

IN THE MATTER OF:-

LAND AT CAMPDOWN, CROOKHORN AND A PROPOSAL  
TO PROVIDE ALTERNATIVE FUNCTIONALLY LINKED LAND

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ADVICE

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## **Introduction**

- 1 I am asked whether new habitat created for Brent Goose and Eurasian Curlew which is intended to mitigate for the loss to development of supporting habitat associated with a Protected European Site, must each support the exact same birds. If there is no such obligation, I am additionally asked whether the new habitat must be provided close to the land it is proposed to develop.

## **Background**

- 2 Policy H40 of the Submission Draft Havant Local Plan proposes a mixed-use development of about 650 new homes, open space, a community centre and sporting facilities at Campdown, between Crookhorn and Bedhampton. Paragraph 6.78 of the reasoned justification for the proposal notes most of the site is identified as a Primary Support Area for Solent Waders and Brent Goose. These species are listed under Article 4.2 of the Birds Directive as qualifying species of the Chichester & Langstone Harbours Special Protection Area ("the SPA"). Supporting habitat is land outside the SPA but functionally linked to it in the sense that it supports bird species which are qualifying features of the protected European Site. In accordance with regulation 63 of the Conservation of Habitats and Species Regulations 2017, Paragraph (c) of policy H40 therefore requires a project level

Habitats Regulations Assessment to inform a package of avoidance and mitigation measures that are thought likely to be necessary to avoid adversely affecting the integrity of the SPA.

3 Natural England define the conservation objectives of the SPA as follows:-

“Ensure that the extent and distribution of the site is maintained or restored as appropriate, and ensure that the site contributes to achieving the aims of the Wild Birds Directive, by maintaining or restoring:-

- The extent and distribution of the habitats of the qualifying features
- The structure and function of the habitats and qualifying features
- The supporting processes on which the habitats of the qualifying features rely
- The population of each of the qualifying features, and,
- The distribution of the qualifying features within the site.

4 The qualifying features of the SPA include populations of Dark-bellied Brent Goose and Eurasian Curlew.

5 Natural England has prepared a Site Improvement Plan for the Solent. It identifies “Coastal Squeeze” caused by development as a threat to the SPA. The proposed response to that threat is to “investigate options to create alternative habitat”. The plan also recognises that the distribution of Brent Goose and Curlew populations has changed over time. The causes of change are said to require investigation, from which it may be inferred they are not fully understood, although a change in land management practices is identified as a factor which affects the attractiveness of functionally linked land to qualifying species.

6 The Solent Waders and Brent Goose Strategy provides further guidance to local planning authorities on issues that threaten to undermine the conservation objectives of Special Protection Areas in the Solent. It was published in September 2010 and supplemented by a Revised Strategy and Mitigation Plan in 2017. The

documents set out policies and proposals to mitigate and compensate for the impact of development. Table 3 of the 2010 Strategy helpfully identifies the characteristics of sites which make them suitable for each species, which are intended to be used to inform the selection and creation of new sites to offset the loss of their habitat. The relevant considerations are summarised on page 4 of the 2010 Strategy as follows:-

“The suitability of sites for Brent Geese depends on distance from the coast, the size of the grazing area, the type of grassland management, visibility and disturbance. Brent Geese prefer large open sites where they have clear sight-lines and short, lush grass for grazing. They use a great deal of energy travelling between feeding areas, so tend to preferentially select sites adjacent to the coast. However, Brent Geese are often seen to fly over some apparently suitable sites to reach others, so there are undoubtedly more subtle factors controlling the desirability of sites”.

- 7 By contrast, waders are said to prefer larger, flat, irregular coastal and grassland sites, which are relatively isolated from dwellings and other buildings.
- 8 The Strategy rates several of the fields within the Campdown site as of the highest importance as supporting habitat. That is reflected by it having been recorded as supporting around 150 Eurasian Curlew and several dozen Brent Goose. However, in recent years the number of birds resorting to the land has dwindled; as I understand it, only around 6 Curlew were recorded on site in 2020. This change is attributed to a cessation of grazing and an increased recreational use of the land during the Covid19 pandemic.
- 9 Against that background, Campdown’s landowners and prospective developer, Persimmon, have begun to explore ways of mitigating for the loss of habitat. The options include providing a permanent winter bird refuge at Northney on Hayling Island. Alternatively, suitable habitat might be provided on land owned by the Council at Warblington Farm. I am told the principle of “replacing” seasonally available habitat on private land with permanent habitat which is owned or leased

and managed by a “suitable organisation” for wildlife purposes is generally accepted by Natural England and the Solent Waders and Brent Geese Strategy Steering Group. However, those who instruct me are concerned that there is no evidence of a functional link between Campdown and Northney or Warblington Farm in the sense that it is not known whether the alternative sites would be used *by the very same birds* that frequent or once frequented Campdown. The question I am asked is does this matter?

### **Legal principles**

10 The relevant legal principles may be stated briefly.

- (1) First, although functionally linked land is not within a protected site, as a matter of law indirect adverse effects on a protected site, produced by the effects on functionally linked land, should be scrutinised in the same legal framework as the direct effects of acts carried out on the protected site itself: ***Lydd Airport Action Group v Secretary of State and London Ashford Lydd Airport [2014] EWHC 1523 (Admin); Forest of Dean Friends of the Earth v Forest of Dean District Council [2013] EWHC 1567 (Admin).***
- (2) Second, a decision maker is afforded substantial discretion in determining whether land is functionally linked to a protected site and its assessment of, and conclusions on, its value as such, especially where the views of the decision maker are supported by expert bodies including Natural England and the RSPB: ***Shadwell Estates v Breckland District Council [2013] EWHC 12 (Admin).***
- (3) Third, the key question in every case is not whether a plan or project will have an effect on a protected site, but whether it is likely to adversely affect its integrity, thereby undermining the conservation objectives of a designation: ***Landelijke Vereniging tot Behoud van de Waddenzee v Staatssecretaris van Landbouw, Natuurbeheer en Visserij (Case C-127/02) [2004] ECR – I 7405.*** There should be no reasonable scientific

doubt remaining as to the absence of such effects, which should be assessed on a strict precautionary principle: ***Waddenzee*** and ***Smyth v Secretary of State for Communities and Local Government [2015] EWCA Civ 174***.

- (4) Fourth, a third party alleging that there was a risk that cannot be excluded on the basis of objective information must produce credible evidence that there was a real as opposed to a hypothetical risk that was required to be considered: ***Boggis v Natural England [2009] EWCA Civ 1061***.
- (5) Fifth, in discharging its duties under the Habitats Regulations, a local authority should give the views of a statutory consultee considerable weight, but its advice is not binding and may be departed from provided cogent reasons can be demonstrated for doing so: ***Wealden District Council v Secretary of State for Communities and Local Government [2016] EWHC 247 (Admin)***.
- (6) Finally, in ***Grace v An Bord Pleanale [2018] Env. L.R. 37*** the court observed that, as a general rule, any positive effects of the future creation of a new habitat, which is aimed at compensating for the loss of area and quality of that habitat type *in* a protected area, are highly difficult to forecast with any degree of certainty or will be visible only in the future. On that basis the court concluded that where a plan or project has the effect that *part of a protected site* will no longer be able to provide a suitable habitat for the species in question, the fact that a part of the site which is likely to provide suitable habitat will be maintained or even enhanced may not be taken into account for the purposes of taking steps under article 6(3) of the Habitats Directive to ensure the project will not adversely affect the integrity of the site concerned; that fact would instead fall to be considered under article 6(4) (i.e. Regulation 64 of the 2017 Regulations) (see paragraphs 52, 53 and 57).

- (7) **Grace** may be distinguished from the present case in that it concerns *compensation* for the loss of part of a protected site, rather than mitigation for the effects of the loss of functionally linked land. Certainly, that has been Natural England's stance in comparable circumstances.

## **Discussion**

- 11 The imperative in this case is to avoid undermining the conservation objectives of the SPA. The conservation objectives of the SPA include maintaining and restoring the population of each of the qualifying features and the extent and distribution of the habitats of the qualifying features, specifically Brent Goose and Curlew. Functionally linked land such as Campdown supports those objectives by providing suitable habitat for the protected species at a population level. The contribution that an individual parcel of functionally linked land makes to those conservation objectives is not fixed; Natural England and the Solent Waders and Brent Goose Strategy Steering Group each recognise its value is subject to unexplained change but is known to be adversely affected by changes in land management.
- 12 The development of Campdown will sever the functional linkage of the land with the SPA. The site was an important area of habitat for Brent Geese and Curlew in September 2010. The evidence is that its importance has changed; that appears to be related to changes in the way the land is used and managed; and there is no evidence that its previous value can be or will be restored if development were not to take place. Those facts are relevant to an appropriate assessment and the approach to mitigation.
- 13 In that context, and consistent with the conservation objectives of the SPA, mitigation must maintain the extent and distribution of habitat in a way that it is judged will maintain the SPA's population of Curlew and Brent Goose. Natural England's Site Improvement Plan anticipates that object may be secured by making available alternative sites providing a suitable habitat. That exercise does

not require the Council to be sure the *particular birds* that use Campdown will frequent the alternative site. The key point is the habitat must be of an extent and distribution which is judged likely to maintain or restore the *population* of the relevant qualifying species; provided it will do so, the distribution of particular birds within the SPA and on functionally linked land is irrelevant. The potential of an alternative site to promote the conservation objectives of the SPA is a matter of expert judgment. That judgment must be guided by the precautionary principle, having regard to, but not necessarily following, the advice of Natural England:

**Wealden DC.** Such judgments are very difficult to challenge: see **Shadwell** and **Boggis**.

- 14 The question of whether the geographical location of a replacement site would be consistent with the object of maintaining or restoring the extent and distribution of the habitats of Brent Goose and Curlew is also a matter of expert judgment. The value of a site arises from a combination of factors, of which location and distance from the boundary of a protected European Site and other functionally linked land are just two. The key issue is whether, having regard to the full bundle of variables, a decision maker may be confident a plan or project will not adversely affect the SPA's conservation objectives. Intuitively, the extent and location of replacement land relative to the SPA is likely to be relevant to its performance as supporting habitat. However, having regard to Curlews' preference for habitat away from houses and other buildings it appears less likely that replacement land should be provided close to that which is to be developed. Therefore, an alternative site which is not located in the immediate vicinity of Campdown might properly promote the SPA's conservation objectives provided there is evidence to support that conclusion applying the precautionary principle, and absent credible evidence that it would not.

## **Conclusion**

15 I conclude:-

- (1) The Habitats Regulations do not require alternative habitat to be used by the exact same population of birds associated with Campdown.
- (2) The question of whether the quality of an alternative will promote the conservation objectives of the SPA is a matter of expert judgment. From a legal perspective, the fact that an alternative site might be located some distance from that which it replaces is unimportant provided expert evidence is adduced which demonstrates it would maintain the extent and distribution of functionally linked land in a way that will maintain or restore the population of qualifying species.
- (3) The judgment in (2) may properly take account of changes in the quality of the habitat at Campdown over recent years.

16 Please do not hesitate to contact me if I may be of further assistance.

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St John's Chambers  
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Tuesday 22<sup>nd</sup> February 2021



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ADVICE

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