

Case Name: *Wyatt, R (On the Application Of) v Fareham Borough Council (Rev1)* [2022] EWCA Civ 983 (15 July 2022)

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Commentary: The Court of Appeal (“CoA”) upheld the High Court’s dismissal of a challenge to Fareham Borough Council’s application of Natural England’s nutrient neutrality advice for the Solent in deciding to grant outline permission for the construction of new houses.

The CoA considered that there were two basic questions in this case:

- 1) First, was the duty to make an “appropriate assessment” under the Habitats Regulations lawfully performed by the Council when it granted permission for housing development near a European protected site?
- 2) Second, did the Council comply with its duty to determine the application in accordance with the development plan unless material considerations indicated otherwise?

The CoA was of the view that neither question involved any novel issue of law and that the relevant legal principles were well established and clear.

On the first question, the CoA noted that it was clear from a wealth of case law that assessing whether a plan or project will adversely affect the integrity of a European protected site under regulation 63 of the Habitats Regulations is always a matter of judgment for the competent authority 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. When reviewing performance of the regulation 63 duty, the court will apply ordinary public law principles: 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 (i.e. an error which was so unreasonable that no reasonable person acting reasonably could have made it).

It is also clear from the case law that 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. The authority may lawfully disagree with and depart from such advice but must have cogent reasons for doing so.

Further, the duty placed on the competent authority by article 6(3) and regulation 63 is to ascertain that there will be no adverse effects on the integrity of the protected site (the “precautionary principle”), but that conclusion does not need to be established to

the standard of absolute certainty. Rather, the competent authority must be satisfied that there is no reasonable doubt as to the absence of adverse effects on the integrity of the site concerned.

After running through the case law, the CoA found that the High Court was entitled to conclude that the Council's application of the precautionary principle was legally sound. The Council had consulted Natural England twice and the CoA considered that it would not be right for it to intervene simply because there was a divergence of expert opinion on some of the figures in the appropriate assessment. It was not inappropriate or unlawful for the Council to adopt, on Natural England's advice, a projected occupancy rate of 2.4 persons per dwelling and a 20% buffer on the ground that one expert viewed them as "insufficiently precautionary".

On the second key question in this case, the CoA noted that the officer's report had acknowledged that the proposal conflicted with a policy that sought to strictly control developments outside existing settlements. However, another policy stated that, where the Council did not have a five-year housing land supply, developments of appropriate scale would in some circumstances be permitted outside existing settlement boundaries. The CoA described this as a classic case of two development plan policies pulling in different directions, and it held that the officer was entitled to conclude as a matter of planning judgment that, on balance, the proposal ought to be approved. The CoA was of the view that this assessment, when regarded with realism and common sense, was not flawed by an error of law.

See [Simoncity](#) for further discussion.

Case summary prepared by Safiyah Islam