The Planning Inspectorate

Appeal Decision

Inquiry Held on 15 August 2022
Site visit made on 16 August 2022

by D R McCreery MA MRTPI

An Inspector appointed by the Secretary of State

Decision date: 24tth November 2022

Appeal Ref: APP/W3330/W/22/3296248
Phase 3, Jurston Farm, Wellington, Grid Ref Easting: 314634, Grid Ref Northing: 120336

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a failure to give notice within the prescribed period of a decision on an application for consent, agreement or approval to details required by a condition of an approval.
- The appeal is made by Mr Paul Hoffmann (C G Fry and Son) against Somerset West and Taunton Council.
- The application dated 9 June 2021, sought discharge of conditions 3, 4, 5, 6, 7 and 10 of reserved matters approval 43/19/0106.
- The details of the conditions for which approval is sought are:
- Condition 3 – Before development commences (including site clearance and any other preparatory works) a scheme for the protection of trees to be retained shall be submitted to and approved in writing by the Local Planning Authority. Such a scheme shall include a plan showing the location of the protective fencing, and shall specify the type of protective fencing, all in accordance with BS 5837:2012. Such fencing shall be erected prior to commencement of any other site operations and at least two working days' notice shall be given to the Local Planning Authority that it has been erected. It shall be maintained and retained for the full duration of works or until such time as agreed in writing with the Local Planning Authority. No activities whatsoever shall take place within the protected areas without the prior written agreement of the Local Planning Authority. (Reason: To ensure the enhancement of the development by the retention of existing trees and natural features during the construction phase).
- Condition 4 – No development shall be commenced until details of the surface water drainage scheme based on sustainable drainage principles together with a programme of implementation and maintenance for the lifetime of the development have been submitted to and approved in writing by the Local Planning Authority. The drainage strategy shall ensure that surface water runoff post development is attenuated on site and discharged at a rate and volume no greater than greenfield runoff rates and volumes. Such works shall be carried out in accordance with the approved details. These details shall include: - • Details of phasing (where appropriate) and information regarding the management and maintenance of drainage systems during construction of this, and any other subsequent phases. • Information about the design storm period and intensity, discharge rates and volumes (both pre and post development), temporary storage facilities, means of access for maintenance (6 metres minimum), the methods employed to delay and control surface water discharged from the site, and the measures taken to prevent flooding and pollution of the receiving groundwater and/or surface waters. • Any works required off site to ensure adequate discharge of surface water without causing flooding or pollution (which should include refurbishment of existing culverts and headwalls or removal of unused culverts where relevant). • Flood water exceedance routes both on and off site, note, no part of the site must be allowed

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to flood during any storm up to and including the 1 in 30 event, flooding during storm events in excess of this including the 1 in 100yr (plus 40% allowance for climate change) must be controlled within the designed exceedance routes demonstrated to prevent flooding or damage to properties. • A management and maintenance plan for the lifetime of the development which shall include the arrangements for adoption by an appropriate public body or statutory undertaker, management company or maintenance by a Residents' Management Company and / or any other arrangements to secure the operation and maintenance to an approved standard and working condition throughout the lifetime of the development. (Reason: To ensure that the development is served by a satisfactory system of surface water drainage and that the approved system is retained, managed and maintained throughout the lifetime of the development, in accordance with National Planning Policy Framework (July 2018) and the Technical Guidance to the National Planning Policy Framework).

- Condition 5 – No development shall commence unless a Construction Environmental Management Plan has been submitted to and approved in writing by the Local Planning authority. The works shall be carried out strictly in accordance with the approved plan. The plan shall include: Construction vehicle movements, Construction operation hours, Construction vehicle routes to and from site including a map showing the route, Construction delivery hours, All construction deliveries being made off highway, On-site turning facility for delivery vehicles and egress onto highway only with guidance of a trained banksman, Expected number of construction vehicles per day, All contractor vehicle parking being accommodate off highway including a plan showing the onsite parking arrangements, Specific measures to be adopted to mitigate construction impacts in pursuance of the Environmental Code of Construction Practice, A scheme to encourage the use of Public Transport amongst contractors, On-site vehicle wheel washing facilities and the regular use of a road sweeper for local highways. (Reason: To ensure that construction traffic does not result in a nuisance to other highway users in accordance with Core Strategy Policies CP6 Transport & Accessibility, DM1).
- Condition 6 – The proposed estate roads, footways, footpaths, tactile paving ,cycle ways, bus stops/bus lay-bys, verges, junctions, street lighting, sewers drains retaining walls, service routes, surface water outfall, vehicle overhang margins, embankments, visibility splays, accesses, carriageway gradients, drive gradients, car motorcycle and cycle parking and street furniture shall be constructed and laid out in accordance with details to be approved by the Local Planning Authority in writing before their construction begins . For this purpose, plans and sections, indicating as appropriate, the design, layout, levels, gradients materials and method of construction shall be submitted to the Local Planning Authority. (Reason: To ensure that an acceptable highway design is provided in accordance with Core Strategy Policies CP6 Transport & Accessibility, DM1, General and DM4 Design; and Site Allocations & Development Management Plan Policies A1, Parking (Linked to Appendix E), A5 Accessibility of Development and A7 Design Quality).
- Condition 7 – In the interests of sustainable development none of the dwellings hereby permitted shall not be occupied until a network of cycleway and footpath connections has been constructed within the development site in accordance with a scheme to be submitted to and approved in writing by the Local Planning Authority. (Reason: To ensure that adequate provision is made for cyclists and pedestrians in accordance with Core Strategy Policies CP6 Transport & Accessibility, DM1, General and DM4 Design; and Site Allocations & Development Management Plan Policies A1, Parking (Linked to Appendix E), A5 Accessibility of Development and A7 Design Quality).
- Condition 10 - Prior to the construction of any of the development above damp proof course level, samples of the materials to be used in the construction of the external surfaces of the development shall be submitted to and approved in writing by the Local Planning Authority. The development shall be carried out in accordance with the approved details and thereafter maintained as such. (Reason: To ensure satisfactory
- appearance of the area).

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Decision

1. The appeal is dismissed.

Preliminary Matters

2. The description of the application for discharge of conditions set out above is taken from the Appeal Form, rather than the Planning Application Form, as it more accurately describes what is proposed.

3. A Case Management Conference was held on 22 June 2022. My note documenting the discussion was issued to the Appellant and the Council on the same day. The purpose of the conference was to provide a structure for the ongoing management of the Inquiry. No discussion of the merits of the respective cases took place.

4. Prior to the Inquiry (11 August 2022) I issued a Supplementary Note to the Appellant and the Council which included a series of questions that I wanted to explore with them, in the interests of assisting with preparation and making the best use of Inquiry time.

5. A list of core documents relating to the Inquiry is set out at the end of the decision. Where it is necessary to refer to a document, I have adopted the same numbering system with the additional prefix 'CD'.

6. Two Statements of Common Ground were submitted over the course of the Appeal. The first relates to general matters and was signed by the Appellant on 11 July 2022 and the Council on 15 July 2022. The second (Planning Merits SOCG) was signed by both parties on 19 July 2022 and includes the respective detailed assessment and positions in relation to the planning merits of the conditions that are the subject of this appeal. In light of my conclusions on the main issue, and as it is not a matter in dispute, it has been unnecessary for me to consider the planning merits of the conditions.

7. Prior to the Inquiry the Council submitted a Habitats Regulations Assessment report dated July 2022 (Shadow Appropriate Assessment) [CD1.3] in line with the timetable agreed in the Case Management Conference. The Appellant declined to provide a detailed written response to the document, instead indicating in more general terms that they did not accept the method of quantifying the predicted phosphate loading and wished to reserve their position. The report was the subject of consultation with Natural England undertaken after the Inquiry. This matter is discussed further in my conclusions.

Background and Main Issue

8. The appeal site is phase 3 of a large housing led development located to the east of Wellington. The entire development is 8 phases in total and was granted outline planning permission with all matters reserved (except access) in 2015 (Ref:43/14/0130) (Outline Planning Permission). It comprises up to 650 houses, community and commercial uses, a primary school, public open space and associated infrastructure. Works on phases 1 and 2 are taking place under separate reserved matters approvals, with some of the homes now completed and occupied. Phases 4 to 8 are yet to receive reserved matters approval.

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9. Phase 3 obtained reserved matters approval in June 2020 (Ref 43/19/0106) (Reserved Matters Approval) and relates to the provision of 190 dwellings with associated works. The Appellant's application to the Council for agreement of matters covered by conditions attached to this approval was made in June 2021. As indicated in the Planning Merits SOCG, the subject conditions (the Conditions) relate to the following:

   - Condition 3: Tree protection measures
   - Condition 4: Surface water drainage
   - Condition 5: Construction environment management plan
   - Condition 6: External works
   - Condition 7: Cycle and footpath network connection details
   - Condition 10: Materials

10. The Council do not object to the planning merits of the details that have been submitted. Withholding their agreement instead arises as a result of their belief that Appropriate Assessment pursuant to the Conservation of Habitats and Species Regulations 2017 (as amended) (Habitats Regulations) [CD3.3] is necessary in order to agree the Conditions.

11. Their position is influenced by Natural England's advice as set out in their note to Councils in Somerset of 17 August 2020 (Natural England Note). The note relates to development in the Somerset Levels and Moors Ramsar Site (the Ramsar Site) and gives advice on determining planning applications that may give rise to additional phosphates and the need to undertake Appropriate Assessment. The advice arises from the outcome of the *Dutch N* case [CD6.11] , which postdates both the Outline Planning Permission and the Reserved Matters Approval.

12. In light of the background set out above, the main issue in this appeal is a procedural one, namely:

   - Whether Appropriate Assessment pursuant to the Habitats Regulations is necessary in order to agree the Conditions attached to the Reserved Matters Approval and, if it is necessary, the scope of any such Appropriate Assessment.

13. In order to address the main issue it is necessary to answer a number of questions that were the focus of the Inquiry. Firstly, whether Paragraph 181 of the National Planning Policy Framework (The Framework) applies. Paragraph 181 states that listed or proposed Ramsar sites should be given the same protection as habitats sites.

14. If Paragraph 181 does apply, there is then a question of whether the Council's decision making in relation to the Outline Planning Permission and Reserved Matters Approval has an effect in terms of the scope of any Appropriate Assessment. There are also questions of whether the requirements of the Habitats Regulations apply at the discharge of conditions stage and whether EU withdrawal has an effect. I will address each of these in turn.

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Reasons

Does Paragraph 181 of The Framework apply?

15. The Somerset Levels and Moors are designated as a Special Protection Area (SPA) under the Habitats Regulations and listed as a Ramsar site under the Ramsar Convention. The SPA and Ramsar Site cover around the same land area and include the appeal site.

16. The effects of additional nutrients from development on the SPA is not at issue in this appeal, in line with the advice in the Natural England Note. The focus of the dispute between the Appellant and the Council, is the effect of additional nutrients on the Ramsar Site. In this regard, the Natural England Note advises that the interest features of the site are considered to be unfavourable, or at risk, from the effects of eutrophication caused by excessive phosphates. As such, there is limited scope for permitting further development that would add additional phosphates either directly or indirectly to the Ramsar Site.

17. The correctness of Natural England's advice, as set out above, is not a matter of specific disagreement between the Appellant and the Council. The question is instead whether the advice applies to phase 3, given that it has reached the point where reserved matters approval has been given and related conditions are being discharged.

18. The trigger in the Natural England Note for applying the advice relating to the need to undertake Appropriate Assessment is 'before determining a planning application that may give rise to additional phosphates within the catchment'. 'Planning application' is not defined within the advice note itself. Nor is there an indication on a plain reading of the advice that it is intended to be tied to an existing legal trigger point within the Planning Acts[1] or associated secondary legislation. Such an approach may limit the scope of the advice to a single moment in the planning application process where it should be considered. This would go against the overarching goal of avoiding authorising activities which may subsequently compromise the ability to restore the site to a favourable condition.

19. As such, when the advice in the note is considered alone, I am satisfied that it can reasonably be interpreted as applying to the discharge of conditions stage. In reaching this view I have paid regard to the Written Ministerial Statement of 20 July 2022 [CD5.2] which confirms that the provisions in the Habitats Regulations may apply to circumstances that include post permission approvals; reserved matters or discharges of conditions.

20. While this may be the case, it is right that there must also be a legal basis for securing this outcome. In this regard, it is of significance that the requirements of the Habitats Regulations in relation to Ramsar sites apply as a result of paragraph 181 of the Framework. This is as opposed to Ramsar sites falling within the definition of a European Site in Regulation 2 of the Habitats Regulations.

[1] Principally Town and Country Planning Act 1990 (1990 Act) and Planning and Compulsory Purchase Act 2004 (2004 Act)

21. If Paragraph 181 is engaged, then it follows that Ramsar sites should be given the same protection as European Sites would receive under the Habitats Regulations in all respects. To give them anything less would be inconsistent with the requirements of national policy.

22. This is a matter of policy, rather than an express legal requirement. *Elsick*[2] provides some authority for the Appellant's proposition that policy cannot make relevant that which is legally irrelevant. Although the *Elsick* case turns on its own facts, it should be regarded as uncontroversial that all parties involved in the planning system should expect that it will aim to create legal certainty

23. It follows that, in order for the Framework policy in paragraph 181 to be applied, there should be some connection with what is under consideration. This principle is important but should not be applied over rigidly. It is common at the discharge of conditions stage to consider matters that were unknown at the point at which planning permission was granted, in many cases that is the entire point of them. A sensible balance therefore needs to be struck between providing certainty and allowing a degree of necessary flexibility.

24. In the context of the present appeal, the Natural England Note sets out specific concerns about managing the issue of permitting further development that would add additional phosphates to the Ramsar Site, either directly or indirectly. As discussed above, as a matter of principle, the application of this advice is not limited to a specific trigger point within the planning application process. Discharge of the Conditions would be an authorising act, as part of the wider consent process, that would allow the realisation of potential effects on the Ramsar Site that the Natural England Note seeks to manage.

25. As a consequence, the advice in the Natural England Note is of relevance to the discharge of the Conditions. As a result of this relevance, it is legitimate to apply the Framework policy in paragraph 181 and to give the Ramsar site the same protection as a European Site under the Habitats Regulations in all respects. Paragraph 181 cannot therefore be regarded as legally irrelevant.

26. For the reasons explained, the act of discharging the Conditions is of sufficient relevance to allow paragraph 181 to be applied. Considering the overarching nature of paragraph 181, this applies regardless of the specific subject matter of the Conditions themselves. As such, the focus the Natural England Note places on wastewater a potential source of phosphate load does not affect my conclusions.

27. For the same reasons, the contents of the Shadow Appropriate Assessment [CD1.3] and its consideration of site specific sources of potential phosphate loading does not alter my conclusions. More broadly, the Shadow Appropriate Assessment is limited in relevance to the main issue, which relates to whether it is necessary for an Appropriate Assessment to be carried out in the first place, rather than the conclusions of that assessment.

28. In conclusion on this point, it is legitimate to apply Paragraph 181 of the Framework which confers the same level of regulatory scrutiny for Ramsar sites as European Sites would receive under the Habitats Regulations.

[2] [2017] UKSC 66

Does granting Outline Planning Permission and Reserved Matters Approval have an effect on the scope of any necessary Appropriate Assessment?

29. I have considered the Appellant's arguments relating to whether applying the requirements of the Habitats Regulations would amount to reopening any of the issues that are established by the Outline Planning Permission and the subsequent Reserved Matters Approval.

30. In this respect, the Appellant draws my attention to the case of *Cranston* [CD6.2] as authority for the proposition that conditions may not alter the nature of the development. *Proberun* [CD6.4] is also cited in support of the point that Council's cannot refuse to approve details on grounds going to the principle of the development. Both these cases turn on their own facts and related to changes in access which directly altered how the physical development on the ground could be carried out.

31. As a matter of fact and degree in the present case, I am not persuaded that managing the effects on the Ramsar Site is an issue that goes to the principle of the development or alters its nature, directly or indirectly. Whether the effects on the Ramsar Site are mitigated, or not, the development itself remains the same in terms of land use, quantum of development, and other main details. Further, no evidence has been submitted to suggest that the operational development on the ground would be carried out any differently as a result of needing to consider effects on the Ramsar site.

32. Managing the effects on the Ramsar Site is an important issue but, in all likelihood, is one that would be addressed off site. While I have paid regard to the principles they set out, the circumstances in this appeal are fundamentally different to those in the cases of *Cranston* and *Proberun.*

33. The Appellant has referred to the site wide drainage strategy, which includes phase 3. This was agreed by the Council pursuant to Condition 7 attached to the Outline Planning Permission.

34. The reasons given for imposing Condition 7 are to ensure that proper provision is made for sewerage on the site and that development does not increase the risk of sewer flooding to downstream property.

35. The Council have not suggested that the site wide drainage strategy should be changed or otherwise regarded as not agreed. Nor is there evidence to demonstrate that the strategy would be indirectly altered in a fundamental way as a result of managing the effects on the Ramsar Site. As such, the strategy remains, it is not in question, and the discharge of Condition 7 is not under direct or indirect challenge in this appeal.

36. As a consequence, the validity of the Outline Planning Permission or decisions relating to the agreement of Condition 7 attached to it are not under threat. The presumption of validity, which the Appellant cites by reference to the cases of *Hoffmann La Roche* [CD6.1] or, in a European context, *Noble* [CD6.6], is not therefore offended in this case.

37. In light of my conclusions above, applying the secondary legislation requirements of the Habitats Regulations would not be an attempt to trump primary legislation. This is because none of the principles in the legal authorities presented by the Appellant that consider the interpretation of Sections 70, 72, and 92 of the 1990 Act are offended. In any event, the distinction the Appellant

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makes relating to the hierarchy of the legislation is not a straightforward one as it is affected by Section 4 of the Withdrawal Act, for the reasons explained later in this decision.

38. Whilst the validity of the planning permission is not in question, neither can its present status be rightly regarded as implementable as there is a need to satisfy the Conditions prior to implementation. As discussed above, it is legitimate to apply national policy in Paragraph 181 of the Framework and therefore confer the same level of regulatory scrutiny for the Ramsar site as a European Site would receive under the Habitats Regulations.

39. It would be an incomplete response to the policy to adopt a position that the Council's agreement of Condition 7 attached to the Outline Planning Permission limits all scope of further consideration of drainage to only surface water, with no ability to look at the issue in its broader sense. The discharge of Condition 7 predates the Natural England Note and hasn't included consideration of effects on the Ramsar Site at all. As such, the agreement of Condition 7 has not narrowed the parameters of further consideration in the way suggested by the Appellant.

40. It is hard to see in practice how an Appropriate Assessment carried out on such a basis could be regarded as satisfactory or, indeed, a rational response to ensuring that the requirements relating to Appropriate Assessment have been complied with. Such an approach would also not be consistent with the precautionary principle which, for the reasons explained later in this decision, is of relevance to this appeal.

41. In conclusion on this point, the Council's decision making in relation to the Outline Planning Permission and Reserved Matters Approval does not have an effect in terms of the scope of any Appropriate Assessment.

<u>Do the requirements of the Habitats Regulations apply at the discharge of conditions stage?</u>

42. In the absence of an Appropriate Assessment, Regulation 63 of the Habitats Regulations prevents a competent authority from giving consent, permission, or other authorisation for a project which is likely to have significant effects. The Habitats Regulations do not specifically require an assessment at the discharge of conditions stage. Nor is Regulation 63 simply concerned with the grant of planning permission. In this respect the language is broad.

43. This is unsurprising as the function of the Habitats Regulations is to give effect in UK Law to the Habitats Directive [CD4.2]. Article 6(3) of the Directive is transposed by Regulation 63 of the Habitats Regulations, which is similarly broad in its language. This is consistent with the purposes of the Directive as expressed in its opening recitals, including the preservation, protection, and improvement of the quality of the environment and ensuring Appropriate Assessment is made of any plan or programme likely to have a significant effect. The thrust of the regime set out in the Habitats Regulations is concerned with the achievement of these outcomes and therefore achievement of the purposes of the Directive.

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44. The inclusion of specific provisions relating to the grant of planning permission, including outline, at Regulation 70 of the Habitats Regulations does not diminish the applicability of Regulation 63 in planning matters. There is nothing in Regulation 70 itself to say that it is intended to give effect or implement the requirements of Regulation 63. Nor am I persuaded that it simply acts as a sweep up provision to cover subject areas that do not have their own bespoke regulations. Adopting such an interpretation would serve to narrow the effect of Regulation 63 in a way that would risk creating gaps in coverage that would run counter to the underlying purpose of the Habitats Regulations. Instead, it is more credible to view the two Regulations as together providing the level of coverage that the regime demands in order to meet the purposes discussed.

45. Even adopting the Appellant's approach that the permission in 'consent, permission or other authorisation' in Regulation 63 is the planning permission referred to in Regulation 70, the concept of 'other authorisation' is a broad one. It is therefore capable of catching other planning related activities, including the discharge of conditions. That doesn't have the effect of making Regulation 70 serve no practical purpose, it simply acts to capture activities in a way that ensures that gaps in coverage do not result. In this respect, I disagree with the Appellant's proposition that their approach to interpreting Regulations 63 and 70 would not create loopholes that would run counter to the underlying purpose of the regulatory regime that the Habitats Regulations create.

46. My conclusions on this matter are consistent with those in the *Dutch N* case [CD6.11] in relation to ensuring that the assessment required under Article 6(3) can have no lacunae, must contain conclusions and findings capable of removing all reasonable scientific doubt as to the effects on the protected site, and integrate the precautionary principle. In light of the relationship between the two, it is logical that these principles apply equally to Regulation 63 as they do to Article 6(3).

47. For these reasons, I am satisfied that Regulation 63 applies to the discharge of conditions stage. This is the case on a plain reading of the words 'consent, permission, or other authorisation', which are broad. It is also the case when a purposive approach is considered in light of the objectives of both the Habitats Regulations and the Directive. In forming this view I have paid regard to the Appellant's comments arising from the observations in *R Bucks CC* [CD6.9]. Although there are reasonable limits to applying a purposive interpretation, my conclusions are well within those limits and are based on a plain reading of the legislation.

48. I acknowledge that the principle of procedural autonomy applies when seeking to give effect to Directives. Both *Noble* [CD6.6.] and *Wells* [CD6.5] establish this in general terms, but turn on their own facts. Carefully considering the evidence put forward in this case, I am satisfied that the approach to applying Regulation 63 set out above is procedurally appropriate, particularly in light of the breadth of the relevant wording. Considering my conclusions above on scope, I see no conflict with the domestic law principles that have been drawn to my attention. This includes the law relating to use of conditions, specifically Sections 70, 72, and 92 of the 1990 Act.

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49. In light of my conclusions on scope and view that Regulation 63 requires Appropriate Assessment at the discharge of conditions stage on the plain reading of the legislation, much of the case law on multi stage development consents, advanced primarily by the Council, is not determinative of the main issue. This is because no potential gap in administrative protection arises from my conclusions. Therefore, discussion of the case law relating to Environmental Impact Assessment and whether, by analogy, the Habitats Regulations places a continuing obligation to assess effects, is not necessary. I have found already that there is an obligation to conduct an Appropriate Assessment at the point of assessing compliance with planning conditions.

50. In terms of relevance to my conclusions, the Council's reliance on *Wingfield* [CD6.12] and *Swire* [CD6.16] mainly serves to support the position that undertaking Appropriate Assessment following the grant of outline planning permission is legally permissible. This isn't particularly controversial as there is no legal requirement that assessment should be undertaken at the earliest time, unlike in Environmental Impact Assessment.

51. In conclusion on this issue, I am satisfied that the requirement for Appropriate Assessment in the Habitats Regulations applies to the discharge of conditions stage.

Does EU withdrawal have an effect on the relevance of the Habitats Directive and related case law

52. The question of whether, following EU withdrawal, the Habitats Regulations are to be interpreted in the light of the Habitats Directive and related case law was considered at the Inquiry. Following the event, judgment in the case of *Harris*[3] was handed down by the High Court. Although the specifics of the case relate to water abstraction licences, it is of relevance as it considers the operation of the Habitats Regulations in the post withdrawal legal framework, and specifically the continuing relevance of the Habitats Directive and related case law. As such, I have paid regard to this judgment.

53. It is common ground between the Appellant and the Council that, following EU withdrawal, the Habitats Directive does not have direct effect in administrative decision making or in the courts. The European Union (Withdrawal) Act 2018 (Withdrawal Act) [CD3.4] preserves the domestic law which has implemented Directives, including the Habitats Regulations (Section 2(1)).

54. In this respect, the Habitats Regulations are retained EU Law, a position confirmed by Section 6(7) of the Withdrawal Act. The provisions in Section 6(3) of the Act are therefore of relevance as they set out how questions as to the validity, meaning or effect of the Habitats Regulations are to be decided. This includes the role of retained case law and general principles of EU law.

55. In relation to case law, in order to fall within Section 6(3) retained domestic case law must fall within the definition at Section 6(7). Specifically, the case law must include 'any principles laid down by, and any decisions of, a court or tribunal in the United Kingdom' so far as they 'relate to anything' to which the Habitats Regulations applies.

[3] [2022] EWHC 2264 (Admin)

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56. As discussed above, the cases of *Wingfield [CD6.12]* and *Swire [CD6.16]* support the position that undertaking Appropriate Assessment following the grant of outline planning permission is legally permissible. They were both considered in the specific context of the Habitats Regulations and establish principles that are of relevance to the present appeal. As a consequence, this case law falls within the definition of retained domestic case law in Section 6(7) of the Withdrawal Act and has been paid due regard in this decision.

57. Turning to retained general principles of EU law, as set out in Section 6(3) of the Withdrawal Act. What constitutes a general principle is open to question, resulting from it being what the Appellant describes as 'a term of art' to describe cross cutting fundamentals. The conclusions of *Harris* saw the precautionary principle as a general principle of EU law. I would agree with this approach, given the cross cutting and fundamental nature of the precautionary principle.

58. Application of the precautionary principle is of relevance in this case as it supports the approach to Regulation 63 set out above, particularly viewing 'consent, permission, or other authorisation' as broad terms that seek to achieve the outcome of the regime set out in the Habitats Regulations and, in turn, the purposes of the Habitats Directive. As a consequence, the precautionary principle is a retained principle of EU law for the purposes of Section 6(3) of the Withdrawal Act and has been paid due regard.

59. Moving on to the question of interpreting Regulation 63 of the Habitats Regulations by reference to the Habitats Directive. There are clear references to securing compliance with the requirements of the Directive in Regulation 9(1) of the Habitats Regulations and paying regard to it in Regulation 9(3). It is correct that Article 6(3) of the Directive does not prescribe the process to be followed. That is perhaps to be expected given the implementing relationship that the Habitats Regulations has with the Directive and that the principle of procedural autonomy applies, as discussed above.

60. However, the Appellant's argument that the Habitats Regulations have to be interpreted on their own terms without regard to the Habitats Directive is a more contentious one. Regulation 3A of the Habitats Regulations is of assistance here and is of relevance given it was introduced as an amendment to the Habitats Regulations in 2019 to ensure they would function appropriately post EU withdrawal.

61. The Explanatory Memorandum [CD3.5] explains the reasons for amending the Regulations, namely to ensure that the protection and standards set out in the Directive are implemented in the same or an equivalent way following EU withdrawal. The document goes as far as confirming there is no change in policy.

62. Regulation 3A itself points towards the continuing relevance of the Habitats Directive in 2 respects. Firstly regulation 3A(1) indicates that the Habitats Directive is to be construed as if it still included the United Kingdom. Secondly, 3A(4) gives the power for guidance to be issued as to the interpretation of the requirements of the Directives. No such guidance has been brought to my attention. However, the provision itself undermines the proposition that the Habitats Directive plays no further role in interpreting the Habitats Regulations.

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63. For the reasons set out above, I am satisfied that the Habitats Directive itself along with relevant associated case law and general principles of EU law continue to be of relevance to interpreting the provisions of the Habitats Regulations. In summary, in the present case there are three areas of particular relevance to the main issue.

64. Firstly, consideration of Article 6(3) and the Directive's purpose as part of adopting a purposive approach. Secondly, applying the precautionary principle as a general principle of EU law. Finally, the specific principle that undertaking Appropriate Assessment following the grant of outline planning permission is legally permissible. Each of the areas set out are therefore unaffected by EU Withdrawal.

65. Further, in light of my view on scope, I do not agree with the Appellant's view that conflict arises between the 1990 Act and the Habitats Regulations in this case. However, even if there were to be conflict, it is not correct to say that it must automatically be resolved in favour of the primary legislation in the 1990 Act. This is because Section 4 of the Withdrawal Act makes provision for the continuance of obligations on or after EU withdrawal. The need to secure compliance with the Habitats Directive in Regulation 9(1) of the Habitats Regulations is one such obligation. The Withdrawal Act and the 1990 Act are therefore on an equal statutory footing and one cannot therefore be assumed to trump the other.

66. For the reasons set out, EU withdrawal does not have a practical effect on the consideration of this appeal in terms of whether the Habitats Directive and related case law are of relevance.

Conclusions

67. In light of the above discussion, it is legitimate to apply Paragraph 181 of the Framework which confers the same level of regulatory scrutiny for Ramsar Sites as European Sites would receive under the Habitats Regulations. This includes the requirement for Appropriate Assessment.

68. The scope of the Assessment is not limited, including by virtue of the Council's decision making in relation to the Outline Planning Permission or the Reserved Matters Approval. The Habitats Regulations, and Regulation 63 specifically, makes the requirement for Appropriate Assessment applicable to the discharge of conditions stage. This position on each of these issues is unaffected by EU withdrawal.

69. As such, in direct response to the main issue in this appeal, Appropriate Assessment pursuant to the Habitats Regulations is necessary in order to agree the Conditions attached to the Reserved Matters Approval and the scope of any such Appropriate Assessment is not limited.

70. The Council submitted the Shadow Appropriate Assessment in the event that I should conclude that an assessment is necessary. Following the Inquiry the document was subject to consultation with Natural England, with the Appellant and the Council given the opportunity of commenting on their response. Natural England note that it is not possible for the Shadow Appropriate Assessment to ascertain that adverse effects on the integrity of the Ramsar site will not result and that there is not enough information and/or certainty to enable adverse effects on integrity to be ruled out.

Pinkbell Ough Estates

71. I have no evidence or other basis on which to reach a different conclusion. As such, (as competent authority) I am unable to carry out the necessary Appropriate Assessment in order to agree the Conditions.

72. Notwithstanding my conclusions, I recognise the other relevant planning considerations which the Appellant draws my attention to and have considered these in drawing my conclusions.

73. Requiring Appropriate Assessment, and identifying any necessary mitigation, inevitably holds up the delivery of both phase 3 and the wider development. This is both in terms of potentially slowing the delivery of later phases and the establishment into the surroundings of the phases that have been built and are at least partially occupied.

74. This issue is of importance, both in terms of the national policy priority given to housing delivery but also for Wellington itself given the scale of the overall development and, therefore, its importance to the local area. As such, there is a public interest in not holding up the delivery of the development.

75. It is also correct that the potential harm to the Ramsar Site arises as a result of being unable to rule out potential adverse effects, rather than as a consequence of a direct allegation of harm resulting from some finer detail of the site's development. Nevertheless, the Habitats Regulations regime exists to ensure that the in combination effects of plans and projects are considered.

76. The Natural England Note indicates that the need for greater scrutiny arises in order to limit the scope for permitting further development that would add additional phosphate either directly or indirectly to the Ramsar Site. The need to consider in combination effects means that the lack of a site specific allegation of harm is immaterial. In any event, as the requirement to carry out Appropriate Assessment has not been fulfilled in this case, I cannot draw firmer conclusions about the effects.

77. The unfulfilled requirement for Appropriate Assessment is an issue of material significance. To say otherwise would fail to give the same protection to the Ramsar Site as would be afforded to habitats sites (as defined in the Framework). Such an outcome would severely undermine the purpose of Paragraph 181 of the Framework. The consequence would also lead to effects on the Ramsar Site not being assessed that rightly should be under the terms of the Natural England Note.

78. In final conclusion, for the reasons set out and taking account of all other points made, the Appeal is dismissed.

D.R. McCreery

INSPECTOR

Ringbrough Estates

Appearances

FOR THE APPELLANT

Charles Banner KC of Keating Chambers, instructed by CG Fry and Son Ltd

Assisted by Caroline Waller (Clarke Willmott LLP) and Paul Hoffmann (CG Fry and Son Ltd)

FOR THE COUNCIL

Christopher Boyle KC of Landmark Chambers, instructed by the Council

Assisted by Luke Wilcox (Landmark Chambers), Martin Evans (Shape Legal, for the Council), Alison Blom-Cooper MRTPI and Emmeline Brooks MRTI (both of the Council)

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Appendix

Core Documents (CD)

1 Evidence

1.1 Short form Statement of Common Ground dated 15 July 2022

1.2 Comprehensive Statement of Common Ground dated 19 July 2022

1.3 LPA's Shadow Appropriate Assessment

2 Legal Submissions

2.1 Appellant Skeleton Argument

2.2 LPA Skeleton Argument

2.3 Appellant Response

3 UK Legislation

3.1 Town and Country Planning Act 1990

3.2 Conservation of Habitats and Species Regulations 2017

3.3 Conservation of Habitats and Species Regulations 2017 (as amended)

3.4 European Union (Withdrawal) Act 2018

3.5 Conservation of Habitats and Species (Amendment) (EU Exit) Regulations 2019 & Explanatory Memorandum

3.6 Environment Act 2021, s. 17

4 European Legislation

4.1 EU Directive 92/43/EEC ("the Habitats Directive")

4.2 Directive 2014/52/EU (EIA Directive) - Article 2

5 Policy

5.1 NPPF Paragraph 181

5.2 Written Ministerial Statement of 20 July 2022

5.3 Chief Planner's Letter 21 July 2022

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5.4 "Changes to the Habitats Regulations 2017" , government consultation paper

6 Case Law

6.1 F Hoffmann La Roche & Co AG v Secretary of State for Trade and Industry [1975] A.C. 295

6.2 Centre Hotels (Cranston) Ltd. v. Secretary of State for the Environment [1982] J.P.L. 108

6.3 O'Reilly v Mackman [1983] 2 A.C. 237

6.4 Proberun Ltd. v. Secretary of State for the Environment [1991] 61 P.C.R. 77

6.5 Case C-201/02 R (Wells) v. Secretary of State for Transport, Local Government and the Regions [2004] 1 C.M.L.R. 31

6.6 R (Noble Organisation Ltd.) v. Thanet District Council [2006] Env. L.R. 8

6.7 Case C-508/03 Commission v. UK [2006] QB 764

6.8 Case C-290/03 R (Barker) v. Bromley LBC [2007] 1 AC 470

6.9 R (Bucks CC) v. Secretary of State for Transport [2014] P.T.S.R. 182

6.10 Commission v Germany [2017] EUECJ C-142/16

6.11 Cooperatie Mobilisation for the Environment UA v College van Gedeputeerde [2019] Env LR 27

6.12 R (Wingfield) v. Canterbury City Council [2019] EWHC 1975 (Admin)

6.13 R (Wyatt) v. Fareham Borough Council [2021] EWHC 1434 (Admin)

6.14 Target Group Ltd v HMRC [2021] STC 1662

6.15 Rossendale BC v Hurstwood Properties Ltd [2021] 2 WLR 1125

6.16 R (Swire) v Canterbury CC [2022] JPL 1026

7 Commentary

7.1 Wetherill, Cases and Materials on EU Law, 9th Edition, Oxford University Press, Chapter 2 Section 3 entitled "The General Principles of EU Law".

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Documents submitted at or post the Inquiry

From the Appellant

- Aberdeen City and Shire Strategic Development Planning Authority (Appellant) v Elsick Development Company Limited (Respondent) (Scotland) [2017] UKSC 66
- Speaking note
- Response to the Council's further additional submissions dated 7 October

From the Council

- R (Wyatt) v Fareham Borough Council [2022] EWCA Civ 983
- R. (on the application of Buckinghamshire CC) v Secretary of State for Transport [2013] EWHC 481 (Admin)
- Harris & Harris v The Environment Agency and Natural England [2022] EWHC 2264 (Admin) with accompanying commentary from the Council dated 15 September
- Annotated version of the Inspector's Supplementary Note dated 11 August

Other documents

- Email response from Natural England dated 14 September and associated comments from the Appellant (dated 15 September)

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