

Case Name: *Brook Avenue Residents Against Development (Barad), R (On the Application Of) v Hanslip & Ors* [2022] EWCA Civ 983 (15 July 2022)

Full case: [Click Here](#)

Commentary: This was an appeal against the refusal of a claim for judicial review following Fareham Borough Council's decision to grant planning permission for residential development on a protected wetland site for plants and birds.

An unsuccessful challenge of judicial review was made by Brook Avenue Residents Against Development ("BARAD") following Fareham Borough Council's ("the Council") decision to grant outline planning permission for a development of eight detached houses with four or more bedrooms on land approximately 5.5km from the Southampton Water Special Protection Area, a European protected site.

BARAD subsequently appealed against the refusal with the two main issues considered at appeal being (1) whether the Council as the competent authority had failed to make a lawful appropriate assessment under regulation 63 of the Conservation of Habitats and Species Regulations 2017 in part because it had relied on Natural England's technical guidance note and (2) whether the Council had failed to perform its duty under s38(6) of the Planning and Compulsory Purchase Act 2004 to determine the application in accordance with the local development plan.

In dismissing the appeal, the court stated that "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 went on to state that "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."

On this basis, the court held that the Council had reached "a reasonable and lawful conclusion as a matter of its own evaluative judgment as a competent authority". It also held that the judgment of the lower court had applied the relevant legal principles appropriately and had adopted the correct approach in its consideration of the Council's

appropriate assessment as a whole. Furthermore, it stated that the lower court demonstrated “an understanding that the Wednesbury standard of review had to be deployed with suitable rigour in the legislative context and applied an appropriately intensive standard of scrutiny consistent with the proper application of Wednesbury principles”.

With regard to the Council's reliance on Natural England's technical guidance note, the court found that there could also be “no proper challenge to the lawfulness of the advice given by Natural England. It was an advisory document to assist competent authorities in performing their functions under the habitats legislation and as such It did not misstate the legal position under regulation 63”.

With regard to the Council's reliance on Natural England's technical guidance note, the court found that there could also be “no proper challenge to the lawfulness of the advice given by Natural England. It was an advisory document to assist competent authorities in performing their functions under the habitats legislation and as such It did not misstate the legal position under regulation 63”.

Case summary prepared by Cobi Bonani