

Natural England Statement: Policy and Guidance

European Protected Species and the Planning Process



Judicial Review Judgement 5th June 2009: Woolley v Cheshire East Borough Council and Millennium Estates Limited

Natural England welcomes the judgement made by His Honour Judge Waksman QC as clarifying the role and responsibilities of planning authorities, and other competent authorities, in the discharge of their duties in respect of European protected species. Natural England also welcomes the ruling as a vindication of its licensing requirements.

European Protected Species and Planning Authorities

The judgement makes clear that planning authorities, in exercising their planning and other functions, must have regard to the requirements of the EC Habitats Directive when determining a planning application, as prescribed by Regulation 3(4) of the Conservation (Natural Habitats, &c.) Regulations 1994 (as amended).

Such due regard means that planning authorities must determine whether the proposed development meets the requirements of Article 16 of the EC Habitats Directive before planning permission is granted (where there is a reasonable likelihood of European Protected Species being present). Therefore in the course of its consideration of a planning application, where the presence of a European protected species is a material consideration, the planning authority must satisfy itself that the proposed development meets three tests as set out in the Directive. The ruling states 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 over-riding public interest" then the authority should act on that and refuse permission.'

In addition, the judgement also clarified that it was not sufficient for planning authorities to claim that they had discharged their duties by imposing a condition on a consent that requires the developer to obtain a licence from Natural England. Natural England considers it essential that appropriate survey information supports a planning application prior to the determination. Natural England does not regard the conditioning of surveys to a planning consent as an appropriate use of conditions. This view is supported by ODPM Circular 06/2005 which states that 'it is essential that the presence or otherwise of protected species and the extent that they may be affected by the proposed development is established before planning permission is granted, otherwise all relevant material considerations may not be addressed'. Information on mitigation of any impacts on European Protected Species should also be included in the supporting information.

The Tests

The proposed development must meet a purpose of 'preserving public health or public safety or other imperative reasons of overriding public interest including those of a social or economic nature and beneficial consequences of primary importance for the environment'.

In addition the authority must be satisfied that, (a) 'that there is no satisfactory alternative' and (b) 'that the action authorised will not be detrimental to the maintenance of the population of the species concerned at a favourable conservation status in their natural range'.

Determining the Tests

Natural England considers that it would be inappropriate to provide guidance to planning authorities, or other competent authorities, on how to judge each of the tests. Such guidance is to be provided by Government Circular 06/2005: Biodiversity and Geological Conservation – Statutory Obligations and their Impact within the Planning System. Natural England is working with DCLG and Defra on the revision of Part IV of the Circular.

Overriding Public Interest and No Satisfactory Alternatives

The judgement reinforces Natural England's long held view that the planning authority has a significant role in considering the three tests and in particular in providing evidence in respect of the 'overriding public interest' and that there is 'no satisfactory alternative'. This is not a new obligation or requirement on planning authorities but clarifies the duty that should have been undertaken since the Regulations came into force on 30th October 1994.

Favourable Conservation Status

Natural England would encourage all planning authorities to appoint, or seek advice, from an appropriately qualified ecologist. Such an ecologist would be able to provide support to planning authorities in considering the impact of a proposed development on European and other protected species in a local, regional and national context. Such advice can be supported by mitigation guidance published by Natural England for bats and Great crested newts.

Bat mitigation guidelines

<http://naturalengland.etraderstores.com/NaturalEnglandShop/product.aspx?ProductID=77002188-97f9-45a5-86a6-326a7ea3cd69>

Great crested newt mitigation guidelines -

<http://naturalengland.etraderstores.com/NaturalEnglandShop/Product.aspx?ProductID=>

Natural England Statement on judicial review judgement - Woolley VS Cheshire East Borough Council and Millennium Estates Ltd.

Species Advice

The judgement makes clear that planning authorities can make decisions without site specific species advice from Natural England. Natural England will continue to provide advice to planning authorities to assist in the consideration of a planning proposal. Such advice may take the form of (a) site specific or (b) standing advice. Natural England will decide what advice will be provided on a case by case basis (and approaches may differ regionally) but the general presumption will be for standing advice.

In our opinion there is no conflict between Natural England's role in providing species advice to planning authorities at the planning stage and our role at the licensing stage. Planning and licensing are two separate and distinct consent regimes. Natural England will require information and evidence in order to discharge its duties as the competent authority for licensing. Much of the information and evidence that supports a licence application will be determined by the planning authority as the competent authority for planning in its consideration of developments against the Article 16 tests.

The level of species detail required at the licensing stage will continue to be higher than that ordinarily required in the planning consent process. Natural England will continue to seek a high level of detail in respect of the compensation, mitigation and its delivery for any proposed development at the licensing stage. Such level of detail often may only be available at a detailed stage of the development's evolution.

Licensing and Planning

Natural England believes that the judgement fully supports our current licensing requirements before a licence can be issued; that of full planning permission or outline planning permission with all conditions or reserved matters relating to wildlife having been discharged (which are intended to be and are capable of being discharged before the development begins).

This allows Natural England to satisfy itself that the development is reasonably likely to be implemented. The issue of planning permission is a significant factor in the determination of a licence application given that the planning authority should consider whether the proposal meets planning policies.

Natural England will continue to make an independent assessment of each licence application and development proposal. Where planning permission is required for a proposed development, Natural England will continue to require evidence from the applicant that the planning authority has considered the three tests and how they were met.

Background

Cheshire East Borough Council granted planning permission to Millennium Estates Limited on 15th February 2008 for the demolition of a property called Bryancliffe in Wilmslow, Cheshire and its replacement by a larger property consisting of 3 apartments. The property contained a small common pipistrelle bat roost and the planning permission attached a condition that required the developers to get a licence from Natural England.

A licence was granted on 16th July 2008 and the building demolished in August 2008. The licensee, Millennium Estates Ltd went into administration in January 2009 before the new building had been started and the site was put up for sale as land with planning permission for building. The owner of a neighbouring property unhappy with the planning permission took the council to judicial review and challenged the planning permission on 7 grounds. The first ground being the failures in connection with the EC Habitats Directive to properly take account of the species and the related legislative requirements in determining the planning application.

The judgement of 5th June 2009 quashed the planning permission and makes it plain that local planning authorities must consider whether the tests of the Habitats Directive can be met when European Protected Species are affected by planning applications, and if they don't consider them adequately then there is a high risk that the planning permission could be quashed at judicial review.