APP/A1910/W/23/3333545

LAND AT RECTORY FARM, KINGS LANGLEY

CLOSING SUBMISSIONS
ON BEHALF OF THE LOCAL PLANNING AUTHORITY

Introduction

1. This is a highly unusual inquiry where the Council appears, not because it has any objection to the planning merits of the scheme, but because it is necessary to resist the Appellants' proposed means of mitigating the acknowledged adverse effects on the integrity of the Chiltern Beechwoods SAC which would, if acceded to, result in an unlawful decision being taken.

The Need for Appropriate Assessment and the Absolute Prohibition on Granting Planning Permission unless the Development can 'Pass'

2. The Council does not repeat the agreed reasons why, without mitigation, this scheme would result in an adverse integrity on the SAC, which are fully set out in Natural England's objection statement to this inquiry and summarised in opening.

3. There is no dispute that the scheme is 'screened into'[1] the Habitats Regulations and an Appropriate Assessment must be carried out, and 'passed', before the competent authority (i.e. now the Inspector) can grant planning permission.[2] The scheme has

[1] Following People over Wind C-323/17, mitigation measures may not be taken to account in deciding whether an Appropriate Assessment needs to be carried out.
[2] Reg 63 of the Conservation of Habitats and Species Regulations 2017. The Appellants are not arguing that any of the exceptions apply here, such as Imperative Reasons of Overriding Public Importance that would allow for some adverse effects on the SAC. In any event, Natural England has ruled this out: see p. 2 of CD 3.3

currently 'failed' its Appropriate Assessment and thus any grant of planning permission would need to be accompanied by the new Appropriate Assessment undertaken by the Inspector and Natural England would need to be consulted as part of the that process and their views taken into account.[3]

4. In carrying out an Appropriate Assessment, the precautionary principle applies and the Inspector needs to be "convinced"[4] that it will not adversely affect the integrity of the SAC. That means that there must be no reasonable scientific doubt remaining as to the absence of adverse effect.[5] The Appropriate Assessment must contain "complete, precise and definitive findings and conclusions capable of removing all reasonable scientific doubt as to the effect".[6] This includes a "full and precise analysis of the measures capable of avoiding … any significant effects"[7] on the SAC.

5. The Appellants have not chosen to provide any proposed 'shadow Appropriate Assessment' to the inquiry and so it is not known exactly what analysis the Appellants would commend the Inspector to adopt in his Appropriate Assessment. However, on the basis of the Appellants' proposed strategy for mitigation i.e. a Grampian condition preventing commencement of development until an allocation of SANG credits to them has been secured and the entering into a future s. 106 agreement with the Council, the Council's position is that an Appropriate Assessment cannot be 'passed'. Natural England has not specifically commented on this mechanism. They have merely said that mitigation (either at the Box Moor Trust (BMT) proposed SANG or the Council-owned SANGs) needs to be "secured in perpetuity".[8] It is therefore unknown what their position is as 'appropriate nature conservation body' in respect of what the Inspector is being asked to do and it does not appear that the Appellants have specifically asked them.[9]

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[3] See Reg 63(3)
[4] Waddenzee C-127/02 at [56]
[5] Waddenzee C-127/02 at [59]
[6] Sweetman C-258/11
[7] People over Wind at [36]
[8] CD 9.21 at 6.12
[9] Consultation under Reg 63(3) therefore cannot be taken to have already occurred in respect of what is now being proposed.

Could SANG be secured on-site at this appeal?

6. It is worth noting at this juncture that the *only* means by which mitigation could actually be secured at this appeal would be if the Inspector were to find that: (i) the Appellants' on-site SANG solution removed all reasonable scientific doubt of adverse effects on the SAC, (ii) conditioned the plans, and (iii) passed the Appropriate Assessment on that basis. However, this is not an option open to him. This is because it would clearly run contrary to Natural England's advice as appropriate nature conservation body and so the Inspector could not possibly reasonably be said to be able to be in a position of being "convinced" that the on-site SANG proposals would remove the adverse effects on the SAC, in light of its deficiencies. One presumes this is the reason why the Appellants – despite extolling the virtues of their proposed on-site solution in written evidence[10] – drew back from that in oral evidence and have expressly confirmed that they are *not* asking the Inspector to find that their on-site proposals would properly mitigate the adverse effects on the SAC.

The Current Factual Position in Relation to the Appellant Buying Into Off-Site SANG

7. In relation to off-site SANG, whilst there was much discussion about this at the inquiry, the factual position is very simple. The Council has not, and is not at the current time in the current circumstances, offering the Appellants credits in its Council-owned sites. That is a fact. The reasonableness or otherwise of this position is irrelevant because there is no legal means by which the Inspector, or Secretary of State, or Appellants can compel the Council to sell credits in relation to its property.[11]

8. In any event and for the avoidance of doubt, the Council's positon is entirely lawful and reasonable. It has a published Mitigation Strategy which contains an Allocations

[10] Kirkpatrick PE at Section 3.2

[11] The only way the Council could be compelled to do so would be if there were a mandatory order imposed by the High Court requiring the sale of credits to the Appellants following a declaration that its decision not to release credits to them is unlawful. The Appellants have never sought such an order. Even if the Inspector were to comment that, in his opinion, the Council's exercise of its discretion is unreasonable, the Council would still not be obliged to agree with the Inspector and act differently and would, in any event, have to keep what is a 'live' decision under review in light of whatever changes happen in the future (which could result in a more restrictive approach as well as a more expansive one).

Policy in respect of Council-owned SANG. This is not a planning document and is not required to be in conformity with the NPPF.[12] As a published strategy (which has been in existence since 15 November 2022 without any challenge from anyone), the Council is as a matter of law obliged to have regard to it in making SANG allocation decisions and to apply it. The purpose of the allocation protocol is to ensure that the Council provides a SANG solution to those developments where it is genuinely not possible for this to be provided on site.[13] A clear example would be small-scale developments on brownfield sites. The Rectory Farm site is greenfield and large. It is far from clear that it is genuinely impossible to provide SANG on the site, with a properly designed scheme. Natural England have never stated as such. It would only be once this test is satisfied that one goes on to look at allocating Council off-site SANG. Even assuming that it is impossible (as Mr Freeman did in the previous SANG allocation decisions he made), in relation to allocations where it is genuinely impossible to provide on-site SANG, the protocol clearly states at para 7.1.5 that: "Strategic SANG capacity will not be allocated to affected proposals in the following circumstances: … Inappropriate Development in the Green Belt: Where it is determined that a proposal constitutes inappropriate development in the Green Belt, it will not be allocated any Strategic SANG capacity".[14] Whilst it was pointed out in cross-examination that there is a footnote reference which does not seems to have any relevant content, which is acknowledged, the published position is not caveated in any way (e.g. by reference to VSC or if an appeal is allowed). It is absolute. Mr Kirkpatrick acknowledges that the Council's position in not allocating SANG to this scheme "reflects" paragraph 7.1.5 of the Mitigation Strategy.[15] The Council is thus doing no more and no less than acting in accordance with its published policy.

9. Notwithstanding paragraph 7.1.5, the Council also acknowledges that it has an absolute discretion in respect of allocating its property (as is made clear by paragraph 7.1.11). In exercising its absolute discretion, it is entitled to decide not to depart from the stated

[12] Agreed by Mr Kitkpatrick in XX. The whole point of an allocations policy is that not everyone who has a policy-compliant scheme can buy the credits on a first come first served basis.
[13] Para 7.1.2 of CD 5.31
[14] CD 5.31 para 7.1.5
[15] Kirkpatrick PE 5.1.18

guidance in this case, irrespective of the outcome of the appeal.[16] This is a decision which is kept under review (as has happened during the inquiry itself) and could be subject to change in the future (e.g. if the Allocations Protocol is revised or if further SANG capacity becomes available allowing a more expansive approach to allocation) but, as matters currently stand at the time of this appeal, the Council is not allocating SANG to the Rectory Farm scheme from Council-owned sites. Any future changes in circumstances are far too uncertain to have any regard to.

10. The only conclusion that can be reached, therefore, in the context of the Appropriate Assessment and consideration of the Grampian condition, is that there is no evidence of any prospect of the Appellants being able to secure off-site SANG mitigation through the Council owned SANGs in the 2 year lifetime of the permission.[17]

11. The Box Moor Trust ('BMT') off-SANG positon is also straightforward. Unlike the Council-owned SANG, there *is* a prospect that the Appellants will be able to secure off-site SANG credits from BMT but, at the current time: (i) The allocations mechanism for the credits has not been set up and is subject to an outstanding s. 106 agreement which needs to be completed between BMT and the Council and (ii) even if / when that is resolved, BMT have not given any formal commitment (despite being asked to by the Council and presumably also by the Appellants[18]) that they will be prepared to allocate credits to the Appellants. Following the setting up of the allocations system, the BMT Board would need to vote to allocate the necessary 135 credits to the

[16] In the interests of good administration, the Council has set out full detailed reasons for the Appellants as to why it will not allocate Council-owned SANG. For reasons of procedural fairness in relation to the giving and testing of evidence, these are not before the inquiry, but the point is that the Council has acted reasonably in the appeal process by continuing to review its decision (as it will continue to do going forward) and the factual position remains the same.
[17] I refer to a 2 year lifetime as this is the Appellant's proposal although the Inspector will note that the Council's position as set out in the conditions sessions that a 1 year period is more appropriate given the pressing need to deliver market and affordable homes and the weight attributed to this in the planning balance and VSC balance.
[18] Mr Kirkpatrick was unclear as to whether BMT had specifically been asked to commit to allocating credits to Rectory Farm by the Appellants but it is a reasonable assumption that any sensible developer would obviously seek such a commitment if they possibly could get one. The Council has itself contacted BMT during the inquiry to try to get a commitment and BMT have not provided one. If they had, then the Council would of course have disclosed that immediately.

Appellants, a sale contract would need to be agreed, and then a s. 106 entered into with the Council to tie the credits and delivery of off-site SANG in perpetuity to the occupation of the houses. The Council wants to make clear that it hopes very much that BMT will allocate credits to the Appellants. However, it is entirely within their own discretion having regard to their charitable objectives which include protecting green space. There is therefore, as the Appellants acknowledge, a risk that they will not.[19]

12. For the purposes of the Appropriate Assessment and consideration of the Grampian condition, the position is therefore that there is a prospect of BMT credits coming forward (i.e. not 'no prospect'). But, equally, there is no certainty that they will (i.e. it is not beyond reasonable doubt that (a) BMT off-site SANG will come forward for allocation more generally and that (b) BMT will be prepared to sell credits to the Appellants for this particular scheme).

13. The consequence of this factual position is that, whilst the Appellants have identified a *potential* mitigation solution which would, if secured, avoid the adverse effects on the SAC, it has not demonstrated that this mitigation solution *will* be delivered within the 2 year lifetime of the permission.

Application of the Factual Position to Appropriate Assessment

14. This now leads to how these factual circumstances feed into the Appropriate Assessment. It is obvious that a planning permission could not be granted subject to a UU in terms such as the drafts before the Inspector to pay a SANG contribution to the Council which the Council would be obliged to return to the Appellants because it is not allocating it Council-owned SANG and / or with a requirement to use 'reasonable endeavours' to continue to negotiating with BMT since those endeavours may not result in the securing of credits. No decision-maker could be certain beyond reasonable scientific doubt that any mitigation would be actually in fact be delivered and there would thus be a risk of adverse impacts on the SAC (i.e. no certainty that they would be avoided) and the Appropriate Assessment would fail. The Appellants do not suggest otherwise (i.e. that either draft UU *alone* would be sufficient).

[19] Mr Kirkpatrick XX

15. The Appellants seek to get around this by proposing a Grampian condition (Condition 28 Option B[20]) which prevents the commencement of development until (a) the Council has confirmed the Appellants' full details of the off-site SANG that "will be secured" and (b) the Appellants and Council have entered into a s. 106 agreement to restrict occupation of the dwellings essentially until the SANG itself is in place and managed and maintained in perpetuity. In order to discharge such a condition the Appellants would need to have actually secured SANG credits from a third party (or indeed the Council) and agreed a s. 106 with the Council. This could be the BMT SANG or it could, equally, be any other SANG which the Council agrees is suitable which comes forward or is available at the time. The Appellants say that the restriction on carrying out development unless and until SANG mitigation is put in place gives sufficient certainty that there will be no adverse impacts on the SAC.

16. The Council's position is that the use of a Grampian condition in effect to act *in and of itself* as mitigation against the adverse impacts on the SAC: (i) does not meet the Habitats Regulations tests of certainty at the time of the decision to grant planning permission that there will be no adverse effects on the SAC and (ii) in any event, fails the tests for the imposition of a condition and thus either should not be imposed or, if it is imposed, would be at risk of being removed or legitimately not complied with, leaving the development without *any* security against adverse impacts on the SAC (meaning the Appropriate Assessment cannot be 'passed').

17. I will deal with each point in turn. The Appellants' approach effectively defers finding a definitive SANG solution until after a decision has been made to grant planning permission. The problem with this is that, as part of the Appropriate Assessment, the competent authority is obliged to consider full and precise details of the robustness and certainty of proposed mitigation measures now (see para 4 above). Without being sure that it *will* be the BMT SANG that is provided, or any other particular SANG at the

[20] Condition 28 Option A is wholly unacceptable since it is predicated on the Council being prepared to allocate Council-owned SANG credits to this scheme contrary to its Mitigation Strategy and where there is no prospect at the current time that it will. The Appellants have in any event confirmed that it is content with Condition 28 Option B and the Inspector is asked to consider Option B only (the drafting of which the Council proposed on a without prejudice basis).

current time, the decision-maker is simply not able to make any sufficiently clear findings on this matter.

18. The effect of the condition is that the Council could, in theory, at a later stage approve the use of credits for a SANG which is, in *this* decision-maker's view, ineffective to avoid adverse impacts on the SAC. Judgements on this point may of course legitimately differ (especially where things are in play such as whether somewhere is a realistic and sufficiently attractive alternative for occupants of this development who wish to recreate in open space). How can the Inspector be certain that what will ultimately come forward, and be agreed by the Council, will be good enough, in *his* judgement? The answer is that he simply cannot be certain, absent a firm commitment that the Appellants *will* be able to avail themselves of any particular SAC within the lifetime of the permission.

19. In other words, a Grampian condition could potentially be used to 'bridge the gap' between decision and delivery of mitigation, but only where the precise details of the mitigation that *actually will* come forward are known.[21] The decision-maker needs to be satisfied *in advance* i.e. at the time the permission in principle is granted that he is certain that the necessary mitigation not only could - but *will* - be made available and in an appropriate time scale, and he simply cannot be satisfied on the facts here.[22]

20. I turn now to the second point which is that there is a real risk that any Grampian condition imposed would be susceptible to being removed for failing to meet the NPPF six tests leaving the permission without any security at all against adverse impacts on the SAC. The Grampian condition in this case is not enforceable because it is insufficiently precise as to what the Appellants need to do (or indeed are capable of doing). In reality, all the Appellants can do is to continue to try to negotiate to buy off-site credits with another party. The Appellants cannot effectively pay money for credits that are not for sale. The Appellants cannot require any third party to sell them credits. It is therefore insufficiently precise in dictating what must happen in order to comply with it and, as a result, the condition is uncertain as to its effect. It is also unreasonable

[21] CD 8.12 para 12 The Frith, Brockenhurst Road provides helpful Inspector commentary on similar arguments
[22] CD 8.8 para 15.8.13 Former RAF Staff Cottage is useful on this point

to impose a condition where there is a real risk that it cannot be discharged. As the PPG states: conditions requiring "the consent or authorisation of another person or body often fail the tests of reasonableness and enforceability", and that is the case here.[23]

21. Furthermore, this is a Grampian condition which includes a requirement to enter into a future s. 106 agreement. Neither of the two proposed UUs are acceptable for the reasons given in paragraph 14 (they could only be acceptable if the Council were content for the Appellants to fall back on buying Council-owned SANG credits which it has clearly stated it is not). It is therefore entirely unclear at the current time what the Heads of Terms of the future s. 106 would be (e.g which off-site SANG it would relate to and what the details would be). This is again therefore not simply a 'bridging the gap' case where a planning permission may be granted subject to the future signing of a s. 106 agreement in order not to hold matters up e,g, if there is a delay whilst signatories execute a known agreement.

22. The PPG is very clear that a Grampian condition requiring a planning obligation to be entered into at a future date is "unlikely to be appropriate in the majority of cases" and would be appropriate only in "exceptional circumstances … where there is clear evidence that the delivery of the development would otherwise be at serious risk" and where the six tests are also met. This paragraph applies to a future s. 106 dealing with SANG matters, as has been confirmed in previous appeal decisions.[24] Mr Ledwidge accepted that there was no evidence that the delivery of this development is at serious risk absent such a condition. The development, on the Appellants' case, cannot be delivered (or even commenced) either way, with or without a permission until SANG mitigation is secured.

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[23] ID: 21a-009-20140306 paragraph 009. It should be noted that whilst the '6 tests' are currently contained in the NPPF (i.e. in planning policy) they derive from the common law. The tests of precision, enforceability and reasonableness are, in public law terms, an aspect of rationality. It would be irrational to impose a condition which cannot be complied with because it is not clear how it will be complied with or can be subverted. It is also irrational to impose a condition if the Council could not be sure of being able to enforce it. There is a broad principle that one cannot lawfully impose a condition requiring a person to secure a result that it does not lie wholly within his power to secure (see e.g. R (Friends of Hethel Ltd.) v. South Norfolk DC [2009] EWHC 2856 (Admin) at [78] and Davenport v. Hammersmith and Fulham LBC (1999) 78 P & CR 421).

[24] See CD 8.2 Decision dated 15 February 2017 (3161692) at [16] - [17] and decision dated 8 November 2017 (3179879) at [15]

23. There are no exceptional circumstances put forward (such as a change in the law) by the Appellants pertaining to this case, other than they would like to have a planning permission in their hand which might help their negotiations with BMT. That is not an exceptional circumstance and, in any event, a Minded To Grant letter ought to have the same effect of demonstrating the planning merits of the scheme notwithstanding its Green Belt location.[25] It is noteworthy that the Appellants have been aware all along of the need to secure SANG mitigation since they submitted their planning application in June 2022 and that permission could not be granted until the matter was resolved. Other developers are in exactly the same situation as them e.g. Hightown Housing Association with their Kier Park scheme and are simply having to wait before permission can be granted. There is no exceptional reason (or indeed any reason) why these Appellants should be treated any differently.

24. Thus, the Grampian condition should not be imposed because it is insufficiently precise, reasonable and enforceable and is contrary to the PPG guidance. If the Inspector disagrees, there is (given the Council's arguments) a clear risk that the condition would end up either being removed or not complied with and not being enforceable on the grounds that it fails to meet the tests.[26] That, in itself, means that the Inspector as competent authority cannot be sure that there will not be an adverse effect on the SAC.

The Solution

25. Regrettably, there is therefore no lawful means to grant permission at the current time and in the current circumstances. Whilst the Council sympathises with the Appellants

[25] The Council makes these points on the basis of its own case, and of course the Inspector must also have regard to the r. 6 party's arguments before he could reach such a view

[26] The easiest process would be for the Appellants to make an application under s.73 of TCPA 1990 to vary or remove the offending condition. If the Council refused the application, then that refusal could be appealed in the usual way, and ultimately judicially reviewed. Alternatively, the Appellants could just not comply with the condition. The Council would then need to decide whether they could lawfully enforce the condition. As enforcement is by way of injunction, the Appellants would simply oppose the injunction on the grounds that the condition is not enforceable.

(as does Natural England[27]), the Appellants have, as I said in opening, 'put the cart before the horse' and, as the chronology of events shows[28], pushed forward with an appeal in full knowledge that they need a SANG mitigation solution and do not have one, presumably in the hope that by the time of the decision, something would have worked out. Unfortunately, at the time of writing, it has not yet. If circumstances change, then the Inspector may be able safely to grant permission but unless and until they do, he cannot.

26. The Inspector therefore can only either (1) not issue a decision at all until SANG credits are secured, (2) issue a Minded To Grant letter and then subsequently issue a planning permission once SANG credits are secured,[29] or (3) refuse permission in line within the Council's Reasons for Refusal 1 and 2[30] and its existing Appropriate Assessment.

27. In respect of options 1 and 2, there are, however, real potential problems since the planning balance and VSC case is predicated on a significant weight being applied to

[27] See CD 3.3

[28] The Appellants submitted the planning application in June 2022 while the Council was in a moratorium and was incapable of granting planning permission for any housing development in the SAC's Zone of Influence. By September 2022, the Appellants knew that Natural England were objecting on the basis of their proposed on-site solution. They made no attempts to redesign their scheme; electing, instead, to restrict themselves to buying off-site credits. The Council's Mitigation Strategy was published in November 2022 with its prohibition on allocating credits to inappropriate developments in the Green Belt. The Appellants were fully aware of that, did not seek to challenge the position, and focussed on negotiating with BMT, even though, by July 2023, NE had made clear that BMT was not suitable as it was only for a trial period. Knowing that there was no Council owned SANG being offered and BMT was unsuitable (at that time), the Appellants declined any further extensions of time for the Council to determine the application and stated they would appeal against non-determination. They thus chose to push for an appeal and the Council then subsequently decided to refuse permission which it did in October 2023. The Appellants ultimately lodged the appeal in November 2023. Negotiations have continued during the appeal process but the SANG credits are still not available. The Council sought to assist by suggesting an adjournment of the inquiry to allow time for the BMT SANG to come forward so the whole debate we have been having (and the Council's attendance) could have been entirely avoided, but the Appellants resisted. No doubt following the Appellants' lead on this, the Inspector agreed not to the adjourn the inquiry, and so we are where we are, but the position of being at appeal with a concluded inquiry and needing this kind of Grampian condition attached to a permission is entirely of the Appellants' making.

[29] If he rejects the r. 6 party's case

[30] Reason for Refusal 1 would also 'kick in' in this situation since the 'other harm' of harm to the SAC would not be outweighed by VSC.

the delivery of homes and affordable homes to address the current shortfall in the Borough. If any meaningful period of time elapses before a permission is granted then that weighting will necessarily reduce and so the VSC and planning balances would need to be re-visited.[31] The Council submits that the only appropriate option therefore is to refuse planning permission in accordance with the Council's Reasons for Refusal 1 and 2. The Appellants can then re-submit a planning application once they have secured adequate SANG mitigation either preferably on-site or, if genuinely not possible, off-site.

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[31] The Inspector would also have to be cognisant of any changes in policy either at a national or local level or any other changes in material considerations.