



Brown long-eared bat commonly found roosting in houses (Image by: Gill Catton)

R (on the application of Simon Woolley) v Cheshire East Borough Council

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Background

This judicial review case addresses how local planning authorities (LPAs) discharge their statutory duty under Regulation 3(4) of the Conservation Regulations (1994) to have regard to the requirements of the Habitats Directive in the exercise of their functions. The case focuses on how LPAs should approach the discharge of this duty in coming to planning decisions and in particular the need to properly consider the three tests set out in the Conservation Regulations that should be considered when harm to European Protected Species (EPS) is likely. The three tests need to be satisfied to allow derogation to be granted from the protection afforded to EPS. These tests are:

- that there should be no satisfactory alternative to the plan or project as a whole or in the way it is implemented
- that the plan or project must be “in the interests of preserving public health or public safety, or for other imperative reasons of overriding public interest (IROPI), including those of a social or economic nature and beneficial consequences of importance for the environment”.
- and that the favourable conservation status of the species affected must be maintained

BSG’s experience of how local planning authorities (LPAs) have approached EPS and in particular the three tests varies, not all LPAs routinely address the three

tests when considering planning applications, often instead relying on licences issued by Natural England and requiring such licenses to be obtained before starting work. On rare occasions we still come across planning permissions that make surveys for protected species a condition of a planning permission, which clearly demonstrates that the LPA could not have had regard to EPS as they did not understand their presence or know enough about how EPS might be using a site. The judgement in this case makes it clear that regardless of the licensing regime, LPAs must also address specifically the three tests to allow derogation when determining a planning application that may result in harm to an EPS.

Summary of the case

This particular case related to a small bat roost in an existing building on a proposed development site. Under the planning permission granted by Cheshire East Borough Council the building was demolished and the bat roost destroyed to make way for a new development. The claimant in this case, Mr Woolley, sought a judicial review on seven grounds, and it was the first of these that related to the Council failing to carry out its statutory duty under Regulation 3 (4) of the Conservation Regulations 1994 by not properly giving consideration to the three tests. His Honour Judge Waksman QC agreed and the Court placed great weight on the guidance set out in paragraph 116 of Circular 06/05 which sits alongside PPS9 and

considers specifically how statutorily protected sites and species should be treated in the planning process. The following excerpt of the judgement is of most relevance here:

“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”.

Interestingly, given our experience of LPAs relying on the licensing regime, the court clearly determined that the Borough Council’s approach did not amount to the LPA discharging its duty. Thus simply requiring a licence to be obtained through planning condition or obligation, or referring to licensing and the Conservation Regulations, is not enough to demonstrate that the LPA has fully engaged with the objectives of the Directive and in the view of the judgement would not discharge the LPA’s duty.

In this case the judgement also notes that the Planning Officer’s report to the planning committee made no reference to the Habitats Directive or the Conservation Regulations. In addition, whilst the presence of bats was noted and a mitigation condition proposed, no more detailed exploration of the implications of the presence of bats was made in the report or at discussion in the committee. As such there was no evidence that showed that the planning committee had been informed of their legal duty in making a decision or the three tests and the implications of these for the decision making process. As such the Court determined that the approach taken by the LPA was in breach of European law and this alone was sufficient to overturn the planning permission.

What it means in practice

It is interesting to note that conservation groups including the Bat Conservation Trust (BCT) and some Wildlife Trusts (see the news section on the BCT web site) have welcomed this case and very much see it as strengthening the law protecting European Protected Species such as bats, great crested newts, otter, dormouse etc. We are sure that future planning permissions will be closely scrutinised to ensure that LPAs adopt the right approach in making planning decisions affecting EPS in future.

In our view this case does not necessarily strengthen the law, but it does provide clarification, particularly over how the law should be applied by LPAs. It may well be that Cheshire East Borough Council would come to the same decision to grant planning permission if they were to consider the application again taking full account of their statutory duty. In future to ensure that the correct process has been clearly undertaken it will be important to ensure that LPAs considering applications affecting EPS consider the three tests when making their planning decisions. The implications for applicants of the LPA not treating this seriously are that otherwise favourable planning decisions could be overturned through third party applications for judicial review.

It is also clear from this case that where EPS are present it will be important to consider the three tests early on in the development process to ensure that there is sufficient confidence that a future application will meet the three tests and therefore not be held up by the presence of EPS. In our view this will require early discussions within the professional team advising the development project, and in particular the ecologists and planning advisors. This will then enable clear advice to be given to the client on the implications of the presence of the EPS. In some cases it may be that the presence of an EPS prevents a successful application or give rise to the need for significant modification of development proposals to avoid the likelihood of a planning refusal. Early survey for EPS in development projects will become even more important to achieving a successful planning application.

Protecting yourself

Given the above BSG advises that to ensure the presence of EPS is properly addressed that the following key steps should be followed when bringing forward development projects:

Step 1

Determine early on in the process, before design and master planning issues have been resolved, the presence of EPS on or adjacent to the development site.

Step 2

Determine the likely impacts of the proposed scheme on EPS and consider whether there are favourable alternatives to the proposed development that avoid harm.

Step 3

Where it is not possible to avoid harm ensure there is a strong case for an overriding need that is in the public interest or is a reason of public health and safety.

Step 4

If necessary develop mitigation measures that will maintain the species affected in a favourable conservation status.

Step 5

Ensure the case for the three tests is clearly set out as part of the planning application documentation. Talk to the planning officers to ensure that their report contains the necessary information. Ensure that the planning authority can demonstrate that it does fully understand its statutory duty under Regulation 3 (4) and has taken this into account in making a planning decision.