duration of these effects, it must be presumed that they will be permanent. In a somewhat bland claim, however, the authors assert that "with mitigation to reduce light spill and the selection of lights with a low UV output, the impact of lighting on bats is not anticipated to be significant". Increased noise levels would also have an adverse impact on some species of bats, the Brown long eared in particular. The report concludes at this point that is probable that there would be a slight adverse impact on foraging habitats from operational noise. Again, the report does not expressly state how long this would last but, since the noise source is the operation of the busway, it must be presumed to be permanent.

67. The overall conclusion of the report was that it was probable that there would be a short term moderate adverse impact on bats. (As Lord Brown has pointed out, this 'short term' impact is likely to continue for some nine years). If planned mitigation measures are successful, the long-term impact of the works was anticipated to be "slight adverse". On this basis the authors of the report concluded that no "significant impacts" to bats were anticipated. This general conclusion requires to be treated with some caution, in my opinion. There can be no doubt that effects which could not be described as insignificant *will* occur for some seven to nine years at least. Thereafter, while the long term impact may not be quantitatively substantial, it will be permanent.

68. The bat survey, together with further information, was sent to Natural England in July 2009. In consequence, the objection to the application was withdrawn. Natural England considered that planning permission could now be granted, albeit subject to certain conditions. The letter relaying the withdrawal of the objection contained the following: -

> "Natural England has reviewed the further information submitted (Great Crested Newt Survey Method Statement and Mitigation Strategy, June 2009 and Updated Bat Survey Method Statement and Mitigation Strategy, July 2009) and can now confirm that we are able to withdraw our objection of 30 April 2009, subject to the following comments: We recommend that should the Council be minded to grant permission for this scheme, conditions be attached requiring implementation of all the mitigation/compensation detailed within these reports. Particularly at Section 10 of the Bat Report and Section 6 of the Great Crested Newt Report. We would also recommend that the Council look closely at the requirement for night time working and associated flood lighting. Natural England would not advocate night time working for reasons of

> disturbance/disruption to the lifecycle of nocturnal wildlife and the Council should ensure these periods are kept to an absolute minimum."

69. The head of planning and development made a report (referred to as "the officer's decision report") to the regulatory committee of the Council which was to take the planning decision on 29 July 2009. The impact on nature conservation was one of the issues of concern identified in the report. Lord Brown has quoted in para 8 of his judgment many of the material parts of the report that touch on this issue and I will not repeat all of those here. It is important, however, I believe, to understand the context of the statement in para 8.17 (quoted in part by Lord Brown) that the Habitats Regulations needed to be considered. The full para reads as follows: -

> "The site is not within any designated sites of importance for nature conservation. However the site is within 30 metres, at its closest, to the Portsmouth Harbour Special Protection Area (SPA) and Portsmouth Harbour RAMSAR site. *Therefore* the requirements of the Habitats Regulations need to be considered." (my emphasis)

70. As Lord Brown has pointed out, the report in para 8.19 stated that the updated bat survey report contained "measures *to ensure* (emphasis added) there is no significant adverse impact" to bats from the proposals. This appears to me to be a gloss on what had in fact been said in the report. The actual claim made (itself, in my opinion, not free from controversy) was that it was *anticipated* that there would be no significant impacts on bats *if* the mitigation measures succeeded.

71. Two points about the decision officer's report should be noted, therefore. Firstly, the enjoinder to consider the Habitats Regulations was made because of the proximity of the works to sites requiring special protection rather than in relation to the need to avoid disturbance of bats in the ecological corridor itself. Secondly, it conveyed to the members of the regulatory committee the clear message that the updated bat survey report provided assurance that there would be no significant impact on bats. No reference was made to the moderate adverse impact that would occur over the seven to nine year period that regeneration of the forage areas would take nor to the permanent, albeit slight, impact that those measures could not eliminate.

72. Lord Brown has said that the addendum to the officer's report dealt specifically with the Habitats Regulations. It did, but the context again requires to be carefully noted. In order to do this, I believe that the entire section dealing with the regulations must be set out. It is in these terms: -

"Habitats Regulations

As stated in the report Natural England initially raised a holding objection to the application, requiring additional survey information concerning potential for the presence of great crested newts and bats, which are protected species. This survey work was undertaken and sent to Natural England, who are now satisfied and subsequently withdrew their objection.

As also stated in the report the application site lies close to habitats which form part of the Portsmouth Harbour Site of Special Scientific Interest (SSSI). This SSSI is part of the Portsmouth Harbour Special Protection Area (SPA) and Ramsar Site. Under the Conservation (Natural Habitats etc) Regulations 1994, as amended ('the Habitats Regulations') the County Council is the competent authority and has to make an assessment of the impacts of the proposal on this European site, therefore the second recommendation for the Committee is to agree that the proposal is unlikely to have a significant impact on the European site. It was implied that by withdrawing their objection Natural England did not consider there would be any significant impact, but they did not specifically give their advice.

Since the report was finalised Natural England have now given specific advice on the requirements of Regulation 48 (1) (a) of the "Habitats Regulations". They raise no objection subject to the avoidance measures included in the application being fully implemented and advise that their view is that either alone or in combination with other plans or projects, this proposal would not be likely to have a significant effect on the European site and the permission may be granted under the terms of the Habitats Regulations."

73. Regulation 48 (1) (a) requires a competent authority, before deciding to undertake, or give any consent, permission or other authorisation for, a plan or project which is likely to have a significant effect on a European site in Great Britain to make an appropriate assessment of the implications for the site in view of that site's conservation objectives. It has nothing to do with the need to ensure that there is no disturbance of species of bats. The addendum to the decision officer's report, therefore, offered no information whatever to the regulatory committee on the vital question whether the proposal would comply with article 12 of the Habitats Directive. Indeed, it is clear from an examination of the letter from Natural England of 17 July 2009 that it was preoccupied with matters that were

quite separate from the question whether there would be disturbance to bats such as would be in breach of article 12 of the Directive. The letter was principally taken up with the question of possible impact on common widespread reptiles. In so far as the letter dealt with the question of the impact on bats, its tone certainly did not convey a view that the planning committee need not consider that matter further. On the contrary, on a fair reading of the letter, Natural England was making it clear that this issue required to be addressed by the committee, not only in terms of the conditions to be applied but also as to whether night-time working would be unacceptable because of disturbance to wildlife.

74. The committee considered the report of the decision officer and the addendum to it and received an oral presentation from officers of the council. The minutes of their meeting record the following in relation to the oral presentation: -

> "In introducing the report, Officers informed Members that the proposal formed part of the strategy to improve the reliability and quality of public transport in South Hampshire and the access to Gosport and Fareham. A Traffic Regulation Order would be imposed on the bus way to allow only cycles, buses and emergency vehicles to use it. Members were advised that an Environmental Impact Assessment (EIA) was not required as the proposal was a freestanding project that did not give rise to 'significant environmental effects'. Notwithstanding that, the County Council considered that important nature conservation, amenity and traffic issues had to be properly addressed and reports on these matters had been taken into account. The addendum to the report provided reassurance that Natural England had no objection to the proposals and confirmed their view that an appropriate assessment under the Habitat Regulations was not required and provided further clarification about the application and the Issue of 'screening' under the EIA Regulations."

75. At best, this had the potential to mislead. A committee member might well think that Natural England had concluded that there would be no violation of article 39 (1) (b) of the 1994 Regulations (which forbids the deliberate disturbance of wild animals of a European protected species) or, more particularly, article 12 of the Habitats Directive. Of course the true position was that Natural England had expressed no explicit opinion whatever on that question. At most, it might be presumed that this was its view. Even if that presumption could be made, however, it does not affect the clear indication in the letter of 17 July 2009 that this matter was still one which required the committee's attention. I can find nothing in the letter which suggests that Natural England regarded this matter as closed. Nor do I believe that the letter could have been properly interpreted by the committee as relieving it of the need to consider the issue.

76. The critical issue on this appeal, therefore, is whether there is any evidence that the regulatory committee considered at all the duty that it was required to fulfil under regulation 3 (4) of the 1994 Regulations.

77. In addressing this question I should immediately say that I agree with Lord Brown on his analysis of the nature of the requirement in article 12 (1) (b) of the Habitats Directive. As he has observed, a number of broad considerations underlie the application of the article. It is designed to protect species (not specimens of species) and its focus is on the protection of species rather than habitats, although, naturally, if major intrusion on habitats is involved, that may have an impact on the protection of the species. Not every disturbance will constitute a breach of the article. The nature and extent of the disturbance must be assessed on a case by case basis.

78. The European Commission's guidance document of February 2007 contains a number of wise observations as to how the application of the article should be approached. While the word 'significant' has not been employed in article 12 (1) (b), a "certain negative impact likely to be detrimental must be involved". In making any evaluation of the level of disturbance, the impact on survival chances, breeding success or reproductive ability of the affected species are all obviously relevant factors. Like Lord Brown, I am sanguine about Mr Cameron QC's formulation of the test as one involving the question whether there has been "a certain negative impact likely to have been detrimental to the species, having regard to its effect on the conservation status of the species". And also like Lord Brown, I consider that the Court of Appeal pitched the test too high in saying that disturbance must have "a detrimental impact on the conservation status of the species at population level" or constitute a threat to the survival of the protected species.

79. Trying to refine the test beyond the broad considerations identified by Lord Brown and those contained in the Commission's guidance document is not only difficult, it is, in my view, pointless. In particular, I do not believe that the necessary examination is assisted by recourse to such expressions as *de minimis*. A careful investigation of the factors outlined in Lord Brown's judgment (as well as others that might bear on the question in a particular case) is required. The answer is not supplied by a pat conclusion as to whether the disturbance is more than trifling.

80. Ultimately, however, and with regret, where I must depart from Lord Brown is on his conclusion that the regulatory committee had regard to the requirements of the Habitats Directive. True it is, as Lord Brown says, that they knew that Natural England had withdrawn its objection. But that cannot substitute, in my opinion, for a consideration of the requirements of the Habitats Directive.

Regulation 3 (4) requires every competent authority to have regard to the Habitats Directive in the exercise of its functions. The regulatory committee was unquestionably a competent authority. It need scarcely be said that, in deciding whether to grant planning permission, it was performing a function. Moreover the discharge of that function clearly carried potential implications for an animal species for which the Habitats Directive requires strict protection.

81. Neither the written material submitted to the committee nor the oral presentation made by officers of the council referred to the Habitats Directive. The reference to Natural England's consideration of the Habitats Regulations, if it was properly understood, could only have conveyed to the committee that that consideration had been for a purpose wholly different from the need to protect bats. It could in no sense, therefore, substitute for a consideration of the Habitats Directive by the committee members whose decision might well directly contravene one of the directive's central requirements. It is for that reason that I have concluded that those requirements had to be considered by the committee members themselves.

82. It may well be that, if Natural England had unambiguously expressed the view that the proposal would not involve any breach of the Habitats Directive and the committee had been informed of that, it would not have been necessary for the committee members to go behind that view. But that had not happened. It was simply not possible for the committee to properly conclude that Natural England had said that the proposal would not be in breach of the Habitats Directive in relation to bats. Absent such a statement, they were bound to make that judgment for themselves and to consider whether, on the available evidence the exercise of their functions would have an effect on the requirements of the directive. I am afraid that I am driven to the conclusion that they plainly did not do so.

83. As I have said, Natural England (at the time that it was considering the Habitats Regulations in July 2009) had not explicitly addressed the question whether the disturbance of bats that the proposal would unquestionably entail would give rise to a violation of the directive. The main focus of the letter of 19 July was on an entirely different question. Lord Brown may well be correct when he says that it is not to be supposed that Natural England misunderstood the proper ambit of article 12 (1) (b), but the unalterable fact is that it did not say that it had concluded that no violation would be involved, much less that the planning committee did not need to consider the question.

84. It is, of course, tempting to reach one's own conclusion as to whether the undoubted impact on the various species of bats that will be occasioned by this development is sufficient – or not – to meet the requirement of disturbance within the meaning of article 12. But this is not the function of a reviewing court. Unless

satisfied that, on the material evidence, the deciding authority could have reached no conclusion other than that there would not be such a disturbance, it is no part of a court's duty to speculate on what the regulatory committee would have decided if it had received the necessary information about the requirements of the Habitats Directive, much less to reach its own view as to whether those requirements had been met. Since the planning permission was granted on a vote of six in favour and five against, with two abstentions, it is, in my view, quite impossible to say what the committee would have decided if it had been armed with the necessary knowledge to allow it to fulfil its statutory obligation. Other members of the court have expressed the view that this is what the committee would have decided. Had I felt it possible to do so, I would have been glad to be able to reach that conclusion. As it is, I simply cannot.

85. I would therefore allow the appeal and quash the planning permission.

PLANNING OBJECTIONS SCOTLAND

# POS_4.1.2_SPSO_ 201606059_Edinburgh City_Council (failure to take account of applicable development plan policy)

RTPI Chartered Town Planners

RTPI Member N .47188

RICS

# SPSO decision report

**Case:** **201606059, The City of Edinburgh Council**
**Sector:** local government
**Subject:** handling of application (complaints by opponents)
**Decision:** some upheld, recommendations


## Summary

Mr C complained about the council's handling of a planning application. In particular that the council had failed to consider their waterside development policy (policy Des 9), had failed to consult with the Scottish Environment Protection Agency (SEPA) and had unreasonably accepted that works for the planning application were initiated on time. Mr C also complained about the council's communication with him.

We took independent planning advice. We found that that policy Des 9 should have been referred to in the report of handling (a report containing information on a planning application). It was not possible to know whether this policy had been taken into consideration during the processing of the planning application, as was required. We also found that it was not possible to say whether consideration of policy Des 9 would have resulted in a different outcome. We upheld this aspect of the complaint.

We also found that SEPA should have been consulted and we upheld this aspect of the complaint.

We did not find any evidence that the council had unreasonably accepted that works for the planning application were initiated on time and we did not uphold this part of the complaint.

Regarding communication, we found that some of the issues raised by Mr C had been not been adequately addressed, however, other issues raised by him had been reasonably clarified. We were concerned that a further response letter had had to be issued to Mr C. The council had accepted that there had been a delay in responding and that Mr C should not have had to submit a formal complaint to prompt a full response to his enquiries. We upheld this aspect of the complaint.


## Recommendations

What we said should change to put things right in future:

- Development plan policies relevant to the processing of any particular application should be referenced in the report of handling.
- Where a statutory consultation appears to be required as part of the processing of a planning application, but has not taken place, this should be explained in the report of handling.

PLANNING OBJECTIONS SCOTLAND

# POS_4.1.3_SPSO_201605227 The_City_of_Edinburgh_Council (Policy and Material considerations)

RTPI Chartered Town Planners

RTPI Member N .47188

RICS

# SPSO decision report

**Case:** **201605227, The City of Edinburgh Council**
**Sector:** local government
**Subject:** handling of application (complaints by opponents)
**Decision:** upheld, recommendations


## Summary

Mr C complained about the council's handling of a planning application to extend a restaurant near his home. Mr C was concerned that a parking policy had not been taken into account when determining the application and that the planning service had not waited on a consultation response from the roads service at the council before approving the application. During their own consideration of the case, the council accepted that parking had not been covered in the planning officer's report for the application and they apologised for this failing.

We took independent advice from a planning adviser. We found that there was no evidence that the relevant policy for parking had been considered when determining the planning application. While there was no statutory requirement to await a roads service consultation response before determining the application, the advice we received highlighted that proceeding without all the relevant information was a key shortcoming. However, there was no evidence that proceeding without the consultation response made any difference to the council's decision to approve the application. On balance, we upheld the complaint. However, based on the advice we received, we did not consider that there was any further action that the council were required to take in respect of the application. We did make a recommendation to ensure that material considerations and relevant policies are taken into account when determining a planning application in the future.


## Recommendations

What we said should change to put things right in future:

- All material considerations should be taken into account when determining a planning application. The correct policies should be identified and referenced in the report of handling.

We have asked the organisation to provide us with evidence that they have implemented the recommendations we have made on this case by the deadline we set.

PLANNING OBJECTIONS SCOTLAND

**POS REFERENCE: -**

**POS-P-0045**

# OBJECTION TO PLANNING APPLICATION ON BEHALF OF MR AND MRS NICOL

**REFERENCE: - 23/00663/FUL**

**ADDRESS: - Anderson Transport Newhouse Farm Long Dalmahoy Road Dalmahoy Kirknewton EH27 8EE**

**APPLICATION DESCRIPTION: - Application for 2 dwellings, access, and landscaping.**

RICS

RTPI Chartered Town Planners

| Document Preparation | | |
|---|---|---|
| Prepared for | Contact Details | |
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| Approved by | Qualifications | Title |
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| Document Control | | |
|---|---|---|
| Issue | Date | Version |
| 1 | 10-03-2023 | Draft |
| 2 | 15-03-2023 | Final |

## 1.0 INTRODUCTION

1.1 Planning Objections Scotland has been instructed by Elaine and Colin Nicol (The owners of 2 Newhouse Cottages, Long Dalmahoy Road) to review application 23/00663/FUL.

1.2 The review has been commissioned to ensure full details are provided by the applicant/agent as required by legislation and regulations to ensure the planning application can be assessed in a holistic manner, not only by the planning authority but to enable effective public engagement. Our clients have also asked us to comment on the proposal's relationship with the Local Development Plan as well as material considerations based on the information submitted to date.

1.3 It is clear from the review below that the application contains errors, omissions and lacks information. A comprehensive assessment of the application cannot be undertaken and, on this basis, alone the Planning Authority should either refuse or seek the withdrawal of the application. The proposal also results in conflicts with the adopted Local Development Plan.

1.4 For the avoidance of doubt, our clients' ability to make subsequent representation on any subsequent submissions are reserved.

## 2.0 THE APPLICATION - ERRORS, OMISSIONS AND LACK OF INFORMATION

2.1 The Heads of Planning Scotland (HOPS) – Validation Guidance Note sets out the national standard for the validation and determination of planning applications and other related consents. The application has been reviewed against this guidance note and it is clear that the submission falls below the required standards and as a consequence this application should not have been validated.

**Concerns with the Drawings**

Location Plan(s)

2.2 The HOPS validation standard on location plans (see section 4 paragraphs 4.1 to 4.5) confirms: -

2.3 *A single location plan produced to a scale of either 1:1250 or 1:2500 will normally be required to be submitted with your application. Depending on the location of your application a supplementary location plan may also be required to be submitted with your application.*

2.4 *The purpose of the location plan is to clearly define the extent of the application site in relation to its surroundings and also to provide sufficient detail in order for ourselves or any other interested party to be able to locate the application site and, as such, the plans submitted should typically be Ordnance Survey based.*

2.5 *If the submitted plan is Ordnance Survey based, it should contain the relevant copyright and licensing information to demonstrate that the plan has been legally sourced. If the submitted plan is not Ordnance Survey based it should be clearly stated on the plan and also contain an acknowledgement as to where it was sourced.*

2.6 *The location plan produced to either of these scales should show the following: -*

- *The application site boundary accurately outlined in RED*
- *Any other surrounding land under the same ownership as the application site outlined in BLUE*
- *Surrounding road names/numbers*
- *All surrounding property names/numbers*
- *The direction of north clearly indicated*
- *A copyright disclaimer/acknowledgement relating to the source of the plan*

- *An accurate scale bar*

2.7 The submitted location plan has been reviewed.

- There is no information acknowledging the source of the plan, whether it is Ordnance Survey based and no copyright disclaimer has been provided.
- Only a redline has been detailed on the location plan. A blue line has not been incorporated showing the applicant's ownership. This is at odds with the information presented on the (04) SITE LAYOUT PLAN which notes ‘ownership control’.

2.8 Updated Location plans are required.

Site Plan(s)/Block Plan(s)

2.9 The HOPS standard on Site Plan(s)/Block Plan(s) (see section 6 paragraphs 6.1 to 6.3) confirms: -

2.10 *A proposed site plan will be required in all instances where the proposals involve development on the ground regardless of their proposed purpose. Depending on the nature of the proposals it may also be required to submit a copy of an existing site plan. However, your local Planning office will be able to advise if this will be necessary. A site plan produced to a scale of 1:100, 1:200 or 1:500 will be acceptable. Site plans are required as they provide a more detailed and accurate overview of the application site in terms of the area to be occupied by your proposals and their relationship to their surroundings.*

2.11 *As noted above, the following list of what should be shown on your site plan will not be required in every case and as such reference should be made to the separate guidance available covering your particular type of proposal. The submission of part site plans may also be required under certain circumstance, such as large sites where the actual areas of works*

*are remote from each other. Contact with your local Planning office is highly recommended should you be considering submitting only a part site plan.*

2.12 *The following list along with the example plan shown in figure 9 on the next page indicates what may be asked for and how it should be shown:*

1. *Produced to a scale of either 1:100, 1:200 or 1:500*
2. *Application site boundary outlined in RED*
3. *Any surrounding land owned or controlled by the applicant outlined in BLUE*
4. *The direction of north*
5. *An accurate scale bar*
6. *All land and buildings located within a 20 metre radius of the application site boundary identified*
7. *The accurate footprint/roof plan profile of all existing and proposed buildings and structures located within the application site with appropriate annotation to identify them*
8. *The extent and type of any hard surfacing with the application site boundary identified. Where this is proposed rather than existing this should be clearly stated*
9. *A note of any boundary treatments such as walls and fences including their height. Where these are proposed rather than existing this should be clearly stated*
10. *The access arrangements (vehicular and pedestrian) to the application site should be clearly shown*
11. *A written dimension showing the distance from any part of your proposals to any part of the application site boundary. Note that if you are proposing multiple buildings or structures then a written dimension will be required from each*
12. *Areas of hard and soft landscaping clearly defined*
13. *If connection to an existing private water supply or private drainage system is proposed then the connection point to the*

*supply or system should be clearly annotated within the application site outlined in RED*

14. *Where a completely new private water supply or private drainage system is proposed then the full details of the supply or system should be clearly annotated within the application site outlined in RED. This is also the case for alterations/upgrading works to such supplies or systems*

2.13 The submitted block plan and site layout plans have been reviewed and they fail to meet the above validation criteria: -

(02) BLOCK PLAN

- The full extent of the site is not outlined in red.
- A blue line has not been incorporated showing the applicant's ownership. This is at odds with the information presented on the (04) SITE LAYOUT PLAN which notes 'ownership control'.
- The direction of North is not shown in this plan.
- All land and buildings located within a 20 metre radius of the application site boundary has not been identified.
- The extent and type of any hard surfacing with the application site boundary has not been identified. Existing and proposed block plans should be provided to clearly identify the extent and type of hard surfacing.
- A note of any boundary treatments such as walls and fences including their height has not been provided. Existing and proposed block plans should be provided to clearly identify the extent of new walls and fencing incorporated within the layout.
- There are no written dimensions showing the distance from any part of the proposal to any part of the application site boundary.
- Areas of hard and soft landscaping are not clearly defined.
- Details of the private drainage system have not been clearly annotated within the application site.

(04) SITE LAYOUT PLAN

- All land and buildings located within a 20 metre radius of the application site boundary has not been identified.
- The extent and type of any hard surfacing with the application site boundary has not been identified. Existing and proposed block plans should be provided to clearly identify the extent and type of hard surfacing.
- A note of any boundary treatments such as walls and fences including their height has not been provided. Existing and proposed block plans should be provided to clearly identify the extent of new walls and fencing incorporated within the layout.
- There are no written dimensions showing the distance from any part of the proposal to any part of the application site boundary.
- Areas of hard and soft landscaping are not clearly defined.
- Details of the private drainage system have not been clearly annotated within the application site.

2.14 It is also worth noting that the requirement for accurate dimensions to be shown on plans is discussed in the following Scottish Public Services Ombudsman investigation of Glasgow City Council (see Appendix POS 2.1.2).

Concerns with the Application Redline Boundary

2.15 The HOPS validation document confirms within section 5 that: -

2.16 *Where the application relates to new build proposals the whole area required to accommodate the proposals should be outlined in RED. This includes any area which is required for vehicular and pedestrian access, parking, landscaping, garden ground, private water supply and drainage facilities, SUDS, visibility splays or any other part of the proposals which would constitute development should be contained within the single site outlined in RED.*

2.17 With regards to drainage arrangements:-

2.18 *Proposals which incorporate either new private water supply and drainage arrangements or connection to existing ones require to be shown in a certain way. The area of land required for such proposals should be included within the application site boundary shown on the location and site plans.*

2.19 Based on Planning Objections Scotland's review the drainage arrangements have not been appropriately detailed to meet the HOPS validation requirements. The burn outfall location has not been incorporated into the redline boundary of the site.

2.20 Planning Objections Scotland note that the inclusion of this additional area of land would require a fresh application (with a further neighbour notification exercise undertaken due to the revised boundary). The revised boundary may also have ramifications for the land ownership certificate/declaration that has currently been served, this would require updating to confirm the owner(s) of additional areas of land have been notified correctly.

Elevations

2.21 The HOPS document on Elevations (see section 7) provides details of the validation standards for existing elevations as well as proposed elevations. With regards to proposed elevations: -

2.22 *Proposed elevations will be required in the majority of cases where proposed alterations or extensions will affect the external appearance of the existing property or structure which is the subject of the planning application. These plans should show all elevations of the proposals and should be produced to a scale of either 1:50 or 1:100. The plans should be sufficiently detailed to give a true representation of the detailing of the*

*building or structure as it stands at the moment. Details of the proposed external finishes should also be shown on the plans. For clarity this means any visible underbuild, walls, roof, windows, doors and in certain instances rainwater goods. An accurate scale bar should also be included on your plans along with written dimensions noting height to eaves and roof ridge and the overall length and breadth of the proposals.*

2.23 The proposed elevations have been reviewed and they fall below the standard prescribed in the HOPS validation standards: -

- There are no written dimensions noting height to eaves and roof ridge and the overall length and breadth of the proposals.

2.24 It is also worth noting that the requirement for accurate dimensions to be shown on plans is discussed in the following Scottish Public Services Ombudsman investigation of Glasgow City Council (see Appendix POS 2.1.2).

Sections and Levels Plans

2.25 The HOPS validation standards on sections and level plans is covered in (section 10), this stipulates: -

2.26 *In certain circumstance and depending on what is being proposed the planning authority may require additional section or levels plans, these may be requested as either existing or proposed or both. Site sections and site levels plans may be required where your proposals involve a change in ground level or when you are proposing to develop an uneven site in order for us to determine how your proposals will interact with their surroundings. Section plans may be required as either site sections or building sections. Typically site sections are only requested where there are significant changes in ground levels proposed to give an accurate indication of how the site will look compared to how it is at present. Building sections will typically be required where a new build is proposed*

*in order to show finished floor levels in order for us to determine the impact of your proposals on their surroundings. Below you will find some further information on each of these plan types.*

2.27 *Where existing and proposed site sections are required they should be produced to a scale of either 1:100 or 1:200, the number and location of where the sections should be taken will depend on the nature of your proposals. These plans should also contain an accurate scale bar.*

2.28 *Where existing and proposed building sections are required they should be produced to a scale of either 1:50 or 1:100, typically only one section will be required showing a cross section through each of the existing and proposed buildings with finished floor levels clearly indicated although this will depend on the nature of your proposals. These plan should also contain an accurate scale bar*

2.29 *Where existing and proposed site levels plans are required they should be produced to a scale of either 1:200 or 1:500. These plans should contain an accurate scale bar along with showing the direction of north and clearly identifying a fixed off-site datum point. Generally, contours should be shown at 0.5m intervals*

2.30 From Planning Objections Scotland review the submission is substandard for the following reasons: -

- There are no existing or proposed site level/topographical plans with a fixed off-site datum point detailed to illustrate the extent of cut and fill that will be undertaken at the site. The topography of this site is a potential development constraint. This information should form part of this application to confirm that the envisaged layout and relationship to neighbouring properties is acceptable.
- No site cross-section plans have been provided. Existing and proposed cross-section plans should be provided to clearly illustrate how the proposed development will relate to the site's existing

topography.

2.31 It is also worth noting that the requirement for accurate information on site levels and sections has been raised before in the Scottish Public Services Ombudsman case which investigated Aberdeenshire Council (see Appendix POS 2.1.4).

2.32 Planning Objections Scotland's review of the submission thus far has illustrated a number of shortcomings and based on the HOPS document the application should not have been validated by the Planning Authority. It is worth noting that the submission also falls short of the information required SG Annex D Circular 3/2022 (see Appendix POS 2.1.1).

**Concerns with the Application Form**

Accurate Description of proposed Development

2.33 It is important that the applicant/agent provides an accurate description of the proposed development on the application form and this reflects the proposed development on the drawings as per Cumming v Secretary of State for Scotland 1993.

2.34 The description associated with the application is as follows:- Application for 2 dwellings, access, and landscaping.

2.35 There is no reference to the drainage infrastructure. The description of the development is misleading and requires rectification.

## 3.0 OTHER DOCUMENTATION THAT SHOULD BE SOUGHT TO FULLY ASSESS THE APPLICATION

### Requirement for Ecological and Protected Species Survey(s)

3.1 When determining a planning application, the planning authority is required to have regard to the Habitats Directive and the Habitats Regulations. Consideration of how European Protected Species (EPS) are affected must be included as part of the consent process, not as an issue to be dealt with at a later stage. Three tests must be satisfied before the Scottish Government can issue a licence under regulation 44(2) of the Habitats Regulations so as to permit otherwise prohibited acts.

3.2 The application site (incorporating the drainage arrangements to the burn) could be utilised by European Protected Species. A preliminary ecological survey is required to confirm whether this proposal will have any adverse impact on biodiversity and protected species.

3.3 To enable the Planning Authority to comply with the Habitats Directive and the Habitats Regulations survey work is required as clarified by the Scottish Government's Chief Planner letter (see Appendix POS 3.1.1) and the Woolley and Morge Court Cases (see Appendix POS 3.1.2 and POS 3.1.3).

### Requirement for Drainage/Hydrology Assessment

3.4 With the proposed addition of two houses at the site to fully understand the hydrology/drainage implications a Drainage Assessment is required to detail the private foul and surface water drainage arrangements.

## 4.0 LEGAL REQUIREMENTS ASSOCIATED WITH THE PLANNING APPLICATION ASSESSMENT

4.1 Sections 25 and 37(2) of the Town and Country Planning (Scotland) Act 1997 require that planning decisions be made in accordance with the development plan unless material considerations indicate otherwise.

4.2 The operation of section 25 of the Act was given consideration in The House of Lord's judgement on City of Edinburgh Council v the Secretary of State for Scotland (1998). If a proposal accords with the development plan and there are no material considerations indicating that it should be refused, permission should be granted. If the proposal does not accord with the development plan, it should be refused unless there are material considerations indicating that it should be granted. The judgement also set out the following approach to deciding an application:

- Identify any provisions of the development plan which are relevant to the decision,
- Interpret them carefully, looking at the aims and objectives of the plan as well as detailed wording of policies,
- Consider whether or not the proposal accords with the development plan,
- Identify and consider relevant material considerations for and against the proposal, and
- Assess whether these considerations warrant a departure from the development plan.

**The Development Plan**

4.3 Sections 25 and 37(2) of the Town & Country Planning (Scotland) Act 1997 (as amended) require the determination of the proposal to be made in accordance with the provisions of the Development Plan, unless material considerations indicate otherwise. The Development Plan comprises NPF4 and the Edinburgh Local Development Plan 2016. The

applicable policies associated with this proposal are as follows:-

National planning Framework 4 (NPF 4)

- 1. Tackling the climate and nature crises
- 2. Climate mitigation and adaptation
- 3. Biodiversity
- 5. Soils
- 8. Green belts
- 14. Design, quality and place
- 17. Rural homes
- 22. Flood risk and water management

Edinburgh Local Development Plan 2016

- Policy Des 1 Design Quality and Context
- Policy Des 4 - Development Design – Impact on Setting
- Policy Des 5 Development Design – Amenity
- Policy Des 7 - Layout Design
- Policy Hou 4 - Housing Density
- Policy Env 10 - Development in the Green Belt and Countryside

**Material Considerations**

4.4 From a review of case law there are two main tests in deciding whether a consideration is material and relevant:

- It should serve or be related to the purpose of planning. It should therefore relate to the development and use of land, and
- It should relate to the particular application.

4.5 The following material considerations are applicable in the assessment of the Planning Application: -

- PAN 72: Housing in the Countryside
- PAN 79 Water and Drainage
- British Code of Practice – Flows and Loads 4 – Sizing criteria, treatment capacity for small waste water treatment systems

4.6 The case officer's Report of Handling should detail and assess all the relevant planning policies as well as the material considerations as required by the House of Lord Judgement and as detailed in the following maladministration cases POS 4.1.2 and POS 4.1.3.

4.7 To fully comment on the proposal's relationship with the Development Plan and associated material considerations further information is required as discussed in section 2 and 3 of this report. Obtaining this additional information is particularly important due to the proximity of neighbouring residential land uses.

4.8 Planning Objections Scotland's view, based on the information submitted to date, is the proposed residential development will have an adverse impact on the Green Belt, landscape and residential amenity. It clearly conflicts with the Development Plan.

<u>NPF 4 - 1. Tackling the climate and nature crises</u>

4.9 When considering all development proposals significant weight will be given to the global climate and nature crises. This proposal has not taken account of the potential biodiversity resource at the site and therefore has not taken account of the nature crisis. The application does not comply with NPF4 - 1. Tackling the climate and nature crises.

<u>NPF 4 - 2. Climate mitigation and adaptation</u>

4.10 The policy intent is to encourage, promote and facilitate development that minimises emissions and adapts to the current and future impacts of climate change. The development of this site is not in a sustainable

location and will not reduce , minimise or avoid green house gas emissions. It does not result in compact urban growth and is not in a location where rural revitalisation is required. It fails to comply with NPF4 Policy 2.

NPF 4 - 3. Biodiversity

4.11 Proposals for local development require to include appropriate measures to conserve, restore and enhance biodiversity, in accordance with national and local guidance. Measures should be proportionate to the nature and scale of development. The proposal has not taken account of the potential biodiversity resource at the site and incorporates no measures to conserve, restore and enhance biodiversity contrary to NPF4 - 3(c). Biodiversity.

NPF 4 - 5. Soils

4.12 The proposal results in encroachment onto undeveloped Class 2 (Prime) Agricultural Land. It meets none of the criteria contained within NPF4 - Policy 5 b) warranting this encroachment. Accordingly, the proposal is contrary to this policy and should be resisted.

NPF 4 - 8. Green belts

4.13 The proposal intrudes into the designated Greenbelt. It meets none of the criteria contained within NPF4 - Policy 8 where this intrusion would be warranted. It will clearly have an adverse visual impact on the greenbelt landscape and should be resisted.

NPF 4 - 14. Design, quality and place

4.14 Policy 14 criterion a) confirms that development proposals should be designed to improve the quality of an area whether in urban or rural locations and regardless of scale. The proposed dwellings extend

development into an open field. It has no regard to the existing built fabric or the rural landscape.

4.15 It is not considered to meet the aims identified in the ‘six qualities of successful places’ contrary to criterion (b) and (c). The inappropriate backland style development that encroaches past the rear curtilages of Tui Steading and Newhouse Cottages is not considered to create a ‘pleasant’ and attractive built space. It is not well connected, it does not improve accessibility and will be car dependent. It is not ‘distinctive’ and has not taken account of local architectural styles or interpreted in a way to reinforce local identity, it is not ‘sustainable’ by integrating nature positive and biodiversity solutions.

NPF 4 - 17. Rural homes

4.16 The proposal doesn’t meet any of the criteria associated with Policy 17a) Rural Homes. Due to the site's relationship to Edinburgh the development of residential dwellings I also fails to meet criterion b,c and d of Policy 17.

NPF 4 - 22. Flood risk and water management

4.17 Further hydrology and drainage information is required to illustrate compliance with the aims of Policy 22c) which seeks to minimise the area of impermeable surfaces, minimise risk of surface water flooding by managing all rain and surface water through sustainable urban drainage systems which should form part of and be integrated with existing blue/green infrastructure.

Policy Des 1 Design Quality and Context

4.18 This policy seeks innovation in the design and layout of new buildings, streets and spaces, provided that the existing quality and character of the immediate and wider environment are respected and enhanced and local distinctiveness is generated. As discussed under paragraph 4.14-4.15,

which related to NPF4 the proposal is not considered to meet the ‘six qualities of successful places’. The proposal does not create or contribute towards a sense of place. The layout and siting of the development is clearly at odds with the green belt and landscape. The residential scheme would damage the character and appearance of the area contrary to Policy Des 1 Design Quality and Context.

Policy Des 4 - Development Design – Impact on Setting

4.19 This Policy confirms that planning permission will be granted for development where it is demonstrated that it will have a positive impact on its surroundings, including the character of the wider townscape and landscape, and impact on existing views. In this case the positioning of the two dwellings is an inappropriate appendage which is clearly at odds with the wider landscape character.

Policy Des 5 Development Design – Amenity

4.20 Criterion a) confirms that the amenity of neighbouring developments is not adversely affected and that future occupiers have acceptable levels of amenity in relation to noise, daylight, sunlight, privacy or immediate outlook

4.21 Due to a lack of information, no meaningful assessment on overshadowing, daylight, sunlight, privacy or immediate outlook can be undertaken.

4.22 The proposed layout results in the formation of an access road along the full side boundary of Tui Steading as well as properties yet to be built. This backland style access will result in vehicular traffic squeezing past private rear curtilages resulting in noise which in turn will reduce residential amenity.

Policy Des 7 - Layout Design

4.23 The proposed layout does not demonstrate a comprehensive and integrated approach to the layout of buildings, streets, footpaths, cycle paths, public and private open spaces, services or SUDS. The proposal is clearly an inappropriate ad hoc addition to an already convoluted residential layout.

Policy Hou 4 - Housing Density

4.24 This further addition does not respect the existing characteristics of built development on Long Dalmahoy Road and will result in the further erosion and unacceptable damage to local character, environment quality and residential amenity.

Policy Env 10 - Development in the Green Belt and Countryside

4.25 The proposal intrudes into the designated Greenbelt. It doesn't meet the criteria contained within Policy Env 10 which limits development to the re-use of existing buildings or new buildings for agriculture, woodland and forestry, horticulture or countryside recreation, or where a countryside location is essential. It is clear the two dwellings would detract from the landscape quality and rural character of the area.

## 5.0 HUMAN RIGHT IMPLICATIONS

5.1 This proposal has potential Human Right implications for neighbours in terms of alleged interference with privacy, home or family life (Article 8) and peaceful enjoyment of their possessions (First Protocol, Article 1).

5.2 Planning Objections Scotland is of the view that refusal of the application or withdrawal are the only measures that can be deployed to ensure compliance with the Human Right Act. Proceeding on this basis would constitute a justified and proportionate control of the use of property and

is necessary in the public interest to ensure there is no interference with Article 8 and First Protocol, Article 1.

## 6.0 CONCLUSION

6.1 The lack of information associated with this submission means the application should be withdrawn or refused.

6.2 Notwithstanding the lack of information, taking account of the issues identified within section 4 of this report the planning application also fails to comply with NPF4 and the adopted Edinburgh Local Development Plan 2016. Furthermore there are no material considerations that would warrant approval of the application.

6.3 Clarity, openness and fairness are essential elements of the planning process, not opening up any amended plans or additional information to scrutiny would be a failure of the system, local democracy and natural justice. Our clients reserve the right to make commentary on any further submissions by the developer.

PLANNING OBJECTIONS SCOTLAND

# POS_2.1.1_SG_Annex_D_Circular_3_2022

RTPI Chartered Town Planners

RICS

## Annex D

## Plans and Drawings

1. All applications should be accompanied by a location plan and almost all will require a site plan. Where the applicant owns some or all of the "neighbouring land" (see paragraph 4.15 of the main circular), a plan showing such land must be included. The following are not statutory requirements but an indication of what planning authorities can reasonably expect by way of a minimum of information on these plans. Planning authorities may also publish their own guidance in this regard.

   **Location plan** – this must identify the land to which the proposal relates and its situation in relation to the locality: in particular in relation to neighbouring land. Location plans should be a scale of 1:2500 or smaller.

   **Neighbouring land owned by the applicant** – where required, this could be incorporated into the above plan or on a separate plan of similar scale.

   **Site Plan** – this should be of a scale of 1:500 or smaller and should show:

   - The direction of North;
   - General access arrangements, landscaping, car parking and open areas around buildings;
   - The proposed development in relation to the site boundaries and other existing buildings on the site, with written dimensions including those to the boundaries;
   - Where possible, all the buildings, roads and footpaths on land adjoining the site including access arrangements;
   - The extent and type of any hard surfacing; and
   - Boundary treatment including walls or fencing where this is proposed.

2. The range of other plans and drawings will depend on the scale, nature and location of the proposal. Planning authorities should consider providing guidance on the levels of information expected in different types of case. The following plans and drawings will not be required in every case, but the list indicates the sort of minimum information which should be included where necessary:

   **Existing and proposed elevations** (at a scale of 1:50 or 1:100) which should:

   - show the proposed works in relation to what is already there;
   - show all sides of the proposal;
   - indicate, where possible, the proposed building materials and the style, materials and finish of windows and doors;
   - include blank elevations (if only to show that this is in fact the case);
   - where a proposed elevation adjoins another building or is in close proximity, the drawings should clearly show the relationship between the buildings, and detail the positions of the openings on each property.

**Existing and proposed floor plans** (at a scale of 1:50 or 1:100) which should:

- explain the proposal in detail;
- show where existing buildings or walls are to be demolished;
- show details of the existing building(s) as well as those for the proposed development; and
- show new buildings in context with adjacent buildings (including property numbers where applicable).

**Existing and proposed site sections and finished floor and site levels** (at a scale of 1:50 or 1:100) which should:

- show a cross section(s) through the proposed building(s);
- where a proposal involves a change in ground levels, show both existing and finished levels to include details of foundations and eaves and how encroachment onto adjoining land is to be avoided;
- include full information to demonstrate how proposed buildings relate to existing site levels and neighbouring development; and
- show existing site levels and finished floor levels (with levels related to a fixed datum point off site), and also show the proposals in relation to adjoining buildings (unless, in the case of development of an existing house, the levels are evident from floor plans and elevations).

**Roof plans** (at a scale of 1:50 or 1:100) to show the shape of the roof and specifying details such as the roofing material, vents and their location.

PLANNING OBJECTIONS SCOTLAND

# POS_2.1.2_SPSO_201605668_Glasgow_City _Council_(dimensions, scale on plans)

RTPI Chartered Town Planners

RTPI Member N .47188

RICS

# SPSO decision report

**Case:** **201605668, Glasgow City Council**
**Sector:** local government
**Subject:** handling of application (complaints by opponents)
**Decision:** some upheld, recommendations


## Summary

Mr C lives in a conservation area. An application for planning permission for external alterations to a property neighbouring his was submitted to the council. The proposal was to increase the height of the roof of an existing utility building and associated works to create additional living space. Mr C submitted objections to the proposal. The council produced a report of handling of the application and granted full planning permission subject to conditions. The first of these was that the development had to be implemented in accordance with the approved drawings.

Mr C was concerned that the council's decision had been procedurally flawed and based on inaccurate information. He complained to the council about this. At both stages of the council's complaints procedure the responses stated their conclusions that the decision had been taken properly and on the basis of accurate information. Mr C was dissatisfied with these responses and raised his complaints with us.

We upheld Mr C's complaints that statements in the report were inaccurate (specifically statements that the pitch of the roof 'will match' the main house and that the rooflights will be 'invisible from a public area'); that the approved drawings associated with the application did not contain sufficient written dimensions to ensure that the precise location and scale of what was being proposed was clear; and that the council did not respond reasonably to some of Mr C's complaints. We did not uphold complaints that the evaluation of the application against relevant guidance was unreasonable or that the inadequacies of the report of handling meant that the decision on the application was unreasonable.


## Recommendations

What we asked the organisation to do in this case:

- Apologise to Mr C that they did not respond reasonably to some of his complaints about the handling of the application.
- Provide Mr C with a direct response to his complaint.
- Amend the approved drawings for the application to ensure the precise location and scale of what was being proposed, and has been approved, is clear.

What we said should change to put things right in future:

- Relevant council staff should be reminded that statements of fact in reports of handling should be accurate.
- Relevant council staff should be reminded that approved drawings should be adequately dimensioned to ensure the precise location and scale of what is being proposed is clear.

In relation to complaints handling, we recommended:

- Relevant council staff should be reminded that issues raised in complaints should be directly responded to.

We have asked the organisation to provide us with evidence that they have implemented the recommendations we have made on this case by the deadline we set.

PLANNING OBJECTIONS SCOTLAND

# POS_2.1.4_SPSO_201508154 Aberdeenshire_Council (finished floor level inaccuracies)

RTPI Chartered Town Planners

RTPI Member N .47188

RICS

# SPSO decision report

**Case:** **201508154, Aberdeenshire Council**
**Sector:** local government
**Subject:** handling of application (complaints by opponents)
**Outcome:** upheld, recommendations


## Summary

Mr and Mrs C raised concerns about the council's handling of various planning applications for a site, including their home. In particular, they said that certain applications failed to protect their home by ensuring that its floor level and that of its neighbour were built to a similar level. As a consequence of this, they said that the council failed to assess the impact of their neighbour's sun lounge on their amenity and privacy.

We made enquiries to the council who confirmed that they had since established that the levels of the properties concerned were not in accord with the applications granted and the houses were not built as envisaged. The difference in levels had led to Mr and Mrs C's property being overlooked.

We took independent planning advice and we found that one of the properties concerned was too high, whereas, the other was too low. The consequence of this was that overlooking of Mr and Mrs C's house was unavoidable. The council were largely responsible for this. Similarly, because the floor levels were incorrect, the council would not have been able to properly assess the impact of the neighbours' sun lounge on Mr and Mrs C's property. We upheld the complaint.


## Recommendations

We recommended that the council:

- make a formal apology to recognise the situation;
- review the staff guidance notes to include the treatment of window alterations during the course of development as consent variations or as permitted development;
- make a formal apology for their inability to assess the impact of the sun lounge;
- be prepared to meet the costs of any agreed solution; and
- review staff guidance notes on planning application handling with regard to successive permissions issued for the same site; the consistency of conditions which require to be carried through from one permission to any future permission; consideration of site levels and especially any proposed changes for residential amenity and overlooking.

PLANNING OBJECTIONS SCOTLAND

# POS_3.1.1_EPS letter from John O'Brien Planning Scottish Executive [2006]

RTPI Chartered Town Planners

RTPI Member N .47188

RICS

SCOTTISH EXECUTIVE

Development Department
Planning Division

Victoria Quay
Edinburgh EH6 6QQ

[redacted]
http://www.scotland.gov.uk

Heads of Planning
Planning Authorities

Your ref:
Our ref:

16 May 2006

Dear Sir/Madam

**EC DIRECTIVE 92/43/EEC ON THE CONSERVATION OF NATURAL HABITATS AND OF WILD FLORA AND FAUNA ("THE HABITATS DIRECTIVE")**

**THE CONSERVATION (NATURAL HABITATS &c) REGULATIONS 1994 ("THE 1994 REGULATIONS")**

**EUROPEAN PROTECTED SPECIES, DEVELOPMENT SITES AND THE PLANNING SYSTEM: INTERIM GUIDANCE FOR LOCAL AUTHORITIES ON LICENSING ARRANGEMENTS ("THE GUIDANCE")**

It has come to our attention that some planning authorities are attaching suspensive conditions to planning permissions instead of fully ascertaining, prior to the determination of the planning application, whether a European Protected Species (EPS) is present on a site, or what the effect might be of such a species being present on a site. An example of this is a condition requiring that a development should not commence until a survey has been undertaken to determine whether bats, otters etc are present.

This letter is to remind planning authorities of the terms of the above Guidance; for ease of reference here is a link to the Guidance: http://www.scotland.gov.uk/library3/environment/epsg-00.asp. The main paragraph that I would draw to your attention is paragraph 29. It states "*it is clearly essential that planning permission is not granted without the planning authority having satisfied itself that the proposed development either will not impact adversely on any European protected species on the site or that, in its opinion, all three tests necessary for the eventual grant of a Regulation 44* (the 1994 Regulations) *licence are likely to be satisfied. To do otherwise would be to risk breaching the requirements of the* (Habitats) *Directive and Regulation 3(4). It would also present the very real danger that the developer of the site would be unable to make practical use of the planning permission which had been granted, because no Regulation 44 licence would be forthcoming. Such a situation is in the interests of no-one*." Case law has reinforced the general message that the EPS requirements must be met with the European Commission showing itself willing to pursue Member States where the process is not properly followed.

Accordingly, to ensure that all decisions are compliant with the Habitats Directive and the Regulations and the above mentioned Guidance, planning authorities should fully ascertain whether

protected species are on site and what the implications of this might be before considering whether to approve an application or not.

It should be noted that, if any future applications notified to the Scottish Ministers are found to have such conditions attached, they will be returned to the planning authority to (a) arrange for any necessary survey etc action to be carried out, and (b) reconsider the proposal in the light of the results.

SNH have reminded its staff of the requirements of this Guidance.

Yours faithfully

[redacted]

**JOHN O'BRIEN**

POS Reference:-3.1.1

PLANNING OBJECTIONS SCOTLAND

# POS_3.1.2_Woolley v Cheshire East Borough Council [2009]

RTPI Chartered Town Planners

RTPI Member N .47188

RICS

Neutral Citation Number: 2009 EWHC 1227 (Admin)

Case No: CO/2820/2008

**IN THE HIGH COURT OF JUSTICE**
**QUEEN'S BENCH DIVISION**
**ADMINISTRATIVE COURT SITTING AT MANCHESTER**

Before :
**HIS HONOUR JUDGE WAKSMAN QC**
**(sitting as a Judge of the High Court)**

Between:
**THE QUEEN**
**(on the application of SIMON WOOLLEY)**
**Claimant**

**and**

**CHESHIRE EAST BOROUGH COUNCIL**
**Defendant**

**and**

**MILLENNIUM ESTATES LIMITED**
**Interested Party**

Richard Harwood (instructed by DLA Piper, Solicitors) for the Claimant
Martin Carter (instructed by Cobbetts LLP Solicitors) for the Defendant
The Interested Party did not appear and was not represented

**Hearing dates: 21 and 22 May 2009**

# Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

His Honour Judge Waksman QC :

## INTRODUCTION

1. This is the hearing of a substantive application for judicial review of the grant of planning permission by the Defendant, now known as Cheshire East Council ("the Council") for the demolition of a property known as Bryancliffe in Wilmslow, Cheshire and its replacement by a larger property consisting of 3 apartments. The planning permission itself was granted on 15 February 2008. That followed a resolution of the Council's Planning Sub-Committee to grant permission subject to conditions and the making of a s106 agreement, on 24 October 2007.

## BACKGROUND

2. The site in question abuts land running down to the River Bollin. See the plan at p261 of the Bundle and the photographs at pp148-153. The area surrounding the river is a designated Area of Special County Value (ASCV) although the site itself is not. The site was largely hidden from the river by a row of mature trees. The developer which bought the site in 2003 ("Millennium" the Interested Party in this case) cut down those trees shortly after acquisition. They were not protected and it was entitled to do so.

3. Millennium first applied for planning permission on 15 April 2005 but it was refused on 15 June. On 9 October 2006 a planning appeal against that refusal was dismissed by the Inspector. A second application was made on 22 December 2006 but later withdrawn after an adverse committee report. A third (and the ultimately successful) application was made on 16 August 2007. On 25 September, the Claimant in this case, the owner of an adjoining property called Bollinholme made representations through his solicitors. On around 14 October, the operative planning officer's report was produced for consideration by the Planning Sub-Committee on 24 October.

4. After the Planning Sub-Committee promulgated its resolution of 24 October, Mr Woolley's solicitors sent a pre-action protocol letter to the Council dated 7 November 2007, threatening judicial review unless its resolution was set aside and the matter returned to the Planning Sub-Committee. This was refused and the formal planning decision letter of 15 February 2008 later followed.

5. In very broad terms, the reason why the appeal failed in 2006 was because the Inspector found that the view of the proposed property from the river (unmasked by trees) was an unacceptable visual intrusion onto the ASCV. Millennium had proposed the planting of trees so as (once more) to mask the property but because of the then layout and location of the flats, the Inspector held that the owners were likely subsequently to obtain permission to remove them.

6. It was also the case before the Inspector that a small bat roost had been found at the existing property. A bat assessment (divider 13) dealt with the evidence

as to the existing roost and put forward proposals for adequate mitigation compensation and enhancement for the local bat population. The Inspector found that the proposal would not result in significant harm to biodiversity interests as set out in paragraph 1 of national policy statement PPS 9.

**THE PLANNING OFFICER'S REPORT**

7. The report referred to the land lying to the North of the site as within the Bollin Valley where special conservation policies applied and also within the Green Belt and an ASCV. The key issues concerned the impact on the visual amenity of the Bollin Valley, the impact on protected trees at the site and the impact on the neighbours' residential amenities. It noted that Millennium had now improved the siting, design and orientation of the new building and had also proposed a wider tree belt along the northern side of the site. It had also amended the bank profile to raise the height of the bank to form an even slope.

8. The existing villa was itself an intrusive urban feature visible from the Bollin River. The new building would be significantly larger than Bryancliffe in terms of footprint mass and scale and would be 1-2 metres higher although 4 metres further away from the valley bank than Bryancliffe. The new building would have a significant visual impact on the valley until the proposed tree belt matured sufficiently to screen and filter views.

9. At p6 the report stated that the most relevant structure and local planning policies included a list of various numbered policies. The Inspector's report on the appeal on the previous planning refusal was said to be a significant material consideration. At p7 the Inspector's concern at the visual intrusion of the proposed new apartments was set out in detail. He had concluded that due to its elevated position the development would be an unduly prominent urban intrusion and that its "unacceptably urbanising effect on the open rural character and visual amenities of the Bollin Valley" was in conflict with SP Policies R2, GEN 3 and NE 1 among others. As already noted he also found that the proposed tree planting plan before him would not provide a solution.

10. The report noted that the main improvement now was that the new building would be set further back from the valley allowing a belt of woodland to be planted and the regrading to the embankment would increase the height of the planting. The result of the resiting of the apartments meant that any new trees would not be under threat of removal by future residents.

11. Although the new building would be much more prominent than the existing one, it would become gradually screened over the 20 years it would take for the new trees to be fully established. At that point the resulting view from the Bollin Valley would be improved from the existing situation. Hence "the main issue for members to determine is whether the potential longer-term improvements outweigh the harm to the visual amenities of the Bollin Valley that would result in the earlier years following development.".

12. The report concluded thus: "Taking into account all representations made, the proposed development is considered acceptable in terms of design the impact on the living conditions of the occupiers of adjoining property the impact on housing supply in the Borough, the interests of nature conservation the impact on protected trees and highway considerations. It is also considered though, that the proposed development will introduce an intrusive building into the landscape when viewed from the Bollin Valley which is characterised by its wooded sides and limited views of buildings. However, on balance, subject to the introduction of a comprehensive and long term landscaping plan, it is considered that the negative impacts of the development can be adequate mitigated and hence overcome the concerns with the previously dismissed appeal. The application is therefore recommended for approval."

13. The report also said that a condition would have to be imposed to secure a method statement concerning the mitigation for the bats.

14. I will deal with other aspects of the report, in context, below.

15. The Council agreed with the recommendation in the report on 24 October, as noted above. It delegated the matter to the Corporate Manager Planning and Development for approval subject to the completion of a s106 agreement to include reference to the fact that any planting must take place prior to the commencement of building works and the conditions set out in the report.

## THE PRESENT POSITION

16. It is common ground, for the reasons set out below, that where demolition was proposed in relation to a site containing a bat roost a licence from Natural England was required. Such a licence was acquired by Millennium on 16 July 2008. In August 2008, it demolished the old building. But in January 2009 it went into administration. So there is now, no longer, any intrusive urban view impacting upon the valley of the River Bollin. The site with the benefit (or otherwise) of the now-challenged planning permission is currently up for sale. The administrators took no part in this hearing.

## THE ISSUES GENERALLY

17. The planning permission is challenged on a total of 7 grounds. I deal with each in the order taken by Counsel at the hearing. It is common ground that subject to the decision of the House of Lords in *Berkeley v SSE* [2001] 2 AC 603, dealing with obligations under EC law, if the permission is found by me to have been unlawful in any way, then it should be quashed provided that the outcome, if there had been no unlawfulness, may or might have been different. Mr Woolley does not have to show that it necessarily, or even probably, would have been. See *Simplex v SSE* (1989) 57 P & CR 306, 327. That deals with the hypothetical position at the time of the original permission. If there might have been a difference at that time, however, Mr Harwood for Mr Woolley accepted that he would also have to show that there might also be a difference if the Council were to make a fresh decision now. There was no issue about

that. Mr Carter for the Council conceded that it might well have done, which is hardly surprising given the change of circumstances referred to above.

18. I deal with the EC law aspect of this in the context in which it arises, Ground 1, to which I now turn.

## GROUND 1: FAILURES IN CONNECTION WITH THE EC HABITATS DIRECTIVE

### Legal Materials

19. Art. 12 (1) of the EC Habitats Directive requires Member States to take requisite measures to establish a system of strict protection of certain animal species prohibiting the deterioration or destruction of breeding sites or resting places. It is common ground that the pipistrelle bats who had their roost at Bryancliffe are so protected. Art. 16 then provides that if there is no satisfactory alternative and the derogation is not detrimental to the maintenance of the populations of the species at a favourable conservation status in their natural range, then Member States may derogate "in the interests of public health and public safety or for other imperative reasons of overriding public interest, including those of a social and economic nature and beneficial consequences of primary importance for the environment" among other reasons.

20. All derogations have to be reported to the European Commission every two years and in *Commission v Finland* C-342/05 the ECJ held that Member States were to ensure that all action affecting the protected species was authorised only on the basis of decisions containing a clear and sufficient statement of reasons referring to the reasons conditions and requirements of Art. 16 (1).

21. This directive is then implemented by the Conservation (Natural Habitats etc) Regulations 1994 ("the Regulations"). The Regulations set up a licensing regime dealing with the requirements for derogation under Art. 16 and this function is now carried out by Natural England. However, Regulation 3(4) provides that local planning (among other) authorities must "have regard to the requirements of the Habitats Directive so far as they may be affected by the exercise of those functions."

22. The critical issue which arises under this Ground is how a local authority such as the Council here should have regard to the Directive. The most pertinent and direct guidance is given by ODPM Circular 06/05 which accompanied and is complementary to PPS 9. Paragraph 98 thereof refers to protected species generally, stating that they are a material consideration for planning permission purposes and that local authorities should consult English Nature before granting planning permission. It then refers to the "further strict provisions" for those species governed by the Habitats Regulations.

23. Paragraph 103 then refers to the licensing regime pointing out that planning permission does not absolve the relevant party from obtaining a licence.

24. Paragraph 116 provides as follows:

> "When dealing with cases where a European protected species may be affected, a planning authority … has a statutory duty under regulation 3(4) to have regard to the requirements of the Habitats Directive in the exercise of its functions. So the Directive's provisions are clearly relevant in reaching planning decisions, and these should be made in a manner which takes them fully into account. The Directive's requirements include a strict system of protection for European protected species prohibiting deliberate killing catching or disturbing of species and damage to or destruction of their breeding sites or resting places. Derogations from this strict protection are only allowed in certain limited circumstances and subject to certain tests being met. Planning authorities should give due weight to the presence of a European protected species on a development site to reflect these requirements, in reaching planning decisions and this may potentially justify a refusal of planning permission."

25. DEFRA Circular 2/2002 is also relevant. It deals with the duties of local planning authorities to provide information to the licensing authority then dealing with a licence application under the Regulations. This is not of direct relevance to the question of their duties when considering a planning application itself. However, it is worth noting that on p2 it is said that authorities will typically be asked to provide information as to whether the tests specified in Art. 16 (1) of the Directive and Regulation 44 of the Regulations have been met. This will include an assessment of the importance attached to the development against the background of national planning policy guidance and regional and local development plans including material considerations. This shows that local planning authorities are expected to have the knowledge to assist in the exercise of whether the Art. 16 (1) tests (see paragraph 20 above) are met.

**The Relevant Duty at the planning stage**

26. Mr Carter submits that the only duty imposed by Regulation 3 (4) on an authority at the planning stage is to note the existence of the Directive and Regulations and to note the existence of the relevant bats. And beyond perhaps also stating that the applicant for permission needs a licence, the authority need not go.

27. I disagree. That approach disregards the very clear guidance set out in paragraph 116 of ODPM Circular 06/05 which (a) refers to the giving of weight "to reflect these requirements" and (b) contemplates that as a result of taking account of the Directive the authority might refuse permission altogether. Indeed, Mr Carter conceded, as he was bound to do in order to give any meaning to the last part of paragraph 116, that in a serious enough case, like an application to build a supermarket on a brownfield site which would involve considerable disruption to a local bat population, the authority might refuse permission where there was adequate space somewhere else on the brownfield site. But if that is right, it recognises that the local authority should engage with the provisions of the Directive. In my view that engagement involves a consideration by the authority of those provisions and considering whether the derogation requirements might be met. This exercise is in no way a substitute for the licence application which will follow if permission is

given. But it means that if it is clear or perhaps very likely that the requirements of the Directive cannot be met because there is a satisfactory alternative or because there are no conceivable "other imperative reasons of overriding public interest" then the authority should act upon that, and refuse permission. On the other hand if it seems that the requirements are likely to be met, then the authority will have discharged its duty to have regard to the requirements and there would be no impediment to planning permission on that ground. If it is unclear to the authority whether the requirements will be met it will just have to take a view whether in all the circumstances it should affect the grant or not. But the point is that it is only by engaging in this kind of way that the authority can be said to have any meaningful regard for the Directive. The very attenuated duty suggested by Mr Carter for the Council is in truth, no duty at all.

28. I have considered whether the Council could discharge its duty simply by making the obtaining of a licence a condition of the grant of permission. But that is not sufficient. After all, if no licence is obtained it is a criminal offence so there is a clear incentive to obtain one anyway. And the making of a condition is not in truth engaging with the Directive.

**Was the Council in breach of Regulation 3(4) here?**

29. In my view it clearly was. Indeed it is not suggested that the Council embarked upon the kind of exercise referred to above. The Planning Officer's report made no mention of the Directive or the Regulations. It referred to the need to have a condition for the mitigation of disturbance to the bats but that in effect assumes that the A16 (1) requirements could otherwise be met. It is true that the bat assessment on Bryancliffe which was referred to in the Planning Officer's report itself makes reference to the Regulations and the need for a licence together with a limited reference to OPDM Circular 06/05. But that does not amount to consideration by the Council.

30. Mr Woolley's solicitors' pre-action protocol letter dated 7 November 2007 expressly referred the Council to the relevant provisions of the Regulation and ODPM Circular 06/05, including paragraph 116. Following this letter the Council had sought to consult with Natural England. And Natural England's response was in effect that it did not have sufficient resources to provide a detailed commentary on the proposed development. But the points made in the letter about the Council's duty under paragraph 116 were not taken up or dealt with in Cobbett's response to that letter. That duty can be fulfilled without input from Natural England.

31. The Planning Permission itself stated in reason 6 that the proposal had an acceptable impact on European protected species. But that is not the question posed by the Directive and Regulation 3 (4) which concerns the requirements to be met before any derogation can take place at all. Equally a reference at the end of the Permission to the existence of the regulations and the need for a licence cannot discharge the Council's duty. The Planning Officer should have specifically raised this rather specialised duty upon the Council in his report so

that the Planning Sub-Committee could then seek to discharge it. As there was no reference to any of the relevant materials it is hardly surprising that the Council gave them no consideration.

32. Accordingly, it is clear that the Council was in breach of Regulation 3 (4).

**Consequences**

33. Mr Carter accepted that if I reached this conclusion as to the nature of the Council's duty and its consequent breach, the unlawfulness on its part had to be seen as a substantive breach of European Law. On that basis, since it is not suggested that the breach was *de minimis*, the principles enunciated by Lord Bingham and Lord Hoffmann in *Berkeley* (supra at pages 608, 613 and 615) come into play. In such a case the unlawful decision should be quashed without more. The Court does not even inquire as to whether it could be said that the impugned decision would have been the same in any event.

34. In any event, given the strict requirements for any derogation I would be very reluctant to hold that the outcome would have been the same in any event. And the fact that a licence was ultimately obtained (and based upon what appear to be some questionable assertions about the existing property and its ability to be used in the future) does not alter that conclusion. Indeed at the Inquiry Millennium's planning witness agreed that imperative reasons of overriding public importance did not arise and that there was a suitable alternative to demolition which was to retain Bryancliffe.

35. The planning permission must therefore be quashed on this ground alone. Strictly, it is not necessary for me to deal with the other grounds in the light of this conclusion. But in deference to the arguments made, I will deal with them briefly below.

**GROUND 5: FAILURE TO TAKE ACCOUNT OF CERTAIN APPLICABLE POLICIES**

**The Law**

36. Section 70 (2) of the Town and Country Planning Act 1990 requires the planning authority to have regard to the development plan so far as is material to the application and to any other material consideration. Section 38 (6) of the Planning and Compulsory Purchase Act 1994 states that if regard is to be had to the development plan, the determination must be made in accordance with the plan unless material considerations indicate otherwise.

37. It is accepted by Mr Harwood that if in substance the planning authority has considered the application, taking into account the provisions of a particular policy the fact that no specific mention is made of it does not render the decision unlawful. One example of that would be where several policies in effect say the same thing but only one is mentioned.

38. A planning officer also has a duty to provide sufficient information and guidance to the planning sub-committee to enable it to reach a decision applying the relevant statutory criteria. See *Lowther v Durham County Council* [2001] 3 PLR 83 at p105.

**The Relevant Policies**

39. Mr Woolley contends that the Council failed to have regard to a number of policies. They are referred to in paragraph 98 of Mr Harwood's Skeleton Argument. It seemed to me that the only two policies which (a) have real relevance and (b) whose provisions might have altered the approach taken by the Council are Structure Plan R1 and GEN 3. Both of them were stated in the Planning Permission to be relevant. R1 did not feature at all in the Planning Officer's Report. GEN 3 did, not as one of the listed relevant polices but as one which the Inspector had relied upon in the appeal when he upheld the refusal.

*R1*

40. At one stage it was contended that this policy was not actually relevant at all. That was a somewhat surprising submission in the light of the fact that the Planning Permission (issued after Mr Woolley's Pre-action protocol letter) said that it was. In any event I find that it was. It refers to loss or damage to particular sites including ASCV's. This includes, in my judgment, interference with its setting. That in turn can include the view to be had from the site which forms part of its overall value.

41. In the highlighted section of the first part of R1 it is stated that:

> "Where, exceptionally, because of other overriding considerations, unavoidable loss or damage to a site or feature or its setting is likely as a result of a proposed development measures of mitigation..will be required."

42. And paragraph 5.24 says that R1 acknowledges that

> "a development which would damage a heritage site or feature may exceptionally be allowed because of other overriding considerations. These considerations relate to the need for the development and whether there are alternatives to the proposal. Alternatives include a reduction in scale or redesign of the development and whether it can be accommodated on a suitable site elsewhere."

*GEN 3*

43. This states that all developments will be required to minimise adverse impacts on the beauty, heritage value and amenity of its site and surroundings. Also a development which has a major adverse impact on adjacent areas particularly ASCV's, should not be allowed.

**Was the Council in breach?**

*R1*

44. There can be no question but that the Council must have regarded its task on this application as essentially balancing two conflicting considerations – the adverse visual impact from the point of view of the river valley, caused by the erection of a new much larger building on the one hand, and the ultimate benefit of the screen provided by the new trees on the other. But R1 suggests that damage to the setting should only be permitted exceptionally. In a case where on any view the competing considerations were finely balanced and against a background of two prior failed applications at the same site, an appreciation of the need to show an exceptional case was of significance as were the other points made in paragraph 5.24.. In my judgment, the Council should have been alerted by the Planning Officer specifically to R1 for that reason. They were not and did not have it in mind.

*GEN 3*

45. This was of course mentioned in the report as being a policy relied upon by the Inspector. But what does not clearly emerge from that is the stipulation that if the development causes a major adverse impact on an adjacent ASCV it should not be allowed. Of course that it not an absolute but it is a strong indicator. That feature of GEN 3 was not set out in terms and in my judgment it should have been.

*Timing of the impact*

46. Mr Carter contends that there is a real question about the extent at least of the application of R1 and GEN3 since any interference would be for the limited period of 20 years at most and decreasing before then. I take that point and obviously the Council had the 20 year period in mind. But that does not alter the fact that they should have considered these policies head-on as it were and then within that they could consider the ameliorating tendencies of the fact that the impact was not to last for a lifetime.

*Conclusion*

47. Accordingly I find that there was unlawfulness here as well. And given the fine balancing exercise in any event performed here, it is impossible to say that the result would have been the same if the Council had considered these two policies directly.

**GROUND 4: FAILURE OF THE REPORT TO SAY WHETHER THERE WAS COMPLIANCE WITH THE POLICIES IN THE DEVELOPMENT PLAN OR NOT**

48. The Planning Permission states that the proposal did not comply with all relevant policies in the Development Plan, but it was considered acceptable because of the long term landscape mitigation. While the report clearly addressed the competing considerations for the Planning Sub-Committee it did not address directly the question of compliance or otherwise with the

Development Plan. Although often policies within a Development Plan as it affects a proposal might pull in different directions (eg housing or employment need as against conservation of the landscape) it is not clear that there were conflicting policies as such here. The proposal manifestly had nothing to do with employment and the Council had a moratorium on more housing at the time so that policy pulled in the same direction as conservation.

49. Given the debate before me as to whether, for example, policies R1 or GEN 3 were truly engaged at all, I take the view that the report should have expressed a view about non-compliance or otherwise with the relevant policies (or the Development Plan as a whole) so that the Council had a clear view of the legal framework within which they were to operate given the terms of s38 (6). This was all the more important where the matter was a finely balanced one. The fact that the Planning Permission expressly stated that there was non-compliance but this was outweighed here itself shows the relevance of the question of compliance or otherwise.

50. Mr Carter submits that it might not be possible for the Planning Officer to come to a clear view on compliance because here it could be said that the temporary nature of the intrusion meant there was compliance or alternatively there was not but there were other material considerations. But that possible ambiguity does not prevent the Planning Officer from taking a view and setting these matters out. And in any event an officer at some stage prior to the Planning Permission (but not the Planning Committee it would seem) took the view that there was non-compliance hence the statement in the Permission itself.

51. As with Ground 5, to which this ground is in truth closely allied, it is not at all clear that the Council would inevitably have come to the same view had the question of compliance been brought to the Committees' attention and addressed head-on. So this is another ground for quashing the Permission.

**GROUND 2: FAILURE TO CONSIDER ALTERNATIVES**

52. As ultimately refined the allegation here was that before the Council agreed that the benefit of a new row of trees screening the proposed building outweighed the visual intrusion for the first 20 years, it should have considered what might have happened if no permission was granted. The existing owner might have decided to plant trees in front of the river valley anyway so that the desired screen would emerge in any event. Then the supposed virtue of this development would in truth have been no virtue because the development was not needed in order to provide the screen.

53. In my judgment there was nothing in this point. The Council was not required to indulge in speculation about what this or some future owner of the site might do in terms of trees, or at all events it was well entitled to decide not to. Millennium might be thought to be unlikely to plant outside of a permission since it had cut the original trees down in the first place. And the position of any purchaser from it was simply unknown. An owner may have preferred an

uninterrupted view of the river. And even if an owner at some point in the future were to plant trees, that process would be starting later than any planting to be undertaken first off as a condition of this Planning Permission.

54. This ground of challenge therefore fails.

**GROUND 3: THE PROPOSED SWAP OF UNITS BETWEEN BRYANCLIFFE AND MACCLESFIELD ROAD/DAVEYLANDS SITES WAS IRRELEVANT AND CONTRARY TO CIRCULAR 05/05**

55. The Council's then policy was against any net increase to the housing supply in the area which of course this development was. Millennium however had planning permission for the building or conversion of up to 15 apartments at another site. It agreed to enter into a s106 obligation whereby that permission would not be put into effect if it built according to a permission for the apartments at Bryancliffe. The Council agreed to this "swap" so that the net housing supply was not increased as a result of the development at Bryancliffe.

56. Circular 05/05 emphasises that planning obligations should be linked to the proposed development with a functional or geographical link between the development and the item being provided by the obligation. In *Tesco v SSE* [1995] 1 WLR 759 Lord Keith stated that an offered planning application that had nothing to do with the development apart from the fact that it was offered by the developer will plainly not be a material consideration and could be regarded as an attempt to buy planning permission. If it had some connection with the proposed development which was not *de minimis,* then regard should be had to it.

57. Here it is said that there was no connection between an offer not to implement a planning permission at some other site in order to obtain permission on this site. And in any event the Council failed to consider whether that other permission might have expired before being implemented anyway.

58. I do not accept this. First, it seems to me that there is a proper functional linkage between what was offered and this development. Specific objection was taken on the basis that without more, housing supply would increase in contravention of Council policy for the area. That consideration by definition deals with a general matter (housing in the area) rather than something specific to the site itself. If the developer is in a position to avoid any net increase to housing supply in the area by giving up another permission, there is a direct connection with one of the policy considerations affecting the planning permission sought. It is not the same as "buying" the instant permission.

59. Moreover, it was not for the Council to speculate as to whether the other permission would in fact be implemented. That would have been an impossible task and it was entitled to assume that as it had been sought, the likelihood was that it would be implemented.

60. In paragraph 34 of his Decision, the Inspector reached the same view and he was right to do so.

61. Accordingly this ground of challenge fails.

**GROUND 6: NO AUTHORITY TO ISSUE THE PLANNING PERMISSION AS THE DECISION NOTICE DID NOT INCLUDE A CONDITION REQUIRING A METHOD STATEMENT FOR PLANTING ON THE SLOPE OR LANDSCAPE AND IMPLEMENTATION CONDITIONS**

62. The report recommended approval subject to a list of conditions which included the submission of details and approval of all landscaping (A01LS) and implementation of landscaping (A04LS). There should also be a method statement for planting on the slope. See Conditions 6, 7 and 24. However such conditions were not included within the Planning Permission. It is said that they were omitted without authority from the Council and accordingly the Planning Permission as a whole was unauthorised and should be quashed for that reason. The original Ground 6 referred only to the omission in the Planning Permission of a condition in relation to the Method Statement.

63. The minutes of the Planning Sub-Committee state that this application was to be delegated to the Corporate manager for Planning for "approval subject to the completion of a Section 106 Agreement to include reference to the fact that any planting must take place prior to the commencement of building works and that any damaged verges must be reinstated, the conditions set out in the report and additional conditions relating to the provision of a wheelwash and the gate post being protected and reinstated." On the face of it, therefore, the Council appeared to want all the conditions recommended by the Planning Officer as well as the s106 Agreement to include planting to take place before commencement of the building works.

64. However, paragraph 3 of the letter from Cobbetts dated 13 March 2008 states that the Council members considered that the grading works should be undertaken before the building works commenced and this was included in the s106 agreement. Accordingly there was no further requirement for the condition and it was omitted from the decision notice. This explanation was no doubt given on the instructions of the Council and it suggests that whatever the minutes might say the intention was that the Condition dealing with a method statement was no longer needed. Certainly, if it was intended to deal with some aspect of the grading works in the s106 agreement it would seem very odd if other aspects still fell to be dealt with by conditions. So although the minutes referred to the conditions generally, there was no intention in fact to retain a condition for the Method Statement.

65. Paragraph 1.5 of Schedule 1 to the s106 agreement provides that a "Detailed Planting Plan and Method Statement will be submitted to the Council for approval prior to the Commencement of the Bryancliffe Permission such consent not to be unreasonably withheld or delayed."

66. Paragraph 1.6 requires Millennium to "implement the On-Site Landscaping Scheme prior to the Commencement of the Bryancliffe Permission.."

67. The Detailed Planting Plan refers to a plan giving details of what was to be planted and where. The Method Statement was defined to mean a method statement for the construction and detail of the retaining walls on the Site, the formation of any banks, the planting of any trees and details of any irrigation scheme.

68. The On-Site Landscaping Scheme meant the Method Statement, Detailed Planting Plan and Drawing No. M1445.01G as annexed to the agreement.

69. In my judgment the effect of all of that was that Millennium had to submit its proposed Method Statement and Planting Plans to the Council for approval prior to commencing the development and that approval had to be given before such work commenced. That is my interpretation of paragraph 1.5. Then, under paragraph 1.6 all of the landscaping work (as approved under paragraph 1.5) had to be completed prior to the commencement of the development. I do not read "implement" as meaning "start". I take Mr Harwood's point that my interpretation might mean that some (but by no means all) of the soft landscaping could not easily be done before the building works started or might be at risk of disruption once they were. Some relaxation of this obligation might be needed in practice. But this potential problem does not to my mind impel a reading of the word "implement" which is contrary to its normal sense. Moreover, to read it as meaning "start" deprives the obligation of much of its effect and would run counter to the Council's clear intention expressed at the meeting.

70. Accordingly, as far as the Method Statement for the grading works is concerned, I do not consider that there was in truth any departure from what the Council authorised in the meeting of the Planning sub-committee.

71. As for soft landscaping other than that involved in the regrading works, I accept that there is a technical difference between placing an obligation within a condition and simply making it part of the s106 agreement. Breach of condition can lead to the issue of an enforcement notice claiming that the development is unlawful, with the possibility of a criminal sanction if not rectified. And while an injunction can be sought on the grounds of a breach of a s106 notice, the Council has the power to seek an injunction in relation to the non-fulfilment of a condition.

72. But given that the Council clearly wanted a very important aspect of landscaping (to do with regrading) covered in the s106 Agreement it is far from obvious to me that in truth it was still insisting on other aspects of soft landscaping remaining as conditions as opposed to being put into the agreement as well. As interpreted by me paragraphs 1.5 and 1.6 well cover all the soft landscaping points. The amendment to Ground 6 to include complaints about the lack of conditions dealing with soft landscaping came very late in

the day. And although Mr Carter was sensibly prepared to deal with them, there was not the same opportunity for the Council to deal with them as it had had when the Method Statement point was raised in DLA Piper's letter of 29 February 2008. Given that the Council might well in fact have been intending that all landscaping should now be in the s106 agreement, which provides for it comprehensively, I am not prepared to find on the materials before me that the officer drawing up the Planning Permission had no authority to deal with that question in the way that he did.

73. Accordingly, Ground 6 fails.

**GROUND 7: FAILURE ADEQUATELY TO SUMMARISE THE RELEVANT POLICIES**

74. Art. 22 (1) (b) of the Town and Country Planning (General Development Procedure) Order 1995 requires decision notices to include a summary of the relevant policies.

75. As noted above the Planning Permission makes reference to a number of polices. It does so by citing their number and then in brackets, what they are about. See p382 of the Bundle. It is said that a fuller description should have been given so as to refer to the particular parts of them that had a bearing on the decision. Reference was made to the decision of Collins J in *Tratt v Horsham District Council* [2007] EWHC 1485 (Admin) in which he stated that it would be insufficient to identify a policy without indicating what it concerns (as occurred in that case). A summary of the relevant policies was required. It need be no more than a few words identifying the relevant aspect of the policy. In *Mid-Counties Co-operative v Forest of Dean District Council* [2007] EWHC 1714 (Admin) Collins J said that all that was needed was an indication of what the policy deals with insofar as it is material to the permission in question.

76. In my judgment, the summaries given in the Planning Permission here were sufficient especially bearing in mind the relatively narrow compass of the issues arising.

77. Accordingly, this final ground of challenge fails also.

**CONCLUSION**

78. However because of my determination of Grounds 1, 4 and 5 in favour of Mr Woolley, this application for judicial review succeeds and the decision which granted planning permission dated 15 February 2008 must be quashed.

79. I am indebted to both Counsel for their excellent and helpful oral and written submissions. I will hear from them hereafter, if necessary, on any consequential matters which cannot be agreed.

PLANNING OBJECTIONS SCOTLAND

# POS_3.1.3_Morge v Hampshire County Council [2011]

RTPI Chartered Town Planners

RTPI Member N .47188

RICS

**Hilary Term**
**[2011] UKSC 2**
*On appeal from: 2010 EWCA Civ 608*

# JUDGMENT

# Morge (FC) (Appellant) *v* Hampshire County Council (Respondent)

**before**

**Lord Walker**
**Lady Hale**
**Lord Brown**
**Lord Mance**
**Lord Kerr**

## JUDGMENT GIVEN ON

## 19 January 2011

**Heard on 8 November 2010**

| *Appellant* | *Respondent* |
| --- | --- |
| Charles George QC<br>Gregory Jones<br>Sarah Sackman<br>(Instructed by Swain & Co Solicitors) | Neil Cameron QC<br>Sasha White<br><br>(Instructed by Hampshire County Council Legal Services) |

**LORD BROWN**

1. This appeal concerns a planning permission granted on 29 July 2009 for a proposed three mile (4.7km) stretch of roadway to provide a rapid bus service between Fareham and Gosport in South East Hampshire. The permission was challenged on environmental grounds including not least its likely impact on several species of European protected bats inhabiting the general area around the proposed busway. The challenge having failed before Judge Bidder QC (sitting as a Deputy High Court judge) on 17 November 2009 – [2009] EWHC 2940 (Admin) – and before the Court of Appeal (Ward, Hughes and Patten LJJ) on 10 June 2010 – [2010] EWCA Civ 608, [2010] PTSR 1882 – this Court on 27 July 2010 gave the appellant limited permission to appeal so as to raise two issues of some general importance.

2. Issue one concerns the proper interpretation of article 12 (1)(b) of the Habitat's Directive 92/43/EEC which provides that:

> "Member States shall take the requisite measures to establish a system of strict protection for the animal species listed [the protected species] in their natural range, prohibiting . . . (b) deliberate disturbance of these species, particularly during the period of breeding, rearing, hibernation and migration; . . ."

3. Issue two concerns the proper application of regulation 3(4) of the Conservation (Natural Habitats, etc) Regulations 1994 SI 1994/2716 (as amended first by the Amendment Regulations 2007 and then the Amendment Regulations 2009), by which domestic effect is given to the Directive:

> "3(4) . . . every competent authority in the exercise of any of their functions, shall have regard to the requirements of the Habitats Directive so far as they [the requirements] may be affected by the exercise of those functions."

With that briefest of introductions let me turn to the essential factual context in which these issues now arise, noting as I do so that altogether fuller descriptions of the facts can be found in the judgments below.

4. The proposed new rapid busway – the first and larger phase of which is already substantially under way, applications for interlocutory relief to stay its continuance having been refused by the Court of Appeal and refused by this Court on granting leave to appeal – runs along the path of an old railway line, last used in 1991. The scheme provides for buses to be able to join existing roads at various points along the route. It will create a new and efficient form of public transport to the benefit of many residents, workers and visitors to the region. Central Government has committed £20m to it.

5. Although most of the scheme lies within a built-up area, there are a number of designated nature conservation sites nearby and, unsurprisingly, once the railway line ceased to be used, the surrounding area became thickly overgrown with vegetation and an ecological corridor for various flora and fauna. Although, therefore, the scheme was widely supported, it also attracted a substantial number of objectors one of whom is Mrs Morge, the appellant, who lives close by.

6. The respondent authority is both the local planning authority for the relevant area and also the applicant for planning permission through its agent, Transport for South Hampshire, who submitted a planning application on 31 March 2009. Taking it very shortly, on 30 April 2009 Natural England (the Government's adviser on nature conservation) objected to the planning application in part because of their concerns about the impact of the development on bats (an objection reiterated on 29 June 2009). As a result the respondent authority commissioned an Updated Bat Survey (UBS) which was submitted on 9 July 2009. On 17 July 2009, largely as a result of the UBS, Natural England withdrew their objections. There then followed a Decision Report prepared by the respondent's planning officers, a further letter from Natural England dated 23 July 2009, an Addendum Decision Report from the officers, and on 29 July 2009 a three hour meeting of the respondent's Regulatory Committee which concluded with the grant of planning permission for the scheme by a majority of six to five with two abstentions.

7. The UBS is a document of some 70 pages. For present purposes, however, its main findings can be summarised as follows. No roosts were found on the site. The removal of trees and vegetation, however, would result in a loss of good quality bat foraging habitats. This would have a moderate adverse impact at local level on foraging bats for some nine years, the impact thereafter reducing, because of mitigating measures, to slight adverse/neutral. In addition the busway would sever a particular flight path followed by common pipistrelle bats, increasing their risk of collision with buses (without, however, given the proposed mitigation of this risk, a significant impact on bats at a local level).

8. The Officers' Decision Report (again a lengthy document) included these passages with regard to the bats:

> "3.7 Detailed ecological surveys have been undertaken across the site over the last eighteen months. . . . A number of bat species roost and forage along the corridor . . . Accordingly, a strategy to mitigate the impact on these species has been developed. The main principles of the strategy [include] enhancement of the habitat of the retained embankment to provide continued habitat for displaced species. Bat surveys have also been carried out to enable appropriate measures to be implemented.
>
> . . .
>
> 5.6 Natural England initially raised objections on the grounds that the application contains insufficient survey information to demonstrate whether or not the development would have an adverse effect on bats . . . which are [a] legally protected species. Further survey work was undertaken in response to this objection and provided to Natural England. Following receipt of this information Natural England are now satisfied that the necessary information has been provided and have withdrawn their objection. They recommend that if the council is minded to grant permission for this scheme conditions be attached requiring implementation of the mitigation and compensation measures set out in the reports.
>
> . . .
>
> Nature Conservation Impact
>
> 8.17 . . . the requirements of the Habitats Regulations need to be considered.
>
> . . .
>
> 8.19. . . The surveys also identified the presence of a diversity of bat species, which are protected, using the trees alongside the track for foraging. An Updated Bat Survey Method Statement and Mitigation Strategy has been submitted with measures to ensure there is no significant adverse impact to them from these proposals.

. . .

Conclusion

8.24 . . . suitable mitigation measures are proposed for . . . protected species . . . ”

The Addendum Report dealt specifically with the Habitat Regulations and repeated that Natural England, having initially objected to the application and required further survey information regarding protected species, were now satisfied and had withdrawn their objection.

9. Against this essential factual background I turn now to the two main issues arising.

*Issue 1 – the proper interpretation of article 12(1)(b) of the Habitat Directive*

Article 12(1)(b) must, of course, be interpreted in the light of the Directive as a whole. Included amongst the recitals in its preamble is this:

> “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 trans- boundary nature, it is necessary to take measures at Community level in order to conserve them”.

10. Article 1 is the definition article and defines “species of Community interest” in four categories, respectively “endangered”, “vulnerable”, “rare”, and “endemic and requiring particular attention [for various specified reasons]”. The six species of protected bats affected by the proposed busway fall variously into the second, third and fourth of those categories. Article 1(i) defines “conservation status of a species” to mean “the sum of the influences acting on the species concerned that may affect the long-term distribution and abundance of its populations”. It further provides:

> “The conservation status will be taken as ‘favourable’ when:

> population dynamics data on the species concerned indicate that it is maintaining itself on a long-term basis as a viable component of its natural habitats, and
>
> the natural range of the species is neither being reduced nor is likely to be reduced for the foreseeable future, and
>
> there is, and will probably continue to be, a sufficiently large habitat to maintain its populations on a long-term basis".

Article 2(2) provides that: "Measures taken pursuant to this Directive shall be designed to maintain or restore, at favourable conservation status, natural habitats and species of wild fauna and flora of Community Interest."

11. There then follow articles 3 to 11 under the head "Conservation of natural habitats and habitats of species". Within these provisions one should note article 6(2):

> "Member states shall take appropriate steps to avoid, in the special areas of conversation, 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."

12. Articles 12 to 16 inclusive then follow under the head "Protection of species". I have already set out article 12(1)(b). Article 16 provides for derogation and so far as material provides:

> "16(1) Provided that that there is no satisfactory alternative and the derogation is not detrimental to the maintenance of the populations of the species concerned at a favourable conservation status in their natural range, member states may derogate from the provisions of articles 12 . . . : . . . (c) in the interests of public health and public safety, or for other imperative reasons of overriding public interest, including those of a social or economic nature and beneficial consequences of primary importance for the environment".

13. Besides the issues now before us the Court of Appeal had to deal in addition with challenges based upon article 12(1)(d) of the Directive and upon the respondent's decision not to treat the proposal as an EIA development (matters

upon which this court refused leave to appeal). Ward LJ gave the only reasoned judgment, one of infinite care and thoughtfulness and, I may add, one of enormous assistance to this Court in its consideration of this further appeal.

14. As a background to deciding the meaning of article 12(1)(b), Ward LJ necessarily had regard to the European Commission's views upon the scope of the Directive, as set out in a Guidance document issued in February 2007 which include the following:

> "(37) Disturbance (e.g. by noise, source of light) does not necessarily directly affect the physical integrity of a species but can nevertheless have an indirect negative effect on the species (eg by forcing them to use lots of energy to flee; bats, for example, when disturbed during hibernation, heat up as a consequence and take flight, so are less likely to survive the winter due to high loss of energy resources). The intensity, duration and frequency of repetition of disturbances are important parameters when assessing their impact on a species. Different species will have different sensitivities or reactions to the same type of disturbance, which has to be taken into account in any meaningful protection system. Factors causing disturbance for one species might not create disturbance for another. Also, the sensitivity of a single species might be different depending on the season or on certain periods of its life cycle e.g. (breeding period). Article 12(1)(b) takes into account this possibility by stressing that disturbances should be prohibited particularly during the sensitive periods of breeding, rearing, hibernation and migration. Again, a species-by-species approach is needed to determine in detail the meaning of 'disturbance'.
>
> (38) The disturbance under article 12(1)(b) must be deliberate . . . and not accidental. On the other hand, while 'disturbance' under article 6(2) must be significant, this is not the case in article 12(1), where the legislator did not explicitly add this qualification. This does not exclude, however, some room for manoeuvre in determining what can be described as disturbance. It would also seem logical that for disturbance of a protected species to occur a certain negative impact likely to be detrimental must be involved.
>
> (39) In order to assess a disturbance, consideration must be given to its effect on the conservation status of the species at population level and biogeographic level in a member state . . .. For instance, any disturbing activity that affects the survival chances, the breeding success or the reproductive ability of a protected species or leads to a

> reduction in the occupied area should be regarded as a 'disturbance' in terms of article 12. On the other hand, sporadic disturbances without any likely negative impact on the species, such as for example scaring away a wolf from entering a sheep enclosure in order to prevent damage, should not be considered as disturbance under article 12. Once again, it has to be stressed that the case by case approach means that the competent authorities will have to reflect carefully on the level of disturbance to be considered harmful, taking into account the specific characteristics of the species concerned and the situation, as explained above."

No problem arises as to what is meant by "deliberate" in article 12(1)(b). As stated by the Commission in paragraph 33 of their Guidance:

> "'Deliberate' actions are to be understood as actions by a person who knows, in light of the relevant legislation that applies to the species involved, and the general information delivered to the public, that his action will most likely lead to an offence against the species, but intends this offence or, if not, consciously accepts the foreseeable results of his action."

Put more simply, a deliberate disturbance is an intentional act knowing that it will or may have a particular consequence, namely disturbance of the relevant protected species. The critical, and altogether more difficult, question is what precisely in this context is meant by "disturbance".

15. Having, as I too have sought to do, thus cleared the ground and recognised that the central difficulty in the case lies in determining the level of disturbance required to fall within the prohibition, Ward LJ rejected the appellant's contention that any disturbing activity save only that properly to be characterised as *de minimis* – too negligible for the law to be concerned with – constitutes disturbance within the article. As Ward LJ pointed out, the example given in paragraph 38 of the Commission's Guidance (scaring away a wolf from the sheep fold) "must be an *a fortiori*, rather than a typical one". The judgment then continues (and I make no apology for quoting it at some length):

> "35 . . . the disturbance does not have to be significant but, as para 38 of the guidance explains, there must be some room for manoeuvre which suggests the threshold is somewhere between de minimis and significant. It must be certain, that is to say, identifiable. It must be real, not fanciful. Something above a discernible disturbance, not necessarily a significant one, is required. Given that there is a

spectrum of activity, the decision-maker must exercise his or her judgment consistently with the aim to be achieved. Given the broad policy objective which I explored . . . above ['to ensure that the population of the species is maintained at a level which will ensure the species' conservation so as to protect the distribution and abundance of the species in the long term'], disturbing one bat, or even two or three, may or may not amount to disturbance of the species in the long term. It is a matter of fact and degree in each case.

36 [Counsel for the appellant] seizes on the words in para 38 . . . of the guidance, 'a certain negative impact likely to be detrimental must be involved and he elevates this statement into a test for establishing a disturbance. His difficulty is that that does not answer the critical question: when does the negative impact become detrimental? Para 39 seems to me to spell out the proper approach, namely to give consideration to the 'effect on the conservation status of the species at population level and bio-geographic level'. This in my judgment is an important refinement. The impact must be certain or real, it must be negative or adverse to the bats and it will be likely to be detrimental when it negatively or adversely effects the conservation status of the species. 'Conservation status of a species' is a term of art which . . . means the sum of the influences acting on the species concerned that may affect the long-term distribution and abundance of its population. That is why the guidance at para 39 makes the point that the disturbing activity must be such as 'affects the survival chances . . . of a protected species'. Furthermore, 'the competent authorities will have to reflect carefully on the level of disturbance to be considered harmful, taking into account the specific characteristics of the species concerned and the situation', to quote the concluding sentence of para 39. The summary in the guidance . . . has the same emphasis:

> 'Disturbance is detrimental for a protected species eg by reducing survival chances, breeding success or reproductive ability. A species-by-species approach needs to be taken as different species will react differently to potentially disturbing activities.'

37. Having regard to the aim and purpose of the Directive and of article 16 and having due consideration of the guidance, I am driven to conclude that for there to be disturbance within the meaning of article 12(1)(b) that disturbance must have a detrimental impact so as to affect the conservation status of the species at population level. . ..

. . .

39. In my judgment whether the disturbance will have a certain negative impact which is likely to be detrimental must be judged in the light of and having regard to the effect of the disturbance on the conservation status of the species, ie, how the disturbance affects the long-term distribution and abundance of the population of bats. I remind myself that according to the [Commission's] guidance . . . , 'favourable conservation status could be described as a situation where a . . . species is doing sufficiently well in terms of quality and quantity and has good prospects of continuing to do so in the future'. Whether there is a disturbance of the species must be judged in that light."

16. Finally, in a passage in the judgment headed Overall Conclusions, Ward LJ, expressing himself satisfied that the respondent's planning committee had due regard to the requirements of the Directive, said this:

"73. I have been troubled by the fact that the conclusion of the bat survey upon which such reliance was placed is to the effect that no *significant* impacts to bats are anticipated. The disturbance does not have to be significant and this is a misdirection or misunderstanding of . . . [article] 12(1)(b) . . . of the Habitats Directive. The question for me is, therefore, whether the conclusions can be upheld. I am satisfied that the decision of the planning committee should not be quashed.

74. I reach that conclusion for these reasons. I am satisfied that the loss of foraging habitat occasioned by cutting a swathe through the vegetation does not offend article 12(1)(b) which is concerned with protection of the species not with conservation of the species' natural habitats. I am satisfied that that bald statement that the bats have to travel further and expend more energy in foraging does not justify a conclusion that the conservation status of the bats is imperilled or at risk. There is no evidence which would allow the planning committee to conclude that the long-term distribution and abundance of the bat population is at risk. There is no evidence that they will lose so much energy (as they might when disturbed during hibernation) that the habitat will not still provide enough sustenance for their survival, or their survival would be in jeopardy. There is no evidence that the population of the species will not maintain itself on a long-term basis. There is therefore no evidence of any activity

> which would as a matter of law constitute a disturbance as the word has to [be] understood.
>
> 75. As I have already concluded, the risk of collision cannot amount to a disturbance and article 12(1)(b) is not engaged in that respect."

17. Mr George QC submits that the Court of Appeal were wrong to hold that article 12(1)(b) is breached only when the activity in question goes so far as to imperil the conservation status of the species at population level i.e. that only then does the activity amount to a "disturbance" of the species. This, he points out (and, indeed, Ward LJ himself recognised), puts the threshold for engaging the article higher than Mr Cameron QC for the respondent put it, Mr Cameron's main concern being that such a construction would sit uneasily with article 16 (1) (a provision which itself necessarily implies that article 12(1)(b) may need to be, and be capable of being, derogated from notwithstanding that this is only permissible where it is "not detrimental to the maintenance of the populations of the species concerned at a favourable conservation status"). The Court of Appeal's construction is also, submits Mr George, inconsistent with an Additional Reasoned Opinion addressed to the UK by the Commission dated 18 September 2008 with regard inter alia to what was then the new Regulation 39(1), inserted by the 2007 Amendment Regulations, providing for an offence where someone "deliberately disturbs wild animals of any species in such a way as to be likely significantly to affect (i) the ability of any significant group of animals of that species to survive, breed or rear or nurture their young . . .". The prohibition in the Directive, the Commission pointed out in their Opinion, "is not limited to *significant* disturbances of *significant groups* of animals". Article 12(1)(b) of the Directive, the Opinion later suggested, "covers all disturbance of protected species."

18. Whilst not actually conceding that the Court of Appeal approach is wrong, Mr Cameron contends now that the proper approach is to ask whether the activity in question produces "a certain negative impact likely to be detrimental to the species having regard to its effect on the conservation status of the species".

19. In my judgment certain broad considerations must clearly govern the approach to article 12(1)(b). First, that it is an article affording protection specifically to species and not to habitats, although obviously, as here, disturbance of habitats can also indirectly impact on species. Secondly, and perhaps more importantly, the prohibition encompassed in article 12(1)(b), in contrast to that in article 12(1)(a), relates to the protection of "species", not the protection of "specimens of these species". Thirdly, whilst it is true that the word "significant" is omitted from article 12(1)(b) – in contrast to article 6(2) and, indeed, article 12(4) which envisages accidental capture and killing having "a significant negative impact on the protected species" – that cannot preclude an assessment of the nature

and extent of the negative impact of the activity in question upon the species and, ultimately, a judgment as to whether that is sufficient to constitute a "disturbance" of the species. Fourthly, it is implicit in article 12(1)(b) that activity during the period of breeding, rearing, hibernation and migration is more likely to have a sufficient negative impact on the species to constitute prohibited "disturbance" than activity at other times.

20. Beyond noting these broad considerations it seems to me difficult to take the question of the proper interpretation and application of article 12(1)(b) much further than it is taken in the Commission's own Guidance document. (The Commission's suggestion in their September 2008 Additional Reasoned Opinion that article 12(1)(b) "covers all disturbance of protected species" in truth begs rather than answers the question as to what activity in fact constitutes such "disturbance" and cannot sensibly be thought to involve a departure from their 2007 Guidance.) Clearly the illustrations given in paragraph 39 of the Guidance – on the one hand "any disturbing activity that affects the survival chances, the breeding success or the reproductive ability of a protected species or leads to a reduction in the occupied area", on the other hand "scaring away a wolf from entering a sheep enclosure" – represent no more than the ends of the spectrum within which the question arises as to whether any given activity constitutes a disturbance. Equally clearly, to my mind, the suggestion in paragraph 39 that "consideration must be given to its effect [the effect of the activity in question] on the conservation status of the species at population level and biogeographic level" does not carry with it the implication that only activity which *does* have an effect on the conservation status of the species (i.e. which imperils its favourable conservation status) is sufficient to constitute "disturbance".

21. I find myself, therefore, in respectful disagreement with Ward LJ's conclusion (at para 37) "that for there to be disturbance within the meaning of article 12(1)(b) that disturbance must have a detrimental impact so as to affect the conservation status of the species at population level". Nor can I accept his view (at para 36) that "the guidance, at para 39, makes the point that the disturbing activity must be such as 'affects the survival chances . . . of a protected species'". On the contrary, as I have already indicated, para 39 of the guidance uses disturbing activity of that sort merely to illustrate one end of the spectrum. Rather the guidance explains that, within the spectrum, every case has to be judged on its own merits. A "species-by-species approach is needed" and, indeed, even with regard to a single species, the position "might be different depending on the season or on certain periods of its life cycle" (para 37 of the guidance). As para 39 of the guidance concludes: "it has to be stressed that the case-by-case approach means that the competent authorities will have to reflect carefully on the level of disturbance to be considered harmful, taking into account the specific characteristics of the species concerned and the situation, as explained above."

22. Two further considerations can, I think, usefully be identified to be borne in mind by the competent authorities deciding these cases (considerations which seem to me in any event implicit in the Commission's Guidance). First (and this I take from a letter recently written to the respondent by Mr Huw Thomas, Head of the Protected and Non-Native Species Policy at DEFRA, the Department responsible for policy with regard to the Directive): "Consideration should . . . be given to the rarity and conservation status of the species in question and the impact of the disturbance on the local population of a particular protected species. Individuals of a rare species are more important to a local population than individuals of more abundant species. Similarly, disturbance to species that are declining in numbers is likely to be more harmful than disturbance to species that are increasing in numbers."

23. Second (and this is now enshrined in Regulation 41(2) of the Conservation of Habitats and Species Regulations 2010 SI 2010/490):

> "41(2) . . . disturbance of animals includes in particular any disturbance which is likely (a) to impair their ability (i) to survive, to breed or reproduce, or to rear or nurture their young, or (ii) in the case of animals of a hibernating or migratory species, to hibernate or migrate; or (b) to affect significantly the local distribution or abundance of the species to which they belong."

Note, however, that disturbing activity likely to have these identified consequences is included "in particular" in the prohibition; it does not follow that other activity having an adverse impact on the species may not also offend the prohibition.

24. In summary, therefore, whilst I prefer Mr Cameron's suggested approach to this article (see para 18 above) than that adopted by the Court below or that contended for by Mr George, it seems to me in the last analysis somewhat simplistic. To say that regard must be had to the effect of the activity on the conservation status of the species is not to say that it is prohibited only if it *does* affect that status. And the rest of the formulation is hardly illuminating.

25. Tempting although in one sense it is to refer the whole question as to the proper interpretation and application of article 12(1)(b) to the Court of Justice of the European Union pursuant to article 267 of the Lisbon Treaty, I would not for my part do so. It seems to me unrealistic to suppose that the Court of Justice would feel able to provide any greater or different assistance than we have here sought to give.

*Issue Two – The proper application of Regulation 3(4) of the 1994 Regulations (as amended)*

26. I can deal with this issue altogether more briefly. Article 12(1) requires member states to "take the requisite measures to establish a system of strict protection for the animal species listed in Annex IV(a) in their natural range". Wisely or otherwise, the UK chose to implement the Directive by making a breach of the article 12 prohibition a criminal offence. Regulation 39 of the 1994 Regulations (as amended) provides that: "(1) a person commits an offence if he . . . (b) deliberately disturbs wild animals of any such species [i.e. a European protected species]". It is Natural England, we are told, who bear the primary responsibility for policing this provision.

27. It used to be the position that the implementation of a planning permission was a defence to a regulation 39 offence. That, however, is no longer so and to my mind this is an important consideration when it comes to determining the nature and extent of the regulation 3(4) duty on a planning authority deliberating whether or not to grant a particular planning permission.

28. Ward LJ dealt with this question in paragraph 61 of his judgment as follows:

> "61. The Planning Committee must grant or refuse planning permission in such a way that will 'establish a system of strict protection for the animal species listed in Annex IV(a) in their natural range . . .' If in this case the committee is satisfied that the development will not offend article 12(1)(b) or (d) it may grant permission. If satisfied that it will breach any part of article 12(1) it must then consider whether the appropriate authority, here Natural England, will permit a derogation and grant a licence under regulation 44. Natural England can only grant that licence if it concludes that (i) despite the breach of regulation 39 (and therefore of article 12) there is no satisfactory alternative; (ii) the development will not be detrimental to the maintenance of the population of bats at favourable conservation status and (iii) the development should be permitted for imperative reasons of overriding public importance. If the planning committee conclude that Natural England will not grant a licence it must refuse planning permission. If on the other hand it is likely that it will grant the licence then the planning committee may grant conditional planning permission. If it is uncertain whether or not a licence will be granted, then it must refuse planning permission."

29. In my judgment this goes too far and puts too great a responsibility on the Planning Committee whose only obligation under regulation 3(4) is, I repeat, to "have regard to the requirements of the Habitats Directive so far as [those requirements] may be affected by" their decision whether or not to grant a planning permission. Obviously, in the days when the implementation of such a permission provided a defence to the regulation 39 offence of acting contrary to article 12(1), the Planning Committee, before granting a permission, would have needed to be satisfied either that the development in question would not offend article 12(1) or that a derogation from that article would be permitted and a licence granted. Now, however, I cannot see why a planning permission (and, indeed, a full planning permission save only as to conditions necessary to secure any required mitigating measures) should not ordinarily be granted save only in cases where the Planning Committee conclude that the proposed development would both (a) be likely to offend article 12(1) and (b) be unlikely to be licensed pursuant to the derogation powers. After all, even if development permission is given, the criminal sanction against any offending (and unlicensed) activity remains available and it seems to me wrong in principle, when Natural England have the primary responsibility for ensuring compliance with the Directive, also to place a substantial burden on the planning authority in effect to police the fulfilment of Natural England's own duty.

30. Where, as here, Natural England express themselves satisfied that a proposed development will be compliant with article 12, the planning authority are to my mind entitled to presume that that is so. The Planning Committee here plainly had regard to the requirements of the Directive: they knew from the Officers' Decision Report and Addendum Report (see para 8 above and the first paragraph of the Addendum Report as set out in para 72 of Lord Kerr's judgment) not only that Natural England had withdrawn their objection to the scheme but also that necessary measures had been planned to compensate for the loss of foraging. For my part I am less troubled than Ward LJ appears to have been (see his para 73 set out at para 16 above) about the UBS's conclusions that "no *significant* impacts to bats are anticipated" – and, indeed, about the Decision Report's reference to "measures to ensure there is no significant adverse impact to [protected bats]". It is certainly not to be supposed that Natural England misunderstood the proper ambit of article 12(1)(b) nor does it seem to me that the planning committee were materially misled or left insufficiently informed about this matter. Having regard to the considerations outlined in para 29 above, I cannot agree with Lord Kerr's view, implicit in paras 75 and 76 of his judgment, that regulation 3(4) required the committee members to consider and decide for themselves whether the development would or would not occasion such disturbance to bats as in fact and in law to constitute a violation of article 12(1)(b) of the Directive.

31. Even, moreover, had the Planning Committee thought it necessary or appropriate to decide the question for themselves and applied to article 12(1)(b)

the less exacting test described above rather than Ward LJ's test of imperilling the bats' conservation status, there is no good reason to suppose that they would not have reached the same overall conclusion as expressed in paras 74 and 75 of Ward LJ's judgment (see para 16 above).

32. I would in the result dismiss this appeal.

**LORD WALKER**

33. For the reasons given in the judgment of Lord Brown, with which I agree, and for the further reasons given by Lady Hale and Lord Mance, I would dismiss this appeal.

**LADY HALE**

34. On the first issue, I have nothing to add to the judgment of Lord Brown, with which I agree. I also agree with him on the second issue, but add a few observations of my own because we are not all of the same mind.

35. The issue is whether the Regulatory Committee of Hampshire County Council (the planning authority for this purpose) complied with their duty to "have regard to the requirements of the Habitats Directive so far as they may be affected by the exercise" of their planning functions (Conservation (Natural Habitats etc) Regulations 1994, reg 3(4); see also Conservation and Species and Habitats Regulations 2010, reg 9(5)). It is, of course, always important that the legal requirements are properly complied with, perhaps the more so in cases such as this, where the County Council is both the applicant for planning permission and the planning authority deciding whether it should be granted.

36. Some may think this an unusual and even unsatisfactory situation, but it comes about because in this country planning decisions are taken by democratically elected councillors, responsible to, and sensitive to the concerns of, their local communities. As Lord Hoffmann put it in *R (Alconbury Developments Ltd and others) v Secretary of State for the Environment, Transport and the Regions* [2001] UKHL 23, [2003] 2 AC 295, para 69, "In a democratic country, decisions about what the general interest requires are made by democratically elected bodies or persons accountable to them." Democratically elected bodies go about their decision-making in a different way from courts. They have professional advisers who investigate and report to them. Those reports obviously have to be

clear and full enough to enable them to understand the issues and make up their minds within the limits that the law allows them. But the courts should not impose too demanding a standard upon such reports, for otherwise their whole purpose will be defeated: the councillors either will not read them or will not have a clear enough grasp of the issues to make a decision for themselves. It is their job, and not the court's, to weigh the competing public and private interests involved.

37. It is important to understand the chronology in this case. The planning application was dated 31 March 2009. Natural England was consulted. Their first reply is dated 30 April. In it they objected to the application on the ground that "that the application contains insufficient survey information to demonstrate whether or not the development would have an adverse effect on legally protected species". Specifically, they were concerned about the impact upon bats and great crested newts. Reference was made to "the impacts of the development and mitigation upon European Protected Species" and the council were reminded of, among other things, their duty under regulation 3(4). This objection was maintained in a letter dated 29 June 2009.

38. Further information on Great Crested Newts and the Updated Bat Survey were submitted in early July in response to this. Based on this information, Natural England wrote on 17 July 2009 withdrawing their objection, subject to recommendations about the conditions to be imposed if planning permission were granted. This letter also contained comments about common widespread reptiles and asking that these too be addressed although Natural England was not lodging an objection in relation to them.

39. Natural England wrote again on 23 July with their "final response" to the proposal. This dealt, first, with the fact that the site was close to the Portsmouth Harbour Site of Special Scientific Interest, itself part of the Portsmouth Harbour Special Protection Area and Ramsar site and gave their advice on the requirements of regulation 48(1)(a) of the Habitats Regulations. Regulation 48(1)(a) imposes a specific obligation on planning authorities, among others, to make an "appropriate assessment" of the implications for a European protected site before granting permission for a proposal which is likely to have a significant effect upon the site. The letter advised that, provided that specified avoidance measures were fully implemented, the proposal would not be likely to have a significant effect upon the protected sites. Thus they had no objection on this score and permission could be granted. The letter went on to deal with "Protected species and biodiversity" under a separate heading, repeated that they had withdrawn their objection subject to the implementation of all the recommended mitigation, but reminded the council that "whilst we have withdrawn our objection to the scheme in relation to European protected species, we have ongoing concerns regarding other legally protected species on site . . ." A separate paragraph went on to deal with biodiversity.

40. The Officer's Report was prepared for the Committee meeting, which was due to take place on 29 July 2009, before receipt of the letter of 23 July. It is 31 pages long. The executive summary lists "the main issues raised", including "concern at the procedure because this is a County Council scheme" and "nature conservation impact" (para 1.4). The account of the "Proposals" refers to the detailed ecological surveys undertaken, including the bat surveys "carried out to enable appropriate measures to be implemented"; but states that the impact on the designated sites would be negligible (para 3.7). The section on "Consultations" includes a paragraph explaining that Natural England had initially objected "on the grounds that the application contains insufficient survey information to demonstrate whether or not the development would have an adverse effect on bats and great crested newts which are legally protected species" but that they had withdrawn their objection after further survey work was undertaken (para 5.6).

41. The section on "Nature conservation impact" deals first with the proximity to the protected sites and points out that the requirements of the Habitats Regulations needed to be considered (para 8.17). This is a reference to the specific obligation in regulation 48(1)(a). It went on to explain why it was thought that an "appropriate assessment" was not needed, noting that Natural England had raised no concerns about any impact on these sites (para 8.18). The report then turns to the corridor itself, referring to the Environmental Report submitted with the application, which dealt with badgers, bats, great crested newts, and reptiles; on bats, it states that "An Updated Bat Survey Method Statement and Mitigation Strategy has been submitted with measures to ensure there is no significant adverse impact to them for these proposals" (para 8.19).

42. The report concludes by recommending that no appropriate assessment is required under the Habitats Regulations (para 9.2); that planning permission be granted (para 9.3); and that the proposed development accords with the Development Plan and the relevant Policies, because, among other things "suitable mitigation measures are proposed for badgers and protected species" (para 9.4). There is a cross reference to the annexed policy C18 on Protected Species, which states that "Development which would adversely affect species, or their habitats, protected by the Habitats Regulations 1994, the Wildlife and Countryside Act 1981 or other legislation will not be permitted unless measures can be undertaken which prevent harm to the species or damage to the habitats. Where appropriate, a permission will be conditioned or a legal agreement sought to secure the protection of the species or their [habitat]."

43. After receiving the letter from Natural England dated 23 July, an addendum to the report was prepared, dealing with three issues which had arisen since the report was finalised. Under the heading "Habitats Regulations" it deals first with the objections raised by Natural England "requiring additional survey information concerning potential for the presence of great crested newts and bats, which are

protected species". It points out that the survey work was undertaken and Natural England had withdrawn their objection. In two separate paragraphs, it goes on to explain that Natural England had now given specific advice on the requirements of regulation 48(1)(a) (thus reinforcing the recommendation made in para 9.2 of the main report).

44. It is quite clear from all of this that separate consideration was being given both to the effect upon European protected species and to the effect upon the protected sites, that both were being considered under the Habitats Regulations, and that the applicable Policy on Protected Species, which also refers to the Habitats Regulations 1994, was being applied. It is true that the report does not expressly mention either regulation 3(4) or article 12 of the Directive. In my view, it is quite unnecessary for a report such as this to spell out in detail every single one of the legal obligations which are involved in any decision. Councillors were being advised to consider whether the proposed development would have an adverse effect on species or habitats protected by the 1994 Regulations. That in my view is enough to demonstrate that they "had regard" to the requirements of the Habitats Directive for the purpose of regulation 3(4). That is all they have to do in this context, whereas regulation 48(1)(a) imposes a more specific obligation to make an "appropriate assessment" if a proposal is likely to have a significant effect upon a European site. It is not surprising, therefore, that the report deals more specifically with that obligation than it does with the more general obligation in regulation 3(4).

45. Furthermore, the United Kingdom has chosen to implement article 12 of the Directive by creating criminal offences. It is not the function of a planning authority to police those offences. Matters would, as Lord Brown points out, have been different if the grant of planning permission were an automatic defence. But it is so no longer. And it is the function of Natural England to enforce the Directive by prosecuting for these criminal offences (or granting licences to derogate from the requirements of the Directive). The planning authority were entitled to draw the conclusion that, having been initially concerned but having withdrawn their objection, Natural England were content that the requirements of the Regulations, and thus the Directive, were being complied with. Indeed, it seems to me that, if any complaint were to be made on this score, it should have been addressed to Natural England rather than to the planning authority. They were the people with the expertise to assess the meaning of the Updated Bat Survey and whether it did indeed meet the requirements of the Directive. The planning authority could perhaps have reached a different conclusion from Natural England but they were not required to make their own independent assessment.

46. But if I am wrong about this, and the planning authority did have to make an independent assessment in terms of article 12(1)(b), there is absolutely no reason to think that they would have reached a different conclusion and refused

planning permission on this account. They may have reached their decision by a majority of six votes to five. But the Minutes make it clear that there were a great many other problems to worry about with this scheme. While the "impact on nature" was among the many matters upon which members questioned officers, this was not one of their listed concerns. If this scheme was not going to get planning permission, it would be because of the local residents' concerns about the impact upon them rather than because of the members' concerns about the impact upon the bats.

47. I would therefore dismiss this appeal on both issues.

**LORD MANCE**

48. I agree with the reasoning and conclusions of Lord Brown and Lady Hale on each of the issues. I add only a few words because the court is divided on the second.

49. Lord Kerr's dissent on this issue is, I understand, based on the premise that (a) Natural England had not expressed a view that the proposal would not involve any breach of the Habitats Directive, and (b) if it had, the planning committee was not informed of this: see his paras 73 and 74.

50. For the reasons given in Lord Brown's and Lady Hale's judgments, I cannot agree with either aspect of this premise.

51. I add the following in relation to the suggestion that Natural England was, in its letter of 17 July 2009, "preoccupied with matters that were quite separate from the question whether there would be disturbance to bats such as would be in breach of article 12 of the Directive" or that the letter was "principally taken up with the question of possible impact on common widespread reptiles" (para 69 below).

52. It is true that the longer part of the text of the letter of 17 July related to the latter topic, in relation to which Natural England at the end of the letter made clear it was not lodging an objection, but was only asking that further attention be given and comments supplied. But the first, and in the circumstances obviously more significant, aspect of the letter consisted in its first three paragraphs. These withdrew Natural England's previous objection made on 30 April and reiterated on 29 June in relation to great crested newts and bats. The withdrawal was in the light of the information, including the Updated Bat Survey, which the Council had

earlier in July supplied. In withdrawing their objection, Natural England emphasised the importance of the mitigation procedures outlined in section 10 of the Survey, and added the further recommendation that the Council look closely at the requirement for night working and keep any periods of such working "to an absolute minimum". This confirms the attention it gave to the information supplied.

53. When making its objection in its letter dated 30 April, Natural England had said:

> "Our concerns relate specifically to the likely impact upon bats and Great Crested Newts. The protection afforded these species is explained in Part IV and Annex A of *Circular 06/2005 'biodiversity and Geological Conservation – Statutory Obligations and their Impact within the Planning System'*".

Part IV of Circular 06/2005 stated that the Habitats Regulations Conservation (Natural Habitats &c.) Regulations 1994 implemented the requirements of the Habitats Directive and that it was unlawful under regulation 39 deliberately to disturb a wild animal of a European protected species. Annex A identified all species of bats as wild animals of European protected species.

54. It is therefore clear that Natural England was, from the outset, focusing on the protected status of all species of bats under the Directive and domestic law; and that its withdrawal of its objection on 17 July was directly relevant to the planning committee's performance of its role under regulation 3(4) to "have regard to the requirements of" that Directive in the exercise of its functions. The planning officer's first report dated 29 July summarised the position for the planning committee in accurate terms. Thereafter, as Lord Brown and Lady Hale record, Natural England's further letter dated 23 July arrived, reiterating Natural England's as position stated in its letter dated 17 July. This too was again accurately summarised to the committee by the planning officer in his addendum dated 29 July to his previous report.

55. With regard to the Updated Bat Survey, there is no reason to believe that Natural England did not, when evaluating this, understand both the legal requirements and their general role and responsibilities at the stage at which they were approached by the Council. The Survey repays study as a whole, and I merely make clear that I do not share the scepticism which Lord Kerr feels about some of its statements or agree in all respects with his detailed account of its terms and their effect. The important point is, however, is that Natural England was well placed to evaluate this Survey, and, having done so, gave the advice they did. This

was, in substance, accurately communicated to the planning committee, in a manner to which the committee was entitled to have, and must be assumed to have had, regard.

56. In addition to my agreement with the other parts of Lord Brown's and Lady Hale's judgments, I confirm my specific agreement with Lady Hale's penultimate paragraph.

**LORD KERR**

57. As legislative provisions go, regulation 3 (4) of the Conservation (Natural Habitats, &c.) Regulations 1994 (the Habitats Regulations) is relatively straightforward. Its terms are uncomplicated and direct. It provides: -

> "(4) … every competent authority in the exercise of any of their functions, shall have regard to the requirements of the Habitats Directive so far as they may be affected by the exercise of those functions."

58. In plain language this means that if you are an authority contemplating a decision that might have an impact on what the Directive requires, you must take its requirements into account before you reach that decision. Of course, if you know that another agency has examined the question and has concluded that none of those requirements will be affected, and if you are confident that such agency is qualified to make that judgment, this may be sufficient to meet your obligation under the regulation. What lies at the heart of this appeal is whether the regulatory committee of Hampshire County Council, when it came to make the decision whether to grant the planning permission involved in this case, either had regard itself to the requirements of the Habitats Directive or had sufficient information to allow it to conclude that some other agency, in whose judgment it could repose trust, had done so and had concluded that no violation arose.

59. An old and currently disused railway line runs between Gosport and Fareham in South Hampshire. A section of this, between Redlands Lane, Fareham and Military Road, Gosport is some 4.7 kilometres in length. On 31 March 2009 Hampshire County Council, acting on behalf of Transport for South Hampshire, applied for planning permission to develop this section in order to create what is described as a "busway". Transport for South Hampshire is a name used to describe three local authorities, Hampshire County Council, Gosport Borough

Council and Fareham Borough Council. Planning permission was granted on 29 July 2009

60. At present there is serious congestion on the main road between Gosport and Fareham. It is planned that the busway should operate by allowing buses to join existing roads at various points along the route and that a fast, efficient and reliable public transport service will ensue. It will also be possible to cycle on the route. Local residents will be encouraged to use buses and bicycles in preference to their private vehicles and it is hoped that the congestion will thereby be relieved. The busway is to be constructed in two phases, 1A and 1B. Clearance work for the first of these is already underway and funding is available to complete this phase. The second phase does not yet have funding. Its future development is not assured.

61. The railway line along which the busway is to be developed was closed as a result of recommendations made in the Beeching report of 1963. It appears that closure did not finally take effect until June 1991, however. In that month the last train ran along the line. Since then the area has become overgrown. It is now regarded as "an ecological corridor for various flora and fauna". Several species of bats fly through and forage in the area but no bat roosts have been found on the planning application site itself. There are two bat roosts in proximity to the route, one in Savernake Close, near the southern section of Phase 1A, the other at Orange Grove which is close to the northern section of Phase 1B

62. All bats are European Protected Species, falling within Annex IV (a) of Council Directive 92/43/EEC (the Habitats Directive). Article 12 of this Directive requires Member States to "take the requisite measures to establish a system of strict protection for the animal species" listed in the annex. The Conservation (Natural Habitats, &c.) Regulations 1994 were made for the purpose of implementing the Habitats Directive. The regulations prescribe a number of measures (most notably in relation to this case, Regulation 39) which seek to achieve this level of protection. Derogation from these measures is permitted to those who obtain a licence from the appropriate authority. Natural England is the nature conservation body specified in the regulations as the licensing authority in relation to European protected species.

63. Although the issue of a licence is quite separate from the grant of planning permission, Natural England is regularly consulted on applications for development where the Habitats Directive and the regulations are likely to be in play and so it was that in April 2009 a letter was sent by the environment department of the Council seeking Natural England's views about the proposal. On 30 April 2009, Natural England replied, objecting to the scheme and recommending that planning permission be refused.

64. Bat surveys had been undertaken in 2008. These considered the suitability of the habitat for bats; they also examined how bats used the site and which species of bats were present. Clearly, however, the detail of the information yielded by these surveys was insufficient to satisfy Natural England's requirements for it stated that the application contained "insufficient survey information to demonstrate whether or not the development would have an adverse effect on legally protected species". The letter also recommended that the local planning authority should consider all the points made in an annex that was attached to the letter. This provided guidance on survey requirements and on how the authority should fulfil its duties on "biodiversity issues under [among others] … Regulation 3 (4) of *The Conservation (Natural Habitats &c.) Regulations 1994* … to ensure that the potential impact of the development on species and habitats of principal importance is addressed."

65. Amendments to the scheme were undertaken but these did not allay Natural England's concerns and their objection to the planning application was repeated in a letter of 29 June 2009.

66. An updated bat survey (leading to the publication of a report entitled "Survey Method Statement and Mitigation Strategy") was carried out on behalf of the Council. The survey identified two species of bat which had not been detected in the 2008 survey. Greater levels of foraging and commuting were also recorded along the disused railway. No roost sites were found but the presence of a common pipistrelle roost was confirmed approximately 40 metres from planned works. The report concluded that the works would result in the loss of a number of trees with low to moderate "roost potential" and approximately seven trees with moderate to high roost potential. Although no known roosts would be lost, because of the difficulty in identifying tree roosts, the Bat Conservation Trust recommends that it should be assumed that trees with high potential as roosts are *in fact* used as roosts. On this basis a number of roosts will be lost as a result of the works. Impact on commuting of bats between foraging habitats was also anticipated. It was felt that this could be restored in the longer term but, until restoration was complete, at least four species of bats that had been detected in the area would be affected. It was concluded that the removal of trees and vegetation would result in the loss of good quality habitats for foraging. Loss of foraging habitats would have an inevitable adverse impact on three species of local bats with one of these (Myotis sp) being more severely affected. This was characterised as a moderate impact at local level during the time that the vegetation was being re-established, a period estimated in the survey to be at least seven years. On the issue of the long term impact of the loss of foraging habitats the report was somewhat ambivalent. At one point it suggested that there would be a long term "slight adverse to neutral" impact. Later, it suggested that it was "probable" that the re-creation of good foraging habitats would result in an eventual neutral impact. The introduction of artificial lighting would affect the quality of foraging habitat by attracting insects

from unlit areas. Although this would favour some species, it would adversely affect others. Moreover, increased lighting can delay the emergence of bats from roosts and so reduce foraging opportunities. Lighting also constitutes a barrier to bats gaining access to foraging areas. Although the report is silent on the duration of these effects, it must be presumed that they will be permanent. In a somewhat bland claim, however, the authors assert that "with mitigation to reduce light spill and the selection of lights with a low UV output, the impact of lighting on bats is not anticipated to be significant". Increased noise levels would also have an adverse impact on some species of bats, the Brown long eared in particular. The report concludes at this point that is probable that there would be a slight adverse impact on foraging habitats from operational noise. Again, the report does not expressly state how long this would last but, since the noise source is the operation of the busway, it must be presumed to be permanent.

67. The overall conclusion of the report was that it was probable that there would be a short term moderate adverse impact on bats. (As Lord Brown has pointed out, this 'short term' impact is likely to continue for some nine years). If planned mitigation measures are successful, the long-term impact of the works was anticipated to be "slight adverse". On this basis the authors of the report concluded that no "significant impacts" to bats were anticipated. This general conclusion requires to be treated with some caution, in my opinion. There can be no doubt that effects which could not be described as insignificant *will* occur for some seven to nine years at least. Thereafter, while the long term impact may not be quantitatively substantial, it will be permanent.

68. The bat survey, together with further information, was sent to Natural England in July 2009. In consequence, the objection to the application was withdrawn. Natural England considered that planning permission could now be granted, albeit subject to certain conditions. The letter relaying the withdrawal of the objection contained the following: -

> "Natural England has reviewed the further information submitted (Great Crested Newt Survey Method Statement and Mitigation Strategy, June 2009 and Updated Bat Survey Method Statement and Mitigation Strategy, July 2009) and can now confirm that we are able to withdraw our objection of 30 April 2009, subject to the following comments: We recommend that should the Council be minded to grant permission for this scheme, conditions be attached requiring implementation of all the mitigation/compensation detailed within these reports. Particularly at Section 10 of the Bat Report and Section 6 of the Great Crested Newt Report. We would also recommend that the Council look closely at the requirement for night time working and associated flood lighting. Natural England would not advocate night time working for reasons of

> disturbance/disruption to the lifecycle of nocturnal wildlife and the Council should ensure these periods are kept to an absolute minimum."

69. The head of planning and development made a report (referred to as "the officer's decision report") to the regulatory committee of the Council which was to take the planning decision on 29 July 2009. The impact on nature conservation was one of the issues of concern identified in the report. Lord Brown has quoted in para 8 of his judgment many of the material parts of the report that touch on this issue and I will not repeat all of those here. It is important, however, I believe, to understand the context of the statement in para 8.17 (quoted in part by Lord Brown) that the Habitats Regulations needed to be considered. The full para reads as follows: -

> "The site is not within any designated sites of importance for nature conservation. However the site is within 30 metres, at its closest, to the Portsmouth Harbour Special Protection Area (SPA) and Portsmouth Harbour RAMSAR site. *Therefore* the requirements of the Habitats Regulations need to be considered." (my emphasis)

70. As Lord Brown has pointed out, the report in para 8.19 stated that the updated bat survey report contained "measures *to ensure* (emphasis added) there is no significant adverse impact" to bats from the proposals. This appears to me to be a gloss on what had in fact been said in the report. The actual claim made (itself, in my opinion, not free from controversy) was that it was *anticipated* that there would be no significant impacts on bats *if* the mitigation measures succeeded.

71. Two points about the decision officer's report should be noted, therefore. Firstly, the enjoinder to consider the Habitats Regulations was made because of the proximity of the works to sites requiring special protection rather than in relation to the need to avoid disturbance of bats in the ecological corridor itself. Secondly, it conveyed to the members of the regulatory committee the clear message that the updated bat survey report provided assurance that there would be no significant impact on bats. No reference was made to the moderate adverse impact that would occur over the seven to nine year period that regeneration of the forage areas would take nor to the permanent, albeit slight, impact that those measures could not eliminate.

72. Lord Brown has said that the addendum to the officer's report dealt specifically with the Habitats Regulations. It did, but the context again requires to be carefully noted. In order to do this, I believe that the entire section dealing with the regulations must be set out. It is in these terms: -

"Habitats Regulations

As stated in the report Natural England initially raised a holding objection to the application, requiring additional survey information concerning potential for the presence of great crested newts and bats, which are protected species. This survey work was undertaken and sent to Natural England, who are now satisfied and subsequently withdrew their objection.

As also stated in the report the application site lies close to habitats which form part of the Portsmouth Harbour Site of Special Scientific Interest (SSSI). This SSSI is part of the Portsmouth Harbour Special Protection Area (SPA) and Ramsar Site. Under the Conservation (Natural Habitats etc) Regulations 1994, as amended ('the Habitats Regulations') the County Council is the competent authority and has to make an assessment of the impacts of the proposal on this European site, therefore the second recommendation for the Committee is to agree that the proposal is unlikely to have a significant impact on the European site. It was implied that by withdrawing their objection Natural England did not consider there would be any significant impact, but they did not specifically give their advice.

Since the report was finalised Natural England have now given specific advice on the requirements of Regulation 48 (1) (a) of the "Habitats Regulations". They raise no objection subject to the avoidance measures included in the application being fully implemented and advise that their view is that either alone or in combination with other plans or projects, this proposal would not be likely to have a significant effect on the European site and the permission may be granted under the terms of the Habitats Regulations."

73. Regulation 48 (1) (a) requires a competent authority, before deciding to undertake, or give any consent, permission or other authorisation for, a plan or project which is likely to have a significant effect on a European site in Great Britain to make an appropriate assessment of the implications for the site in view of that site's conservation objectives. It has nothing to do with the need to ensure that there is no disturbance of species of bats. The addendum to the decision officer's report, therefore, offered no information whatever to the regulatory committee on the vital question whether the proposal would comply with article 12 of the Habitats Directive. Indeed, it is clear from an examination of the letter from Natural England of 17 July 2009 that it was preoccupied with matters that were

quite separate from the question whether there would be disturbance to bats such as would be in breach of article 12 of the Directive. The letter was principally taken up with the question of possible impact on common widespread reptiles. In so far as the letter dealt with the question of the impact on bats, its tone certainly did not convey a view that the planning committee need not consider that matter further. On the contrary, on a fair reading of the letter, Natural England was making it clear that this issue required to be addressed by the committee, not only in terms of the conditions to be applied but also as to whether night-time working would be unacceptable because of disturbance to wildlife.

74. The committee considered the report of the decision officer and the addendum to it and received an oral presentation from officers of the council. The minutes of their meeting record the following in relation to the oral presentation: -

> "In introducing the report, Officers informed Members that the proposal formed part of the strategy to improve the reliability and quality of public transport in South Hampshire and the access to Gosport and Fareham. A Traffic Regulation Order would be imposed on the bus way to allow only cycles, buses and emergency vehicles to use it. Members were advised that an Environmental Impact Assessment (EIA) was not required as the proposal was a freestanding project that did not give rise to 'significant environmental effects'. Notwithstanding that, the County Council considered that important nature conservation, amenity and traffic issues had to be properly addressed and reports on these matters had been taken into account. The addendum to the report provided reassurance that Natural England had no objection to the proposals and confirmed their view that an appropriate assessment under the Habitat Regulations was not required and provided further clarification about the application and the Issue of 'screening' under the EIA Regulations."

75. At best, this had the potential to mislead. A committee member might well think that Natural England had concluded that there would be no violation of article 39 (1) (b) of the 1994 Regulations (which forbids the deliberate disturbance of wild animals of a European protected species) or, more particularly, article 12 of the Habitats Directive. Of course the true position was that Natural England had expressed no explicit opinion whatever on that question. At most, it might be presumed that this was its view. Even if that presumption could be made, however, it does not affect the clear indication in the letter of 17 July 2009 that this matter was still one which required the committee's attention. I can find nothing in the letter which suggests that Natural England regarded this matter as closed. Nor do I believe that the letter could have been properly interpreted by the committee as relieving it of the need to consider the issue.

76. The critical issue on this appeal, therefore, is whether there is any evidence that the regulatory committee considered at all the duty that it was required to fulfil under regulation 3 (4) of the 1994 Regulations.

77. In addressing this question I should immediately say that I agree with Lord Brown on his analysis of the nature of the requirement in article 12 (1) (b) of the Habitats Directive. As he has observed, a number of broad considerations underlie the application of the article. It is designed to protect species (not specimens of species) and its focus is on the protection of species rather than habitats, although, naturally, if major intrusion on habitats is involved, that may have an impact on the protection of the species. Not every disturbance will constitute a breach of the article. The nature and extent of the disturbance must be assessed on a case by case basis.

78. The European Commission's guidance document of February 2007 contains a number of wise observations as to how the application of the article should be approached. While the word 'significant' has not been employed in article 12 (1) (b), a "certain negative impact likely to be detrimental must be involved". In making any evaluation of the level of disturbance, the impact on survival chances, breeding success or reproductive ability of the affected species are all obviously relevant factors. Like Lord Brown, I am sanguine about Mr Cameron QC's formulation of the test as one involving the question whether there has been "a certain negative impact likely to have been detrimental to the species, having regard to its effect on the conservation status of the species". And also like Lord Brown, I consider that the Court of Appeal pitched the test too high in saying that disturbance must have "a detrimental impact on the conservation status of the species at population level" or constitute a threat to the survival of the protected species.

79. Trying to refine the test beyond the broad considerations identified by Lord Brown and those contained in the Commission's guidance document is not only difficult, it is, in my view, pointless. In particular, I do not believe that the necessary examination is assisted by recourse to such expressions as *de minimis*. A careful investigation of the factors outlined in Lord Brown's judgment (as well as others that might bear on the question in a particular case) is required. The answer is not supplied by a pat conclusion as to whether the disturbance is more than trifling.

80. Ultimately, however, and with regret, where I must depart from Lord Brown is on his conclusion that the regulatory committee had regard to the requirements of the Habitats Directive. True it is, as Lord Brown says, that they knew that Natural England had withdrawn its objection. But that cannot substitute, in my opinion, for a consideration of the requirements of the Habitats Directive.

Regulation 3 (4) requires every competent authority to have regard to the Habitats Directive in the exercise of its functions. The regulatory committee was unquestionably a competent authority. It need scarcely be said that, in deciding whether to grant planning permission, it was performing a function. Moreover the discharge of that function clearly carried potential implications for an animal species for which the Habitats Directive requires strict protection.

81. Neither the written material submitted to the committee nor the oral presentation made by officers of the council referred to the Habitats Directive. The reference to Natural England's consideration of the Habitats Regulations, if it was properly understood, could only have conveyed to the committee that that consideration had been for a purpose wholly different from the need to protect bats. It could in no sense, therefore, substitute for a consideration of the Habitats Directive by the committee members whose decision might well directly contravene one of the directive's central requirements. It is for that reason that I have concluded that those requirements had to be considered by the committee members themselves.

82. It may well be that, if Natural England had unambiguously expressed the view that the proposal would not involve any breach of the Habitats Directive and the committee had been informed of that, it would not have been necessary for the committee members to go behind that view. But that had not happened. It was simply not possible for the committee to properly conclude that Natural England had said that the proposal would not be in breach of the Habitats Directive in relation to bats. Absent such a statement, they were bound to make that judgment for themselves and to consider whether, on the available evidence the exercise of their functions would have an effect on the requirements of the directive. I am afraid that I am driven to the conclusion that they plainly did not do so.

83. As I have said, Natural England (at the time that it was considering the Habitats Regulations in July 2009) had not explicitly addressed the question whether the disturbance of bats that the proposal would unquestionably entail would give rise to a violation of the directive. The main focus of the letter of 19 July was on an entirely different question. Lord Brown may well be correct when he says that it is not to be supposed that Natural England misunderstood the proper ambit of article 12 (1) (b), but the unalterable fact is that it did not say that it had concluded that no violation would be involved, much less that the planning committee did not need to consider the question.

84. It is, of course, tempting to reach one's own conclusion as to whether the undoubted impact on the various species of bats that will be occasioned by this development is sufficient – or not – to meet the requirement of disturbance within the meaning of article 12. But this is not the function of a reviewing court. Unless

satisfied that, on the material evidence, the deciding authority could have reached no conclusion other than that there would not be such a disturbance, it is no part of a court's duty to speculate on what the regulatory committee would have decided if it had received the necessary information about the requirements of the Habitats Directive, much less to reach its own view as to whether those requirements had been met. Since the planning permission was granted on a vote of six in favour and five against, with two abstentions, it is, in my view, quite impossible to say what the committee would have decided if it had been armed with the necessary knowledge to allow it to fulfil its statutory obligation. Other members of the court have expressed the view that this is what the committee would have decided. Had I felt it possible to do so, I would have been glad to be able to reach that conclusion. As it is, I simply cannot.

85. I would therefore allow the appeal and quash the planning permission.

PLANNING OBJECTIONS SCOTLAND

# POS_4.1.2_SPSO_ 201606059_Edinburgh City_Council (failure to take account of applicable development plan policy)

RTPI Chartered Town Planners

RTPI Member N .47188

RICS

# SPSO decision report

**Case:** **201606059, The City of Edinburgh Council**
**Sector:** local government
**Subject:** handling of application (complaints by opponents)
**Decision:** some upheld, recommendations


## Summary

Mr C complained about the council's handling of a planning application. In particular that the council had failed to consider their waterside development policy (policy Des 9), had failed to consult with the Scottish Environment Protection Agency (SEPA) and had unreasonably accepted that works for the planning application were initiated on time. Mr C also complained about the council's communication with him.

We took independent planning advice. We found that that policy Des 9 should have been referred to in the report of handling (a report containing information on a planning application). It was not possible to know whether this policy had been taken into consideration during the processing of the planning application, as was required. We also found that it was not possible to say whether consideration of policy Des 9 would have resulted in a different outcome. We upheld this aspect of the complaint.

We also found that SEPA should have been consulted and we upheld this aspect of the complaint.

We did not find any evidence that the council had unreasonably accepted that works for the planning application were initiated on time and we did not uphold this part of the complaint.

Regarding communication, we found that some of the issues raised by Mr C had been not been adequately addressed, however, other issues raised by him had been reasonably clarified. We were concerned that a further response letter had had to be issued to Mr C. The council had accepted that there had been a delay in responding and that Mr C should not have had to submit a formal complaint to prompt a full response to his enquiries. We upheld this aspect of the complaint.


## Recommendations

What we said should change to put things right in future:

- Development plan policies relevant to the processing of any particular application should be referenced in the report of handling.
- Where a statutory consultation appears to be required as part of the processing of a planning application, but has not taken place, this should be explained in the report of handling.

PLANNING OBJECTIONS SCOTLAND

# POS_4.1.3_SPSO_201605227 The_City_of_Edinburgh_Council (Policy and Material considerations)

RTPI Chartered Town Planners

RTPI Member N .47188

RICS

# SPSO decision report

**Case:** **201605227, The City of Edinburgh Council**
**Sector:** local government
**Subject:** handling of application (complaints by opponents)
**Decision:** upheld, recommendations


## Summary

Mr C complained about the council's handling of a planning application to extend a restaurant near his home. Mr C was concerned that a parking policy had not been taken into account when determining the application and that the planning service had not waited on a consultation response from the roads service at the council before approving the application. During their own consideration of the case, the council accepted that parking had not been covered in the planning officer's report for the application and they apologised for this failing.

We took independent advice from a planning adviser. We found that there was no evidence that the relevant policy for parking had been considered when determining the planning application. While there was no statutory requirement to await a roads service consultation response before determining the application, the advice we received highlighted that proceeding without all the relevant information was a key shortcoming. However, there was no evidence that proceeding without the consultation response made any difference to the council's decision to approve the application. On balance, we upheld the complaint. However, based on the advice we received, we did not consider that there was any further action that the council were required to take in respect of the application. We did make a recommendation to ensure that material considerations and relevant policies are taken into account when determining a planning application in the future.


## Recommendations

What we said should change to put things right in future:

- All material considerations should be taken into account when determining a planning application. The correct policies should be identified and referenced in the report of handling.

We have asked the organisation to provide us with evidence that they have implemented the recommendations we have made on this case by the deadline we set.

EDINBVRGH
THE CITY OF EDINBURGH COUNCIL

# Memorandum

**To** Head of Planning
City of Edinburgh Council
Planning and Transport
Place
Waverley Court
4 East Market Street
Edinburgh
EH8 8BG

F.A.O Lewis McWilliam

**From** John A Lawson

**Your ref** **23/00663/FUL**

**Date** 24th February 2023

**Our ref** **23/00663/FUL**

Dear Lewis,

**Anderson Transport Newhouse Farm Long Dalmahoy Road**

Further to your consultation request I would like to make the following comments and recommendations regarding this application for 2 dwellings, access, and landscaping.

Newhouse Farm lies along the southern side of Long Dalmahoy Road which runs along the southern boundary of the historic Dalmahoy Estate. The cartographic evidence indicates that Newhouse Farm was constructed in or around 1749, with the farm increasing in size over the following 100 years.

Accordingly, this application must be considered under terms of Scottish Government's Our Place in Time (OPIT), NPF4 Policy 7, PAN 02/2011, HES's Historic Environment Policy for Scotland (HEPS) and Edinburgh Local Development Plan (2016) Policy ENV 9. The aim should be to preserve archaeological remains in situ as a first option, but alternatively where this is not possible, archaeological excavation or an appropriate level of recording may be an acceptable alternative.

The proposed development will require significant groundbreaking works associated with construction. Such works may uncover significant archaeological deposits regarding the development of Newhouse Farm since the mid-18th century. It is recommended therefore that a programme of archaeological works is undertaken prior to development to fully excavate, record and analysis any significant remains that may be affected. It is that the following condition is attached to any permissions, if granted, to ensure that this programme of archaeological works is undertaken.

> 'No development shall take place on the site until the applicant has secured the implementation of a programme of archaeological work (excavation, analysis & reporting, publication) in accordance with a written scheme of investigation which has been submitted by the applicant and approved by the Planning Authority.'

The work must be carried out by a professional archaeological organisation, either working to a brief prepared by CECAS or through a written scheme of investigation submitted to and agreed by CECAS for the site. Responsibility for the execution and resourcing of the programme of archaeological works and for the archiving and appropriate level of publication of the results lies with the applicant.

**Director of Culture, Culture and Wellbeing, Place**
City of Edinburgh Council Archaeology Service, Museum of Edinburgh, 142 Canongate, Edinburgh, EH8 8DD
Tel 0131 558 1040; 07775587516; john.lawson@edinburgh.gov.uk

Yours faithfully

**John A Lawson**
**(Archaeology Officer)**

Edinburgh Airport
EH12 9DN
Scotland

W: edinburghairport.com

24 February 2023

Lewis McWilliam
City of Edinburgh Council
By email

Dear Lewis

**Your Ref:** **23/00663/FUL**
**Development:** **APPLICATION FOR 2 DWELLINGS, ACCESS, AND LANDSCAPING. AT ANDERSON TRANSPORT, NEWHOUSE FARM, LONG DALMAHOY ROAD, DALMAHOY, KIRKNEWTON, EH27 8EE**
**Our Ref:** **EDI3419**

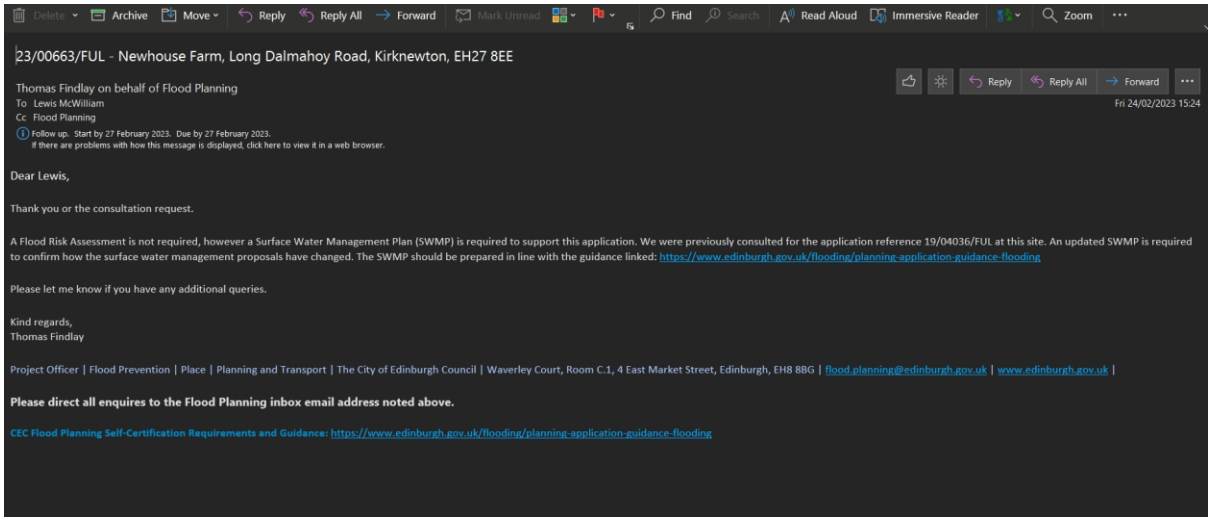
The proposed development has been fully examined from an aerodrome safeguarding perspective and does not conflict with safeguarding criteria.

We therefore have no objection to this proposal.

Yours sincerely

[redacted]

Claire Brown
Edinburgh Airport Limited
safeguarding@edinburghairport.com


Delete
Archive
Move
Reply
Reply All
Forward
Mark Unread
Find
Search
Read Aloud
Immersive Reader
Zoom
23/00663/FUL - Newhouse Farm, Long Dalmahoy Road, Kirknewton, EH27 8EE
Thomas Findlay on behalf of Flood Planning
To Lewis McWilliam
Cc Flood Planning
Follow up. Start by 27 February 2023. Due by 27 February 2023.
If there are problems with how this message is displayed, click here to view it in a web browser.
Reply
Reply All
Forward
Fri 24/02/2023 15:24
Dear Lewis,
Thank you or the consultation request.
A Flood Risk Assessment is not required, however a Surface Water Management Plan (SWMP) is required to support this application. We were previously consulted for the application reference 19/04036/FUL at this site. An updated SWMP is required to confirm how the surface water management proposals have changed. The SWMP should be prepared in line with the guidance linked: https://www.edinburgh.gov.uk/flooding/planning-application-guidance-flooding
Please let me know if you have any additional queries.
Kind regards,
Thomas Findlay
Project Officer | Flood Prevention | Place | Planning and Transport | The City of Edinburgh Council | Waverley Court, Room C.1, 4 East Market Street, Edinburgh, EH8 8BG | flood.planning@edinburgh.gov.uk | www.edinburgh.gov.uk |
Please direct all enquires to the Flood Planning inbox email address noted above.
CEC Flood Planning Self-Certification Requirements and Guidance: https://www.edinburgh.gov.uk/flooding/planning-application-guidance-flooding

Monday, 27 February 2023

Local Planner
Planning Services
Edinburgh City Council
Edinburgh
EH8 8BG

Development Operations
The Bridge
Buchanan Gate Business Park
Cumbernauld Road
Stepps
Glasgow
G33 6FB

Development Operations
Freephone Number - 0800 3890379
E-Mail - DevelopmentOperations@scottishwater.co.uk
www.scottishwater.co.uk



Dear Customer,

**Anderson Transport Newhouse Farm, Long Dalmahoy Road Dalmahoy, Kirknewton, EH27 8EE**
**Planning Ref: 23/00663/FUL**
**Our Ref: DSCAS-0081762-23F**
**Proposal: Application for 2 dwellings, access, and landscaping.**

**Please quote our reference in all future correspondence**

## Audit of Proposal

Scottish Water has no objection to this planning application; however, the applicant should be aware that this does not confirm that the proposed development can currently be serviced. Please read the following carefully as there may be further action required. Scottish Water would advise the following:

## Water Capacity Assessment

Scottish Water has carried out a Capacity review and we can confirm the following:

- There is currently sufficient capacity in the Marchbank Water Treatment Works to service your development. However, please note that further investigations may be required to be carried out once a formal application has been submitted to us.

## Waste Water Capacity Assessment

- Unfortunately, according to our records there is no public Scottish Water, Waste Water infrastructure within the vicinity of this proposed development therefore we would advise applicant to investigate private treatment options.

### Please Note

- The applicant should be aware that we are unable to reserve capacity at our water and/or waste water treatment works for their proposed development. Once a formal connection application is submitted to Scottish Water after full planning permission has been granted, we will review the availability of capacity at that time and advise the applicant accordingly.

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## Surface Water

For reasons of sustainability and to protect our customers from potential future sewer flooding, Scottish Water will not accept any surface water connections into our combined sewer system.

There may be limited exceptional circumstances where we would allow such a connection for brownfield sites only, however this will require significant justification from the customer taking account of various factors including legal, physical, and technical challenges.

In order to avoid costs and delays where a surface water discharge to our combined sewer system is anticipated, the developer should contact Scottish Water at the earliest opportunity with strong evidence to support the intended drainage plan prior to making a connection request. We will assess this evidence in a robust manner and provide a decision that reflects the best option from environmental and customer perspectives.

### General notes:

- Scottish Water asset plans can be obtained from our appointed asset plan providers:
    - Site Investigation Services (UK) Ltd
    - Tel: 0333 123 1223
    - Email: sw@sisplan.co.uk
    - www.sisplan.co.uk
- Scottish Water's current minimum level of service for water pressure is 1.0 bar or 10m head at the customer's boundary internal outlet. Any property which cannot be adequately serviced from the available pressure may require private pumping arrangements to be installed, subject to compliance with Water Byelaws. If the developer wishes to enquire about Scottish Water's procedure for checking the water pressure in the area, then they should write to the Customer Connections department at the above address.
- If the connection to the public sewer and/or water main requires to be laid through land out-with public ownership, the developer must provide evidence of formal approval from the affected landowner(s) by way of a deed of servitude.
- Scottish Water may only vest new water or waste water infrastructure which is to be laid through land out with public ownership where a Deed of Servitude has been obtained in our favour by the developer.

- The developer should also be aware that Scottish Water requires land title to the area of land where a pumping station and/or SUDS proposed to vest in Scottish Water is constructed.

- Please find information on how to submit application to Scottish Water at our Customer Portal.

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## Next Steps:

### All Proposed Developments

All proposed developments require to submit a Pre-Development Enquiry (PDE) Form to be submitted directly to Scottish Water via our Customer Portal prior to any formal Technical Application being submitted. This will allow us to fully appraise the proposals.

Where it is confirmed through the PDE process that mitigation works are necessary to support a development, the cost of these works is to be met by the developer, which Scottish Water can contribute towards through Reasonable Cost Contribution regulations.

### Non Domestic/Commercial Property:

Since the introduction of the Water Services (Scotland) Act 2005 in April 2008 the water industry in Scotland has opened to market competition for non-domestic customers. All Non-domestic Household customers now require a Licensed Provider to act on their behalf for new water and waste water connections. Further details can be obtained at www.scotlandontap.gov.uk

### Trade Effluent Discharge from Non-Domestic Property:

- Certain discharges from non-domestic premises may constitute a trade effluent in terms of the Sewerage (Scotland) Act 1968. Trade effluent arises from activities including; manufacturing, production and engineering; vehicle, plant and equipment washing, waste and leachate management. It covers both large and small premises, including activities such as car washing and launderettes. Activities not covered include hotels, caravan sites or restaurants.
- If you are in any doubt as to whether the discharge from your premises is likely to be trade effluent, please contact us on 0800 778 0778 or email TEQ@scottishwater.co.uk using the subject “Is this Trade Effluent?". Discharges that are deemed to be trade effluent need to apply separately for permission to discharge to the sewerage system. The forms and application guidance notes can be found here.
- Trade effluent must never be discharged into surface water drainage systems as these are solely for draining rainfall run off.
- For food services establishments, Scottish Water recommends a suitably sized grease trap is fitted within the food preparation areas, so the

development complies with Standard 3.7 a) of the Building Standards Technical Handbook and for best management and housekeeping practices to be followed which prevent food waste, fat oil and grease from being disposed into sinks and drains.

- The Waste (Scotland) Regulations which require all non-rural food businesses, producing more than 50kg of food waste per week, to segregate that waste for separate collection. The regulations also ban the use of food waste disposal units that dispose of food waste to the public sewer. Further information can be found at www.resourceefficientscotland.com

I trust the above is acceptable however if you require any further information regarding this matter please contact me on **0800 389 0379** or via the e-mail address below or at planningconsultations@scottishwater.co.uk.

Yours sincerely,

**Ruth Kerr.**
Development Services Analyst
PlanningConsultations@scottishwater.co.uk

## Scottish Water Disclaimer:

*"It is important to note that the information on any such plan provided on Scottish Water's infrastructure, is for indicative purposes only and its accuracy cannot be relied upon. When the exact location and the nature of the infrastructure on the plan is a material requirement then you should undertake an appropriate site investigation to confirm its actual position in the ground and to determine if it is suitable for its intended purpose. By using the plan you agree that Scottish Water will not be liable for any loss, damage or costs caused by relying upon it or from carrying out any such site investigation."*

**From:** Lisa Brown
**Sent:** 28 Jun 2023 10:40:57 +0000
**To:** Lisa Brown
**Subject:** FW: Planning Application Consultation 23/00663/FUL
**Attachments:** ufm6_STDCN-_Standard_Con_Letter.pdf

-----Original Message-----
From: Justine Stansfield <Justine.Stansfield@edinburgh.gov.uk>
Sent: 27 February 2023 16:27
To: Lewis McWilliam <Lewis.McWilliam@edinburgh.gov.uk>
Subject: FW: Planning Application Consultation 23/00663/FUL

Dear Lewis

I have been sent the above planning application for 2 DWELLINGS, ACCESS, AND LANDSCAPING. AT ANDERSON TRANSPORT, NEWHOUSE FARM, LONG DALMAHOY ROAD,DALMAHOY, KIRKNEWTON, EH27 8EE.

As this is for 2 individual properties, we would expect presentation to be the same as the surrounding area, which is individual kerb side collections. However, there is some distance between the property and the main road, and no indication that the access road would be adopted, so it is likely that presentation would be on Long Dalmahoy Road, at the end of the access road.

We would have no objection to this proposal, but would want to see that space be allowed within each plot for the housing of the below bins outwith collections.

Below per house:
140 litre non-recyclable waste bin
240 litre mixed recycling waste bin
44 litre box for glass
25 litre food waste box

This has not been included in any of the drawings submitted, as we would usually expect.

Please ask the Architect to inform the developer / builder to contact me directly 12 weeks prior to residents moving in to arrange for the purchase and delivery of the bins and to add these to the systems for collection.

Regards

Justine

Justine Stansfield, Project Officer
m 07825 733 623

-----Original Message-----
From: planning.support@edinburgh.gov.uk <planning.support@edinburgh.gov.uk>
Sent: 22 February 2023 09:13
To: Waste Planning <WastePlanning@edinburgh.gov.uk>
Subject: Planning Application Consultation 23/00663/FUL

Please provide a summary of your consultation for inclusion in the Report of Handling. The full consultation response will be publicly available on the portal.

**From:** Lisa Brown
**Sent:** 28 Jun 2023 10:45:43 +0000
**To:** Lisa Brown
**Subject:** FW: 23/00663/FUL Newhouse Farm

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**From:** Lynne McMenemy <Lynne.McMenemy@edinburgh.gov.uk>
**Sent:** 10 March 2023 15:57
**To:** Lewis McWilliam <Lewis.McWilliam@edinburgh.gov.uk>
**Subject:** 23/00663/FUL Newhouse Farm

Hi Lewis,

Realised this has been sitting a while. Set out a policy view below. Tried to keep it short so let me know if you want anything expanded upon, though maybe pretty straight forward.

Thanks,

Lynne

The application site lies within the Edinburgh Green Belt.

**NPF4**
Policies 8 and 16 from NPF4 are particularly relevant to the application, though others will also apply.

Policy 16 part a) supports development of housing on identified sites within the Local Development Plan. The site is not allocated for housing in the LDP. Part f) sets out that development of homes on non-allocated sites will be supported only in limited circumstances. These in the first instance require a site to be broadly in line with the LPD's spatial strategy and 20 minute neighbourhoods and also one of four criteria relating to early delivery of the housing pipeline, a rural homes policy, smaller scale opportunities within an existing settlement boundary or the delivery of less than 50 affordable homes. None of these criteria are applicable to the proposal. There is no evidence of early delivery of the housing pipeline, there is no policy citing the need for rural homes, the location is not an identified settlement and it is not for affordable housing. Overall, the site would not be consistent with the LDP's spatial strategy of housing in designated land releases and within the urban area, nor would it meet the criteria for a 20 minute neighbourhood.

NPF4 Policy 8 states that development in a green belt designated through a LDP will only supported if it meets particular criteria under part a) i. Of these criteria there are none directly relating to new housing other than for specific purposes such as dwellings for agricultural workers. Additional dwellings are not an intensification of an established use.

**LDP 2016**Policy Env 10 Development in the Green Belt and Countryside remains part of the development plan and compliments NPF4 Policy 8. It also sets criteria for development in the green belt along with the overarching principle that development would not detract from the landscape quality and/or rural character of the area. Criteria c is most relevant. It states:

*c) For development relating to an existing use or building(s) such as an extension to a site or building, ancillary development or intensification of the use, provided the proposal is appropriate in type in terms of the existing use, of an appropriate scale, of high quality design and acceptable in terms of traffic impact*

Policy Env 10 is expanded upon in the planning guidance '**Development in the Countryside and Green Belt'**. This guidance remains relevant. It explains that additional dwellings are not an intensification of an established use where that use is a house. The guidance notes that -
*new houses not associated with countryside use will not be acceptable unless there are exceptional plann ing reasons for approving them. These reasons include the reuse of brownfield land and gap sites within existing clusters of dwellings.*

The applicant's Planning Statement describes location as the settlement of 'Newtown'. However, this is not a recognised established settlement. Whilst a very small cluster of farm buildings and old and new homes are within this location these follow an established roadside pattern along Long Dalmahoy Road. The location of the proposed dwellings is beyond this and would be an intrusion into the landscape quality and rural character of the area. It would not represent a gap site.

There are no policy conclusions which would support the proposed development.

Lynne McMenemy | City Plan 2030 Project Manager | Planning | Sustainable Development | Place Directorate | The City of Edinburgh Council | Waverley Court, Level G3, 4 East Market Street, Edinburgh, EH8 8BG | lynne.mcmenemy@edinburgh.gov.uk | www.edinburgh.gov.uk

Thank you for your support as we adapt our planning service to help deliver a swift renewal and a positive future for the city.

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