

Case Name: *Enterprise Hangars Ltd v Fareham Borough Council* [2023] EWHC 2060 (Admin) (10 August 2023)

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Commentary: This case concerned the claimant's proposal for the development at Solent Airport (which is located on land owned by Fareham Borough Council) of nine mixed-use live/work hangar buildings for the aviation sector. The airport is located in a part of the Council's area known as Daedalus and, according to its "Vision and Outline Strategy" for the area, the Council had for many years recognised Daedalus in its local plan as being the most significant commercial development area in the borough. As a result, the Council had committed itself, as one of its corporate priorities, to work with others to deliver a thriving aviation-led employment area, supported by a viable airfield.

The Council, having carried out its own inspection, concluded that the presence of badgers at Solent Airport was reasonably likely. It was, therefore, common ground that the claimant needed to provide with its planning application a habitat assessment concerning badgers. However, the Council had refused to provide the claimant access to the site in order to undertake the assessment on the basis that it would not sell the land required for the claimant's proposed residential development which would not accord with the Council's vision for the land in the future.

The claimant submitted its planning application in March 2022. The application was accompanied by an ecological report which concluded that the site had moderate potential for foraging and commuting badgers. This conclusion was made using binoculars since access to the site was denied. However, the ecology officer at Hampshire County Council noted that the assessment had been carried out from a distance, so it was not clear how evidence of badgers could have been properly assessed.

The lack of a proper habitat assessment concerning badgers was one of the reasons why the Council refused the claimant's planning application in November 2022. The claimant applied to the court for both an order quashing the Council's decision to refuse permission and a mandatory order requiring the Council to give it access in order to carry out the required habitat assessment. The claimant advanced the following three grounds of challenge:

1. The claimant contended that the defendant had fettered its discretion as planning authority in its capacity as a private landowner for the site. Section 70(2) of the Town and Country Planning Act 1990 requires local planning authorities to have regard to the development plan when determining planning applications, but these issues should not be in play at an earlier stage when the authority is exercising some other function;

2. The claimant also asserted that the Council had given the claimant an unfair and impossible material consideration to answer which amounted to procedural impropriety; and
3. Finally, the claimant alleged that it was irrational to allow issues of land ownership to be used by planning authorities to stifle development: whether or not the development site was for sale should have been dealt with separately to the claimant's planning application.

Allowing the claim on all three grounds, the Court agreed with the claimant that the Council was a planning authority which had been entrusted by Parliament to discharge its functions as such in accordance with the principles of public law. The Council cannot exercise the rights that it would otherwise have as a landowner if this would inhibit its ability to decide applications for planning permission according to law. There must be an effective separation of those functions.

The Court also decided that the Council's actions as landowner created potential unfairness in the planning process which it could and should have eliminated by granting the claimant access to the site. It was deemed immaterial that, if Solent Airport had been owned by a private person who refused access, the defendant could not have done anything about the matter. As a local authority, it was obligated to act in accordance with the requirements of public law.

Despite the high threshold for an irrationality claim to succeed, the court also concluded that the Council had not acted as a rational local authority should. The court considered that the Council put forward justifications for refusing to let the claimant inspect for badger activity which had no basis in law and which, in certain respects, were entirely spurious.

The Council's decision fell to be quashed and, subject to receiving written submissions on the form of order, the court was also minded to grant a mandatory order requiring access for the survey in the absence of any undertaking from the Council to permit this.

Case summary prepared by Ivana Davies and Safiyah Islam