Bat Conservation Trust

Local Planning Authorities' legal duty to protected species

An important judgment was handed down by His Honour Judge Waksman QC sitting as a judge of the High Court at the start of June 2009 in the case of *R (on the application of Simon Woolley) v Cheshire East Borough Council*. The judgment clarifies for the first time the legal duty of a Local Planning Authority (**"LPA"**) when determining a planning application for a development which may have an impact on European Protected Species (**"EPS"**), such as bats, great crested newts, dormice or otters.

The species protection provisions of the Habitats Directive, as implemented by the conservation (Natural Habitats Etc.) Regulations 1994, contain three "derogation tests" which must be applied by Natural England (**"NE"**) when deciding whether to grant a licence to a person carrying out an activity which would harm an EPS. For development activities this licence is normally obtained after planning permission has been obtained. The three tests are that:

- the activity to be licensed must be for imperative reasons of overriding public interest or for public health and safety;
- there must be no satisfactory alternative; and
- favourable conservation status of the species must be maintained.

This court judgment makes it clear that, notwithstanding the licensing regime, the LPA must also address its mind to these three tests when deciding whether to grant planning permission for a development which could harm an EPS. A LPA failing to do so would be in breach of Regulation 3(4) of the 1994 Regulations which requires all public bodies to have regard to the requirements of the Habitats Directive in the exercise of their functions.

This case related to an application for judicial review of a decision by Macclesfield Borough Council (now the Cheshire East Borough Council) to grant planning permission for a development in Wilmslow involving the demolition of an existing Edwardian Villa and its replacement with a larger property consisting of three luxury apartments.

A small bat roost had been identified at the existing property following a survey undertaken in 2006 in connection with a previous planning application which was refused by the LPA and rejected on appeal by a Planning Inspector (the Bats issue was raised but was not given as a reason for refusal). It was common ground that in order to demolish the building containing the bat roost that a licence from NE was required. Such a licence was acquired by the developer in July 2008 and the building was demolished the following month.

The judicial review was brought by the claimant, Mr Woolley, on seven grounds. The first ground is the one of interest here. The claimant argued that in granting planning permission the LPA had failed in its duty under Reg 3(4) of the 1994 Regulations by failing to give consideration to the three derogation tests contained in the species protection provisions of the 1994 Regulations. The Court agreed.

The Court considered that the guidance set out in paragraph 116 of Circular 06/05 which accompanies PPS9 is fundamental to the approach to be taken by LPAs:

"*When dealing with cases where a European Protected Species may be affected, a planning authority… has a statutory duty under Regulation 3(4) to have regard to the requirements of the Habitats Directive in the exercises of its functions. Further the Directive's provisions are clearly relevant in reaching planning decisions, and these should be made in a manner which takes them fully into account …*".

The Court considered that in order for a LPA to comply with Regulation 3(4) it must engage with the provisions of the Directive. The following passage of the judgment is of particular interest:

"*In my view that engagement involves a consideration by the authority of those provisions and considering whether the derogation requirements might be met. This exercise is in no way a substitute for the licence application which will follow if permission is given. But it means that if it is clear or perhaps very likely that the requirements of the Directive cannot be met because there is a satisfactory alternative or because there are no conceivable "other imperative reasons of overriding public interest" then the authority should act upon that, and refuse permission. On the other hand if it seems that the requirements are likely to be met, then the authority will have discharged its duty to have regard to the requirements and there would be no impediment to planning permission on that ground. If it is unclear to the authority whether the requirements will be met it will just have to take a view whether in all circumstances it should affect the grant or not. But the point is that it is only by engaging in this kind of way that the authority can be said to have any meaningful regard for the Directive.*"

Furthermore the Court held that a LPA cannot discharge its duty simply by adding a condition to the grant of planning permission which requires a licence from NE to be obtained. Such a condition would not amount to engaging with the Directive. Similarly a mere reference at the end of the planning permission to the existence of the 1994 Regulations and the need for a licence cannot discharge the LPA's duty.

The Court also made it clear that the LPA can fulfil its duty to engage with the Directive even if NE fails to provide its view (it is not obliged to do so and often responds, as it did in this case, to the effect that it does not have sufficient resources to provide a detailed commentary on the proposed development). Where planning applications are determined by planning committee the Planning Officer has a key role in identifying the relevant legal duty and should specifically highlight this duty in his/her report so that the planning committee can seek to discharge it. In this case the Planning Officer's report made no mention of either the Directive or the Regulations and merely noted the existence of bats and a proposed condition for the mitigation of the disturbance of the bats. Furthermore, there was no elaboration on the position at the committee meeting which could have reasonably informed the planning committee members of its legal duty when making their decision.

The Court held that the flawed approach taken by the LPA was considered to be a substantive breach of European law and was enough on its own to justify the quashing of the planning permission.

In our view this decision has been a long time coming. The lack of engagement by LPAs with the strict derogation legal tests in the 1994 Regulations for European Protected Species will have largely gone unnoticed in planning decision making, despite Circular 06/05. This judgment has already been welcomed by other conservation groups.

The judgment should not been seen as a negative result for developers as it is simply clarifying a legal duty which was already in existence but not being appropriately applied by many planning authorities. A developer who is aware of the existence of EPS can help smooth the path for planning permission by demonstrating to the LPA how the three derogation tests has been met and reminding the LPA of its legal duty to consider the tests and the Directive so it does not make a decision which is susceptible to legal challenge on that issue. These tests will ultimately need to be satisfied in any event by NE when considering the EPS licence application so additional work or a new obstacle has not been created. In this context it is important to note that NE has altered its administration of licence applications recently (March 2009) and now requires much more detailed evidence in the application from the developer as to the ability of the activity to meet the three legal tests.

The effects of this are yet to be seen, but it may mean that more licence applications will be rejected at least on first submission. This judgment will help avoid the situation where a developer obtains planning permission but then ultimately is unable to obtain the EPS licence required, so making the planning permission effectively redundant and leading to wasted costs. The message for developers and LPAs alike is to consider the derogation tests upfront in order to avoid unnecessary costs and delays in the planning process. Otherwise, the judgment will pave the way for increased third party challenge of planning decisions involving EPS.