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Alan Ridley
Planning Inspectorate
4/02 Kite Wing
Temple Quay House
2 The Square
Bristol, BS1 6PN

Our Ref:CVH/HAR

1 July 2011

Dear Mr Ridley,

Re: Town and Country Planning Act 1990
Appeals by Paul Newman New Homes and Mr Paul Newman.
Site at Land at Valley Farm, Soulbury, Leighton Buzzard, LU7 0JJ, Land at Derwent Road, Linslade, Leighton Linslade and Land at Valley Farm, Soulbury, Leighton Buzzard

We write further to our letter of 24 June 2011, having now considered the Ecology evidence submitted on behalf of the Appellant by Dr Rowlands.

There are 3 areas which we consider warrant comment. Firstly (and secondly), at para 6.25 of his Proof of Evidence, Dr Rowland states;

"I do not propose to consider the "need" or "no alternative" tests within my evidence, however consider that the need for the development (including the consideration of alternatives) will be the subject of discussion by others in relation to the appeal proposals. In the event that the appeal is allowed, I consider that this would demonstrate the need for development and that alternatives had been considered."

With respect to Dr Rowland, as regards the "need" test, this is to confuse the planning definition of "need" and the Habitats Regulations test of "imperative reasons of overriding public interest", often referred to as "IROPI". At first blush it is perfectly clear that the IROPI test sets a far higher threshold than that of planning need, so that even if the Inspector is satisfied that there is a need for the proposed development, as far as the Regulation 53 test is concerned, the need for the development has to be both "imperative" and "overriding".

The same can be said of the “no alternative test”. In planning terms the requirement is to establish that there is no more suitable alternative site available for the proposed development. As regards the Habitats Regulations test, the actual wording of Article 16(1) of the Directive is;

“…provided there is no satisfactory alternative”, which is faithfully reproduced in Regulation 53.

This has been consistently interpreted by the authorities and published guidance as meaning that there is no satisfactory alternative to the breach of the system of strict protection of European Protected Species (EPS) as set out in Article 12(1) of the Directive, transposed as Regulation 41 of the 2010 Regulations. The prohibition covers deliberate capture, injury, killing, or disturbance of EPS and damage or destruction of breeding sites or resting places.

Regulation 41(2) sets out details of and defines what constitutes “disturbance” in the context of the Regulations, and includes impairing the ability of EPS to survive, breed, rear and nurture young, hibernation and migration or to significantly affect the local distribution or abundance of the species in question.

As with the “need” test, it is perfectly clear that meeting the requirements of the “no satisfactory alternative” test of the Directive and Regulations is significantly different from the “no alternative” test as used in a planning context, and cannot simply be disposed of as Dr Rowlands suggests.

It is within the context of “disturbance” to EPS that our third concern arises. Dr Rowlands appears to have focussed solely on the effect of the removal of one tree (T68) which supports a confirmed bat roost and whether such would breach the third limb of the Regulation 53 tests for the grant of an EPS licence which would allow for such disturbance. (See Rowlands Proof paras 6.24 – 6.28)

The recent Supreme Court case of Morge v Hampshire County Council [2011] UKSC 2 has provided helpful guidance on the correct judicial interpretation of the term “disturbance”.

Citing the European Commission’s Guidance on the Habitats Directive, Lord Brown in the leading judgement at para.21 stated that;

“…the guidance explains that, within the spectrum, every case has to be judged on its own merits…”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.” ”

Lord Brown further referred to a letter from the Head of the Protected and Non-Native Species Policy at DEFRA as providing elaboration on this point, in para.22;

“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."

In the context of the current proposals, Dr Rowlands states at para. 2.43 of his Proof that 12% of species recorded were Noctule bats, which are described in para. 2.44 of his Proof as "uncommon" but "widely distributed". The remainder, (bearing in mind that 84% of species recorded were pipistrelles) some 4%, he considers to be either serotine or possibly brown long-eared bats, which are also regarded by the Bat Conservation Trust (BCT) as "uncommon".

At no point in his evidence does Dr Rowlands consider the impact of the proposed development on the conservation status of these species and whether the grant of DEFRA licenses would be detrimental to favourable conservation status. This is unsurprising and a reflection of the inadequacy of the survey data and the impact assessment to date.

Furthermore, as the BCT Guidelines (Chapter 2) make clear:

"Surveys should be carried out before planning permission is considered; only in exceptional circumstances should they be carried out after consent through planning conditions",

which is precisely what is being proposed in this case (with the apparent approval of Natural England – see below), although there is no evidence produced as to what constitutes "exceptional circumstances" in this instance.

Lord Brown also made clear at para.20 that the guidance from the Commission;

"…does not carry with it the implication that only activity which *does* (emphasis in original) have an effect on the conservation status of the species (i.e. which imperils its favourable conservation status) is sufficient to constitute "disturbance"."

When Dr Rowlands' evidence is set in this context it is evident that he has failed to consider either the correct approach to the notion of "disturbance", wider impacts of the proposed development on foraging (which can clearly adversely affect the ability of EPS to survive, to breed or reproduce, or to rear or nurture their young – Regulation 41(2)), and therefore to be in a position to conclude, as he does, that;

"…the appeal proposals conform to the strict legal protection afforded to bat species and that any derogation which is or may be required to enable the appeal proposals can be achieved." (Rowlands Proof para.6.31)

As regards the consultation response of Natural England dated 1 April 2010, whilst they state that they have no objection to the proposed development at present, if any bats are found during the demolition or construction phases, then work should cease immediately and a bat licence sought. What is singularly lacking from NE's response is any clear indication as to whether, in their view, the criteria for derogation are met and that work would be allowed to continue.

In the absence of such a clear indication from NE, any grant of planning permission runs the risk of being incapable of being implemented as offending Article 12 of the Habitats Directive.

Yours sincerely,

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