Neutral Citation Number: [2024] EWHC 1780 (Admin)

AC-2023-LON -002095
CO/2520/2023

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
PLANNING COURT

Date: 16 July 2024

Before :

Dan Kolinsky KC

(sitting as a Deputy Judge of the High Court)

- -

BETWEEN

MR WAYNE WARD
MRS WARD

Claimants

- and -

SECRETARY OF STATE FOR
HOUSING, COMMUNITIES AND LOCAL GOVERNMENT

First Defendant

- and -

HORSHAM DISTRICT COUNCIL

Second Defendant)

Michael Rudd, instructed by Fulchers Solicitors for the Claimants

Matt Lewin, instructed by the Government Legal Department for the First Defendant

The Second Defendant did not appear and was not represented.

Hearing date: 13 June 2024

Approved Judgment

This judgment was handed down remotely at 11am on 16 July 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

Judgment: Approved by the court for handing down

Dan Kolinsky KC (sitting as a Deputy High Court Judge):

1. The Claimants seek to quash the decision dated 30 May 2023 of the Defendant's Planning Inspector to dismiss their appeal against the Second Defendant's refusal of planning permission for development described as "one residential unit and stable block" at land east of Coolham Road, West Chiltington, West Sussex ("the Site").

2. There are three grounds of challenge. Grounds 1 and 2 concern the Inspector's approach to water neutrality and its effect on the Arun Valley Special Protection Area (applying the requirements of regulation 63 of the Conservation of Habitats and Species Regulations 2017 ("the Habitats Regulations 2017")). Ground 3 concerns whether the Inspector should have granted planning permission for the proposed stable block (making a split decision to grant planning permission for part of the proposed development applied for).

3. The Claimants were granted permission to proceed with their claim at an oral renewal hearing by HHJ Walden Smith on 16 January 2024. The scope of ground 2 was reduced from the pleaded case to focus on whether the Inspector erred in failing to address whether the planning appeal should be held in abeyance.

4. This judgment is structured as follows.

    a. Factual Background
    b. Water Neutrality (ground 1 and 2)
    c. The Stable Block (ground 3)
    d. Conclusions.

Part A: Factual Background

5. The Claimants applied for planning permission for "one residential unit and stable block" at the Site on 17 July 2018. The submitted plans identify the location of the proposed residential unit (on the northern part of the Site). Proposed elevation plans were submitted showing the appearance and scale of the proposed mobile home. The

location of the proposed stable block shown on the proposed plans (on the western part of the Site) and details of the proposed elevations were indicated in the plans.

6. The existing use of the Site was indicated on the planning application form as being agriculture.

7. On 4 March 2019, the Second Defendant refused planning permission on the ground that the development was in an unsustainable location and was not readily accessible by sustainable methods of transport. This decision was made by the Second Defendant's members against the recommendation of planning officers.

8. The Claimants appealed to the Planning Inspectorate on 19 May 2019. At the appeal stage, the Claimants were represented by experienced planning consultants (Green Planning Studio Limited since July 2019). A hearing was scheduled for June 2020 but was postponed due to the COVID-19 pandemic.

9. In their appeal statement, the Claimants submitted that the Site was in a sustainable location and that the development complied with the development plan and should be granted permission.

10. In December 2020, the Claimants moved onto the Site with their son. This fact was notified to the Planning Inspectorate in an email dated 23 December 2020. The explanation for the Claimants moving onto the Site was said to be necessitated by personal circumstances which were exacerbated by the pandemic. In the email, it was explained as follows:

> "… the Appellant has recently had to move onto the Appeal Site. This is due to the owner of the land where the Appellant had been staying asking them to leave. In light of the Covid 19 restrictions the Appellant was unable to find any other land suitable for him to pull onto; a number of his friends and family having to shield/isolate. As you will see from the submitted papers, the Appellant's family has numerous health issues which are ongoing and access to medical facilities is paramount this has been exacerbated by the Appellant's wife having had to undergo surgery on her ankle recently, which has also caused mobility issues. The Appellant had no option but to temporarily move onto the site; the site is not therefore currently vacant".

11. In evidence (before the Inspector and the Court) those personal circumstances were explained in more detail. This evidence confirms the fact that Mrs Ward had undergone surgery on her ankle in 2020 which caused mobility issues. Further, the Claimants' son, who was 9 years old when they moved onto the Site, has medical and developmental needs. He was receiving outpatient care from a local hospital and attending a local primary school.

12. The occupation of the Site by the Claimants differs from the proposed development. The Claimants are living in a touring caravan which is stationed on the southern part of the Site. A stable block was erected on the southern part of the Site (i.e. in a different location to the proposed development). I was told at the hearing that the stable was a temporary structure which is capable of being moved.

13. The rescheduled planning appeal hearing took place on 17 May 2022. The length of the delay in rescheduling this was due to the appeal requiring an in person hearing (as it was not suitable for a remote hearing).

14. The Inspector's appeal decision ("DL") was issued on 30 May 2023 (over a year after the hearing). This delay was due to the sequential submissions which took place after the hearing addressing the water neutrality issue which I discuss further below.

15. Before turning to the issue of water neutrality (which is the focus of grounds 1 and 2 of the claim), it is helpful to explain how the other planning issues were addressed by the Inspector.

16. In paragraph 6 of DL, the Inspector identified three main issues. These were:
    1) National policy and the objectives of the development plan in respect of gypsy and traveller accommodation;
    2) Whether the development is a suitable location with regard to services and facilities; and
    3) The effect on the Arun Valley Special Protection Area, with particular regard to the water usage and the matter of water neutrality.

In the DL, the Inspector occasionally referred to "nutrient neutrality" when in fact he meant "water neutrality". It was not suggested that this error of terminology was in itself material to the challenge.

17. On the first main issue, the Inspector found that the Second Defendant could not demonstrate a five-year supply of gypsy and traveller sites and that considerable weight should be attached to this factor (DL12).

18. On the second main issue, the Inspector considered that the Site was located in a sustainable location, given its small scale and the need for additional gypsy and traveller sites in rural locations (DL20).

19. Thus, the planning objections to the proposed development which had been raised by the Second Defendant in its reason for refusal were, on the Inspector's reasoning, overcome.

20. However, by the time that the appeal was determined, the issue of water neutrality had become a material planning consideration. It is necessary to set out the background to this in some detail.

Part B: Water Neutrality

Natural England's Guidance

21. On 14 September 2021, Natural England ("NE") issued a Position Statement for Applications within the Sussex North Water Supply Zone ("the NE Position Statement"). The NE Position Statement explained:

"Arun Valley SPA, SAC and Ramsar Site- Sussex North Water Supply Zone

The Sussex North Water Supply Zone includes supplies from a groundwater abstraction which cannot, with certainty, conclude no adverse effect on the integrity of;

- Arun Valley Special Area Conservation (SAC)
- Arun Valley Special Protection Area (SPA)
- Arun Valley Ramsar Site.

As it cannot be concluded that the existing abstraction within Sussex North Water Supply Zone is not having an impact on the Arun Valley site, we advise that developments within this zone must not add to this impact".

Having referred to relevant caselaw of the Court of Justice of the European Union, the guidance continued:

"Between them these cases require Plans and Projects affecting sites where an existing adverse effect is known (i.e. the site is failing its conservation objectives), to demonstrate certainty that they will not contribute further to the existing adverse effect ….

Developments within Sussex North must therefore must not add to this impact and one way of achieving this is to demonstrate water neutrality.
…
The definition of water neutrality is the use of water in the supply area before the development is the same or lower after the development is in place".

Under the heading of Strategic Approach, the guidance note stated:

"Natural England has advised that this matter should be resolved in partnership through Local Plans across the affected authorities, where policy and assessment can be agreed and secured to ensure water use is offset for all new developments within Sussex North. To achieve this Natural England is working in partnership with all the relevant authorities to secure water neutrality collectively through a water neutrality strategy.

Whilst the strategy is evolving, Natural England advises that decisions on planning applications should await its completion. However, if there are applications which a planning authority deems critical to proceed in the absence of the strategy, then Natural England advises that any application needs to demonstrate water neutrality. We have provided the following agreed interim approach for demonstrating water neutrality".

The guidance set out a methodology for calculating whether water neutrality could be demonstrated.

22. The guidance was updated in February 2022 to "expand upon and clarify" the version published in September 2021.

23. In March 2022, NE published a "frequently asked questions" guidance note. It explained water neutrality as: "For every new development, total water use in the region after the development must be equal to or less than the total water use in the region

before the new development". In response to the question: "Does the Statement apply to existing public water supply uses?", it stated: "Existing water uses are not covered by the Statement as they are covered by the existing permissions and the abstraction licence which are being dealt with separately via Southern Water's licence amendments. These existing uses can only be used to offset new development if they are supplied by public water supply from Sussex North and they are able to reduce ongoing water consumption".

Representations in Respect of Water Neutrality

24. The Second Defendant drew the Claimants' attention to the NE Position Statement by an email dated 14 February 2022. In a letter to the Planning Inspectorate dated 13 April 2022, the Second Defendant submitted that there was currently no evidence that the development could achieve water neutrality and therefore it could not be concluded with sufficient certainty that the development would not have a likely significant effect on the Arun Valley protected sites.

25. The Claimants responded by filing a Supplementary Appeal Statement which addressed the issue of water neutrality. Having referred to the NE guidance, the Claimants contended as follows:

" The Appellant and his family are currently occupying the Appeal Site. The Appellant will confirm at the Hearing that he moved onto the Appeal Site in December 2020. In light of the Covid 19 restrictions the Appellant was unable to find any other land suitable for him to pull onto; a number of his friends and family having to shield/isolate.

The Appellant's family has numerous health issues which are ongoing and access to medical facilities is paramount this was exacerbated by the Appellant's wife having had to undergo surgery on her ankle in 2020 which caused mobility issues. The Appellant had no option but to move onto the site. This was confirmed in an email to PINS on 23rd December 2020 …

The Appellant and his family were therefore on site, prior to the issue of the Natural England Statement, which was dated 14th September 2021. The Appellant and his family were therefore using water on the site, prior to the issue of the Natural England Statement and the grant of a permission at the site would not therefore result in any additional use of water. The development is therefore capable of achieving water neutrality in accordance with the definition set out above."

26. The Claimants relied upon two appeal decisions in which, they contended, Planning Inspectors had adopted essentially the same approach for which the Claimants' consultants were contending (i.e. that the status quo was preserved because the use was already taking place).

    a. The first was an appeal decision dated 28 February 2011 (referred to as *Barney v East Dorset District Council*). In that case, English Nature (as NE were then known) published guidance which applied to residential development within 400m of Dorset Heathlands protected sites. The issue was identified in July 2006 and interim guidance on mitigation published in 2007. The guidance set a base date against which cumulative effects of subsequent development would be measured. The Inspector held that the grant of planning permission in that case would "not in reality, add to the resident population within the 400m zone – the site has had long term occupation since 2003". Rather, it would maintain the status quo which had existed since 2003. Thus, the Inspector held that the appeal would not have adverse effects on important interest features of designated sites. The Claimants contended that this "status quo"/ "nil impact" analysis should be applied to the circumstances of the present case.

    b. The second appeal decision relied upon was referred to as *Mitchell v Waverely Borough Council.* It was a decision dated 24 August 2006. The Inspector concluded that there would be no impact on the Thames Basin Heaths Special Protection Area (TBHSPA) with the grant of planning permission for a gypsy and traveller site because the Inspector considered that the enforced removal of gypsy families from the site within the mitigation zone would not necessarily result in the families leaving the mitigation zone areas. On the facts the Inspector found that there was a "good probability" that the family would attempt to stay in the local area if there were removed from the site. The Inspector therefore found that the development would not be likely to have a significant effect on the TBHSPA. The Claimants similarly argued that this logic was applicable to the current situation.

27. The Second Defendant's response disputed this approach. It contended:

"In respect of Water Neutrality issues, the appellants have not submitted a Water Neutrality Statement or demonstrated any baseline water usage. The Council considers that the occupation of the site without the benefit of planning permission and prior to the receipt of Natural England's Water Neutrality Statement does not in this case render the site as Water Neutral. The cases referenced by the Appellant are noted, however there are differences in the circumstances between that appeal and this.

In light of the lack of required information to demonstrate that the development is water neutral, the Council advises the Planning Inspectorate that it is therefore unable to assess whether the site is Water Neutral or not or whether the development adds to the impact of water demand as the Appellant has not demonstrated that water neutrality is reasonably achievable. All development proposals that consume mains water are potentially impacted by the Natural England Position Statement".

The Second Defendant made submissions distinguishing the appeal decisions relied upon by the Claimants. These submissions included contrasting the length of occupation in those cases with the present case. The Second Defendant also commented:

"There is further concern that reliance on breaches of planning control to justify significant impact on habitat sites sets an unwelcome precedent that rewards those who breach and undermines the integrity of the planning system. ……The Council would argue simply that harm afforded by a development that has been carried out without the benefit of planning permission should not be used as justification to then authorise that same harm."

28. On 8 August 2022 (subsequent to the appeal hearing on 17 May 2022), the Inspector (through his case officer) sent an email to the parties with his further reflections on the water neutrality issue. He referred to the discussion which had taken place at the hearing about whether this issue could be addressed by condition and stated as follows:

"….the development needs to be assessed against the requirements of regulation 63 of the Conservation of Habitats and Species Regulations 2017 before any permission may be granted. The consideration of any measures to avoid or reduce the harmful effects upon the Arun Valley and achieve water neutrality can only be taken into account at the Appropriate Assessment Stage of the Habitats Regulations Assessment. A Water Neutrality Statement is therefore required which should demonstrate how it has achieved neutrality and will, therefore not add to the existing adverse effect, and it is not sufficient to take the stance that, as the development is retrospective, the status quo is being maintained and the need for such a Statement is obviated."

29. In response to this direction, the Claimants' representatives filed a Water Neutrality Statement on 11 August 2022. In that statement, the Claimants maintained their earlier position that their occupation of the Site prior to the publication of the NE Position Statement obviated the need for an appropriate assessment because the development

would simply maintain the status quo with regard to water consumption. Nonetheless, the statement calculated that development would be water neutral because its total water usage would be the same (85.5L per person per day) as it was when the Claimants moved onto the Site in December 2020.

30. In paragraph 37, the Claimants' Water Neutrality Statement submitted as follows:

"If the Inspector is minded to refuse the Appeal on grounds of water neutrality a better solution would either be to grant a temporary permission to allow the Council opportunity to adopt a mitigation strategy or to place the appeal in abeyance and delay the decision until a mitigation strategy has been adopted by the Council."

This request was repeated in para 51 of the statement (in the conclusions section).

31. The Second Defendant provided a response dated 23 August 2022 challenging the Claimants' calculation of the baseline water usage with reference to the date on which they began to occupy the Site:

"the Water Neutrality Statement ….doesn't demonstrate that the development does not increase the rate of water abstraction for drinking water supplies above existing levels. The appeal site, prior to unlawful occupation the siting of 1 gypsy plot with associated stable block, comprised undeveloped land and as such the 'existing' water usage is considered to have been 'nil' water usage (the actual water consumption rate) and not 85lpd per person as referred to in the statement.

Water neutrality is defined as development that takes place which does not increase the rate of water abstraction for drinking water supplies above existing levels. Natural England guidance provides that planning permission for development in the affected areas cannot be granted unless it can be shown that the new development will not create any more water demand in the Sussex North Water Resource Zone.

The Council maintains that prior to its residential occupation the site had a nil water use and that the Water Neutrality Statement has not therefore demonstrated that the siting of 1 gypsy pitch and associated stable block which uses 85lpd [litres per day] per person, would not add to a negative impact on wildlife sites in the Arun Valley, which are protected under the Habitats Regulations 2017 (as amended).

The Water Neutrality report maintains that there was a 85.5 lpd per person water usage prior to the Natural England Statement and that this figure is both the 'existing' and the 'proposed' has not changed following the publication of the Natural England Statement and remains as 85.5lpd. The Council considers that the additional 85.5lpd per person should be mitigated by offsetting measures such as reducing water demand through efficiencies; reuse of water where possible such as rain / grey water harvesting technologies and offsetting the remaining water demand from the development. No details of offsetting have been provided and no strategy put forward.

> The Council maintains its concerns in respect of water neutrality which has not been robustly evidenced. The Council maintain that there is no provision to issue a temporary permission, given the proposals are not water neutral and do not comply with the Habitats Regulations 2017."

32. By an email dated 12 September 2022, the Claimants provided a further appeal decision dated 5 September 2022 said to support their approach to the water neutrality issue. This appeal decision (*Hillside View*) related to a gypsy site in the zone of influence of the Cotswold Beechwood Special Area of Conservation (CBSAC). The site had been occupied for six years and before restrictions applied. The Inspector found that the Council had no intention of enforcing against the use and accordingly the proposal did not add to the resident population and would have an overall neutral impact. He therefore concluded that the proposal would not cause any significant harm to the CBSAC.

33. On 16 November 2022, the Planning Inspectorate consulted NE for advice on the correct approach to take in the appeal. NE responded in a letter dated 7 December 2022: "Our response to the .. queries raised by the inspector are as follows:

> Query 1) Whether the appellant's interpretation of the position is correct, and whether the fact that occupation had commenced before the directive has a substantive difference to the requirement for neutrality.
>
> Natural England's view is that unless the appellant can demonstrate, to the satisfaction of the competent authority, that the proposed residential occupancy has already been granted permission or otherwise accounted for, prior to the issuing of our advice in September 2021, it will need to consider water neutrality impacts on the Arun Valley Special Area Conservation (SAC), Special Protection Area (SPA) and Ramsar site and underpinning Sites of Special Scientific Interest (SSSIs).
>
> The impacts of currently permitted water usage, such as for residential dwellings with granted permissions, are not covered by Natural England's statement or advice note on water neutrality; their impacts are being dealt with separately via our ongoing work with Southern Water.
>
> Query 2) whether and, if so, how, appropriate mitigation measures can be employed to make the development acceptable
>
> If the appellant cannot suitably demonstrate that their occupancy was previously granted permission or otherwise accounted for then Natural England's view would be that the water neutrality statement should be revised to reflect the water usage from the existing lawful use of the site.

In this instance further mitigation measures would be needed to achieve water neutrality. These measures, as detailed in Natural England's Arun Valley and Water Neutrality FAQs (….) and Horsham's FAQs concerning Water neutrality and planning applications (…), could include:

- Offsetting proposed water use by reducing existing water consumption from within the Sussex North public water supply
- Reducing proposed water usage through the implementation of water efficient fixtures and fittings
- Reducing proposed water use through the appropriate implementation of rainwater harvesting or greywater recycling"

34. The Claimants commented on NE's consultation response in an email dated 9 December 2022.

"It is noted there is reference to proposed residential occupancy, the residential occupancy is existing.

Notwithstanding, we note that Natural England's correspondence makes reference to households who have otherwise been accounted for not being subject to the requirements to consider water neutrality. It is clear that the Appellant's household can be "otherwise accounted for" adopting the approach used in Barney v East Dorset District Council … and Mitchell v Waverley BC … Accordingly, Natural England's letter endorses the approach taken by the Appellant".

The Inspector's Decision on water neutrality

35. The Inspector addressed the issue of water neutrality in DL paras 21-35.

36. His decision summarised the applicable legal framework in paras 24-26 as follows:

"…. the correct approach to be taken is that the development needs to be assessed against the requirements of regulation 63 of the Conservation of Habitats and Species Regulations 2017. The consideration of any measures to avoid or reduce the harmful effects upon the Arun Valley and achieve water neutrality can only be taken into account at the Appropriate Assessment stage of Habitats Regulation Assessment. The general advice is that mitigation within such a development site should ideally be considered first to minimise the contribution from the development itself. Where it is not possible to provide or secure the necessary mitigation in this way, then mitigation on land outside the development can be considered.

Attempts to secure a water neutrality strategy by way of a condition imposed on a planning permission is not considered to be acceptable by Horsham District Council nor Natural England as it does not provide for the necessary certainty that the impacts of a development can be mitigated. Any grant of planning permission absent of the up-

front certainty that the impact on the Arun Valley can be mitigated would therefore be contrary to the Habitat Regulations.

Paragraph 180 of the Framework is clear that planning permission should be refused for development that would result in significant harm to biodiversity and/or result in the loss or deterioration of irreplaceable habitats. No means of strategic mitigation currently exists".

37. It is not suggested by the Claimants that the Inspector mischaracterised the legal framework or misunderstood it in any material respect. The above paragraphs are accepted as being an accurate encapsulation of the approach required under the Habitats Regulations 2017.

38. In applying this legal framework, the Inspector concluded:

    a. water abstraction for drinking water supplies is having a negative impact on the Arun Valley protected sites and that the NE Position Statement had advised that all new development should demonstrate water neutrality (DL23);

    b. accordingly an appropriate assessment was required (DL24);

    c. a condition requiring the development to achieve water neutrality would not be lawful as it would not provide the necessary degree of certainty that the impacts of the development would be mitigated (DL25);

    d. no means of strategic mitigation had been identified (DL26).

39. The Inspector acknowledged that the Claimants had been residing on the Site since December 2020, prior to the publication of the NE Position Statement (DL27). He recorded their contention that the development would not increase water usage above the levels that existed prior to the publication of the NE Position Statement in September 2021 and therefore "their continued residence does not increase any water usage and would merely maintain the status quo" (DL28).

40. The Inspector discussed the appeal decisions relied upon by the Claimants (DL29-32) noting that two of the three decisions "preceded Natural England's recent advice" (DL30) and that the more recent decision involved prior occupation of more than six years (DL31) and that Natural England had taken little, if any, part in the appeal process (DL32).

41. The Inspector concluded as follows (DL 33-35).

> " 33. In the above regard NE, when re-consulted on the current development, took a contrary view to that of the above Inspector and stated :"Natural England's view is that unless the appellant can demonstrate, to the satisfaction of the competent authority, that the proposed residential occupation has already been granted planning permission or otherwise accounted for, prior to the issuing of our advice in September 2021, it will need to consider water neutrality impacts on the Arun Valley Special Area of Conservation (SAC), Special Protection Area (SPA) and Ramsar site and underpinning Sites of Special Scientific Interest (SSSIs)."
>
> 34. NE goes on to say that the water neutrality statement should be revised to reflect the water usage from the existing lawful use of the site. It also indicates that, amongst other things, measures should be employed to reduce nitrates through the incorporation of water efficient fixtures and fittings.
>
> 35. In conclusion on this main issue, the development does not enjoy planning permission, and neither is it immune from planning control. Irrespective of the Inspector's conclusions in the 2022 appeal decision cited above I am satisfied that NE's contemporary advice should be adhered to and mitigation measures should be identified by the appellants to allow for an Appropriate Assessment to take place."

42. In his overall planning balance (DL41-44), the Inspector noted that although the development was otherwise acceptable in planning terms, allowing the appeal would be contrary to paragraph 180(a) of the NPPF (DL42) (as it then was; currently para 186(a)).

Relevant Legal Provisions

43. The Habitats Regulations 2017 transpose the requirements of Council Directive 92/EEC of 21 May 1992 on the Conservation of Natural Habitats and of Wild Flora and Fauna ("the Habitats Directive"). The Habitats Directive was first implemented in UK law by the Conservation (Natural Habitats etc) Regulations 1994 (SI 1994/2716). The 2017 Habitats Regulations continue in English law under s.2(1) of the European Union

(Withdrawal) Act 2018. The Habitats Regulations were amended by the Conservation of Habitats and Species (Amendment) (EU Exit) Regulations 2019. As the Court of Appeal noted in para 23 of CG Fry Limited v SSLUHC [2024] Civ 730, the Memorandum to those regulations made it clear that they were not intended to introduce any change in policy (paragraph 2.4).

44. The key provision for present purposes is regulation 63 of the Habitats Regulations 2017. It provides (so far as is material) as follows:

"(1) A competent authority, before deciding to undertake, or give any consent, permission or other authorisation for, a plan or project which—

(a) is likely to have a significant effect on a European site or a European offshore marine site (either alone or in combination with other plans or projects), and

(b) is not directly connected with or necessary to the management of that site,

must make an appropriate assessment of the implications of the plan or project for that site in view of that site's conservation objectives.

(2) A person applying for any such consent, permission or other authorisation must provide such information as the competent authority may reasonably require for the purposes of the assessment or to enable it to determine whether an appropriate assessment is required.

(3) The competent authority must for the purposes of the assessment consult the appropriate nature conservation body and have regard to any representations made by that body within such reasonable time as the authority specifies.

…….

(5) In the light of the conclusions of the assessment, and subject to regulation 64, the competent authority may agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the European site or the European offshore marine site (as the case may be).

(6) In considering whether a plan or project will adversely affect the integrity of the site, the competent authority must have regard to the manner in which it is proposed to be carried out or to any conditions or restrictions subject to which it proposes that the consent, permission or other authorisation should be given".

45. An exception to the obligation in para (5) arises under regulation 64, where the authority is satisfied that there are "no alternative solutions" and that there are "imperative

reasons of overriding public interest" for the project to be caried out. It is common ground that this exception does not arise in the present case.

46. The Court of Appeal's decision in R (Wyatt) v Fareham Borough Council [2023] PTSR 1952 at para 9 draws together key points of approach to the duty under regulation 63. For present purposes, the most material points are:

> (1) The duty imposed by article 6(3) of the Habitats Directive and regulation 63 of the Habitats Regulations rests with competent authorities, not with the courts. Whether a plan or project will adversely affect the integrity of a European protected site under regulation 63(5) is always a matter of judgment for the competent authority itself …. That is an evaluative judgment, which the court is neither entitled nor equipped to make for itself ….. In a legal challenge to a competent authority's decision, the role of the court is not to undertake its own assessment, but to review the performance by the authority of its duty under regulation 63. The court's function is supervisory only. …
>
> (3) When reviewing the performance by a competent authority of its duty under regulation 63, the court will apply ordinary public law principles, conscious of the nature of the subject-matter and the expertise of the competent authority itself. If the competent authority has properly understood its duty under regulation 63, the court will intervene only if there is some *Wednesbury* error in the performance of that duty….. . When exercising its supervisory function, the court will apply the normal *Wednesbury* standard, not a heightened standard such as "anxious scrutiny" ……
>
> (4) A competent authority is entitled, and can be expected, to give significant weight to the advice of an "expert national agency" with relevant expertise in the sphere of nature conservation, such as Natural England …..And the court for its part will give appropriate deference to the views of expert regulatory bodies (see, for example, the judgment of Beatson LJ in *R (Mott) v Environment Agency* [2016] 1 WLR 4338, at paras 69 to 77)……..
>
> (6) The requirement in the second sentence of article 6(3) of the Habitats Directive and in regulation 63(5) of the Habitats Regulations embodies the "precautionary principle, and makes it possible effectively to prevent adverse effects on the integrity of protected sites as a result of the plans or projects being considered" …."

47. Wyatt concerned an unsuccessful challenge to the approach in NE's nutrient budget calculation guidance. The specific point was the method of calculating water waste use per dwelling within the calculation set out in that guidance. In giving its judgment, the Court of Appeal made the following observations on approach which are relevant for present purposes:

a. At para 52: "Whatever the particular circumstances in a given case, the basic duty of the competent authority under regulation 63 is, and remains, to grant planning permission only if satisfied that the proposed development "will not adversely affect the integrity" of the European protected site. The duty of the court is, and remains, to ensure that the authority's evaluative judgment on that question was lawfully exercised".

b. At para 56 commenting on NE's guidance at issue in that case, the Court of Appeal observed:

"It should be remembered that the technical guidance note is not statute. It does not create some additional legal requirement or test. It is an advisory document, which is neither mandatory in effect nor prescriptive of a single correct procedure to be followed. It contains guidance, whose purpose is to assist competent authorities in performing their functions under the habitats legislation. It does not assert that the approach it suggests is the only means of conducting an appropriate assessment".

Ground 1 – submissions

48. The focus of ground 1 is the Inspector's approach to water neutrality. In their pleaded case, the Claimants contend that the Inspector failed to "adequately and fully" address their case in respect of water neutrality. As pleaded, a central criticism was that the Inspector had simply adopted NE's advice.

49. The focus of this ground of challenge was refined in written and oral submissions. Mr Rudd's essential contention was that the Inspector had failed to appreciate that the Claimants' contentions were not inconsistent with NE's advice. Mr Rudd submitted that approach in the appeal decisions was compatible with NE's guidance. He submitted that the fact that water use was in fact taking place on the Site in September 2021 (following from the commencement of occupation in the mobile caravan in December 2020) meant that the water use was "otherwise accounted for" (applying the phrase used by NE in its representations to the Planning Inspector dated 7 December 2022) when NE's guidance was published in September 2021. The concept of "otherwise accounted for" was, he contended, consistent with a use which was in fact taking place when the guidance was published.

50. Mr Rudd submitted that the Inspector gave no reasons for adopting a restrictive approach to the meaning of "otherwise accounted for" by treating it as meaning that the use taking place had to have acquired immunity from planning control. This part of Mr Rudd's argument focuses on the first sentence of para 35 of DL where the Inspector indicated that the development does not "enjoy planning permission" and "neither is it immune from planning control".

51. On behalf of the Secretary of State, Mr Lewin contended that the Inspector's approach was consistent with NE's advice to the Planning Inspector read fairly and as a whole. He emphasised in particular the second sentence of NE's response to the Inspector on issue 1 (see para 33 above) which stated that the "impacts of currently permitted" water usage are not covered by NE's guidance. He submitted that this was a strong indicator that the Inspector's approach was consistent with NE's recommendation.

52. Moreover, Mr Lewin stressed that NE was advising the Inspector (as the competent authority). The decision of the competent authority was one which the Court would not ordinarily interfere with other than on Wednesbury grounds. Applying the legal framework summarised in para 9 of Wyatt, Mr Lewin submitted that the Court needed only to be satisfied that the Inspector's approach was within the reasonable range of approaches lawfully open to the Inspector (as the competent authority).

53. Mr Lewin also submitted that the Inspector had sufficiently addressed the Claimant's case and was not obliged to follow the decisions of previous Inspectors (applying North Wiltshire District Council v Secretary of State for the Environment (1992) 65 P&CR 137 at 145).

Discussion

54. It is clear in my judgment that the Inspector grasped the argument which the Claimants were advancing. The Inspector encapsulates it accurately in DL 27 and 28 – namely that because they were already occupying the Site, there was no increase in water usage from the development. It would simply maintain the status quo.

55. It is clear from the chronology of the appeal process that the Inspector grappled with this point with some care. He issued a direction after the hearing (on 8 August 2022) asking for a water neutrality statement to be prepared and indicating that "it is not sufficient to take the stance that, as the matter is retrospective, the status quo is being maintained and the need for such a statement is obviated".

56. That fairly put the Claimants on notice that the Inspector was minded to the view that a mitigation strategy would be needed.

57. The Claimants' response was to maintain their position. In form they submitted a water neutrality statement. In substance, they continued to contend that there would be no impact on the status quo.

58. The Inspector consulted NE on whether the Claimants' approach was correct. It is fair to acknowledge that he did not receive an unequivocal answer from NE to this enquiry. However, I agree with Mr Lewin's submission that, read as a whole, the thrust of NE's guidance was that the competent authority has to decide whether the proposed residential occupancy has already been granted planning permission (which, I interpose it plainly had not) or whether it was "otherwise accounted for". In the second sentence of NE's response there is an indication (albeit not conclusive) that the focus should be on the impacts of water use "not currently permitted".

59. In the light of NE's response, I do not consider that the Inspector's approach of treating "otherwise accounted for" as akin to "immune from planning control" was outside of the range of reasonable approaches open to him. It reflected the Inspector's judgment (as the competent authority) as to how NE's guidance best applied to the circumstances of this case.

60. The Inspector had well in mind that in the three appeal decisions relied on long standing uses (which did not have immunity from planning control) had been taken into account as part of the baseline for assessing impact in those cases. However, those cases were factually distinguishable from the present case because of the long standing nature of occupation in each such case. Moreover, the precise circumstances of the relationship of the development with the protective habitats differed in each case. The Inspector

acknowledged that he was taking a different approach from the previous Inspectors but grounded his approach in the specific circumstances of this case.

61. In my judgment, the Inspector gave an adequate explanation of the approach that he was adopting. He understood and addressed in sufficient detail the Claimant's case and his approach cannot be characterised as an irrational application of the guidance given to him by NE.

62. In my judgment, the Inspector's approach to water neutrality was consistent with NE's guidance and represented a lawful approach to his duties under regulation 63(5) of the Habitats Regulations 2017.

63. I therefore reject the Claimants' first ground of challenge.

Ground 2 – submissions

64. The second ground of challenge is that it was unlawful for the Inspector not to address the Claimants' request in paragraphs 37 and 51 of the Water Neutrality Statement that the appeal should be held in abeyance.

65. It is common ground that this request was not referred to in the DL.

66. Mr Rudd submits that, once it had become clear to the Inspector that water neutrality was the only issue preventing the grant of planning permission, the abeyance request became an obviously important part of the Claimants' case which needed to be addressed. The failure to address it was, he submitted, a flaw in the Inspector's approach which prejudiced the Claimants.

67. Mr Rudd also sought to draw support from the general guidance published by NE in September 2021 which supported decisions on planning applications awaiting the production of a water neutrality strategy (as discussed in para 21 above).

68. Mr Lewin submitted that this request to hold the appeal in abeyance was not a principal important issue and so the Inspector was not obliged to give reasons addressing it.

69. Mr Lewin also submitted that because a residential use was taking place, holding the appeal in abeyance (and thereby, he submitted, practically enabling the continuing use of water from the unauthorised use) would be contrary to the Habitats Regulations 2017.

Discussion

70. As I have said, it is common ground that there is no indication in the Inspector's decision (or otherwise) as to how the abeyance request was considered.

71. The legal approach to the duty to give reasons is encapsulated by the House of Lords in South Bucks District Council v Porter (No 2) [2004] 1 WLR 1953 at para 36. The duty extends to addressing the "principal important controversial issues". The reasons need refer only to the main issues in dispute, not every material consideration,

72. In considering whether the request for abeyance needed to be dealt with, it is necessary to reflect realistically on how the point was raised. The request to hold the appeal in abeyance in itself did not indicate what (exactly) the Inspector was being asked to do. The proposition that the appeal should be held in abeyance begs a number of questions. It was not clear from the request how long it was being suggested the appeal should be held in abeyance. It was not clear from the request what should happen if a mitigation scheme did not materialise. There was an inherent difficulty (not addressed in the request) of what would happen if circumstances changed in the period that the appeal was being held in abeyance. It was unclear from the request how the rationale for holding the appeal in abeyance would be communicated to the parties. For instance: (a) what would they be told about the stage of the analysis that the decision maker has reached to decide to hold the matter in abeyance? (b) would the Inspector (for example) be expected to publish some kind of interim decision indicating that he was minded to grant planning permission subject to mitigation or refuse planning permission only on grounds of water neutrality?

73. The answers to these questions were not obvious or necessarily straightforward. The Claimants did not advance any explanation of what "hold in abeyance" might have

meant in practice or grapple with the questions which such a request would necessarily raise as to how to manage the decision making process if such a scenario were to be followed.

74. In raising this point, the Claimants did not formulate a clear proposition which the Inspector could consider and address in his decision.

75. I accept that, as it turned out, water neutrality can be seen to be the only unresolved planning issue in the case. However, that this was so only became apparent on the publication of the Inspector's decision. Had the Inspector tried to follow the course suggested by the Claimants (so far as that course is capable of being understood), it is unclear how it would have become apparent to the Claimants and the Second Defendant (as local planning authority) that such a stage in the analysis had been reached. The determination of the appeal could have simply been deferred and the fact that water neutrality was the only unresolved issue may have remained obscured whilst the appeal was held in abeyance.

76. Moreover, there was no certainty (as articulated in the Claimants' request) how long this period of abeyance should be for. It was unclear whether in this indeterminate period the Claimants or the Second Defendant could know what the status of the appeal was or what stage the Inspector's analysis had reached.

77. In short, it was unclear that the Claimants' proposition was workable in practice.

78. I acknowledge that it would have been more satisfactory if the Inspector had explained why he was rejecting the Claimants' suggestion (or tried to flush out these inherent uncertainties and decide if there could be a workable proposition behind the request). However, I do not consider it was unlawful (applying the test in South Bucks DC v Porter (No 2) at para 36). for the Inspector to decide the appeal without expressly addressing this proposition. I accept Mr Lewin's primary submission that this was not a principal important issue which needed to be addressed (given the uncertain way in which it had been raised).

79. On the same basis, I do not accept Mr Rudd's argument that the request to hold the appeal in abeyance (without more detail) gave rise to a mandatory material consideration as explained by the Supreme Court in R (Samuel Smith Old Brewery) v North Yorkshire CC [2020] PTSR 221 at para 32. I do not consider that this was a consideration which was expressly or impliedly identified in the applicable legislation or policy or that it was "so obviously material" as to require direct consideration.

80. I do not consider that the Claimants' reliance on the general guidance of NE in its 2019 Position Statement adds anything to their argument. That guidance was not specific to the circumstances of this case. It did not have in mind cases where use had already commenced on the site. By contrast, NE had given specific guidance to the Inspector in respect of the appeal proposal which had not suggested or contemplated that the appeal should be put in abeyance.

81. In my assessment, ground 2 does not succeed because the proposition that the appeal should be put in abeyance was not sufficiently articulated to make it a practical suggestion. In this context, the Inspector's failure to address it was neither unlawful nor a breach of his duty to give reasons for his decision.

82. Given that conclusion, it is unnecessary for me to address the question of prejudice.

83. I make two further observations in the light of the way this point was argued.

84. First, I observe that the Claimants may well have greater visibility of their planning position with the publication of the Inspector's decision than they would have had if the appeal had been held in abeyance. It is now a matter of public record that, as at 30 May 2023, the only planning obstacle with their development proposal (on the Inspector's analysis) was the issue of water neutrality. That may be of real assistance to them even if it means that they need to make a further planning application to secure a planning consent once this issue becomes resolvable. By contrast, holding the proposal in abeyance, would not necessarily inform them how the Inspector had resolved the other issues in the case, why the determination of their appeal had been delayed, what the delay meant and when it might reasonably be expected to be resolved.

85. Second, I do not accept Mr Lewin's argument that to hold the appeal in abeyance would conflict with regulation 63 of the Habitats Regulation 2017. I do not agree that delaying the determination of the appeal would be the equivalent of granting a consent in law or in practice. Mr Lewin's argument to that effect was advanced without authority to support it. I do not accept that it would necessarily conflict with the Habitats Regulation 2017 to delay a decision to enable mitigation to be addressed. The fact that some use was taking place on the site which was not lawful does not change this analysis. Delaying the decision on the appeal does not authorise the unlawful use. The delay's purpose would have been to allow for mitigation measures to be identified. I see no necessary conflict with the Habitats Regulation 2017 and reject this part of Mr Lewin's argument.

Part C: The Stable Block

86. The third ground of challenge relates to whether the Inspector should have made a split decision and granted planning permission for the proposed stable block.

87. The only discussion of the stable block in DL is contained in para 43 which states as follows.

> "Finally, turning to the stable block erected I cannot see any planning reason why this should be refused permission. However, it has been erected close to the southern boundary of the site, and this does not accord with the submitted Site layout plan. For that matter, the mobile home has also been sited in a different position to that shown. As I have not been provided with an updated layout plan to accurately reflect the situation on the ground I do not intend to draw a distinction between the two physical elements involved".

88. There is a dispute between the parties as to whether a request for a split decision was made to the Inspector.

89. It is common ground that no request was articulated in the submissions prepared by the Claimants' experienced planning consultant.

90. However, in his oral submissions, Mr Rudd on behalf the Claimants relied on paragraph 20 of Mr Ward's supplementary witness statement (undated but submitted with the Supplementary appeal statement in April 2022). It stated as follows. "I need a place to

stable my horses, the Appeal Site is perfect, even if permission is not granted for the pitch I will seek permission for the stabling of horses as I have no other site for that".

Legal Principles

91. The applicable law as to the making of split decisions is as follows.

    a. An inspector may make a split decision (see R (Coronation Power Ltd) v Secretary of State for Communities and Local Government [2011] EWHC 2216 (Admin) at paras 23-27).

    b. If no request is not made for a split decision, no obligation on the part of the Secretary of State's Inspector to address the point of his/her own volition is likely to arise (see Granada Hospitality v SSETR (2001) 81 P&CR 36 at para 74 and Langton Homes Ltd v SSCLG [2014] EWHC (Admin) at para 80 where the point was not raised by an experienced planning consultant and therefore no obligation arose for the Inspector to address it).

Submissions (ground 3)

92. The focus of the Claimants' written submissions on ground 3 was that the Inspector was aware that he could grant a split decision. Mr Rudd submitted that, in addressing this issue in paragraph 43 of DL, the Inspector wrongly focused on the stables as they existed rather than the proposal for which the stables which was the subject of the planning application.

93. In oral submissions, Mr Rudd relied upon the paragraph of Mr Ward's supplementary witness statement which is referred to above as constituting a request to make a split decision.

94. Mr Lewin submitted that there was no request. He relied on the fact that the request was not articulated in the Claimants' submissions (made by their experienced planning consultants in support of the appeal). He contends that Mr Ward's witness statement did not contain any clear request for the Inspector to make a split decision.

95. In the absence of any request, Mr Lewin submits there was no obligation on the part of the Inspector to make decision.

96. Further, Mr Lewin submits that there is nothing in paragraph 43 that renders the decision unlawful.

Discussion (ground 3)

97. As pleaded, no reliance was placed on any request to the Inspector to make a split decision.

98. It is common ground that there is no explicit request in the submissions written by the Claimants' planning consultant.

99. I reject Mr Rudd's reliance in oral submissions on the passage of Mr Ward's witness statement as constituting a sufficiently explicit request to the Inspector to make a split decision. The wording of this passage is unclear. It says, I "will seek permission". It reads as a statement of future intention rather than a specific request to the Planning Inspector to make a split decision.

100. I consider that this case is similar to Langton Homes where no request was made. In those circumstances, there is no requirement on the Inspector to address the issue.

101. Moreover, I do not consider that the discussion in para 43 of DL renders the Inspector's approach unlawful. It is true that in this paragraph the Inspector is commenting on the stable as it exists on the site. As Mr Rudd submitted, he did not have any application for such development before him. However, I do not consider that this paragraph provides a legal foundation for the contention that the Inspector was required to address whether a split decision should have been given for the stable block as proposed. As no clear request was made for him to do so, I consider that there was no legal error in his failure to address this.

102. I therefore reject ground 3.

Part D: Conclusion

103. I have rejected all three grounds of challenge. This claim is dismissed.

104. I express sympathy for Mr and Mrs Ward's experience of the planning process in this case. Their application for permission was made over 5 years ago. They were refused planning permission by the Second Defendant against officer recommendation. In the meantime, the pandemic caused delays and during those delays an unexpected complication (water neutrality) arose which required a strategic solution – which, I was told, is not yet in place. Nevertheless, the Inspector's task was to determine the appeal taking account of the circumstances as they existed at the date of his decision and based on the evidence before him. I have concluded that he did so lawfully.

105. I thank Counsel for their helpful oral and written submissions.