

**Case Name:** *Crest Nicholson Operations Ltd v Secretary of State for Housing, Communities and Local Government & Anor* [2025] EWHC 2194 (Admin) (22 August 2025)

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**Commentary:**

This High Court judgment concerns a claim for a planning statutory review under section 288 of the Town and Country Planning Act 1990 concerning the imposition of a condition on a reserved matters approval that stipulated that no dwelling could be occupied until water neutrality was demonstrated, either via a site-specific mitigation scheme or Horsham District Council's offsetting scheme.

The claimant argued that the imposition of Condition 6 was unlawful on two main grounds, both of which were dismissed:

Ground 1: The Inspector and the First Defendant erred in law and acted irrationally by proceeding on the basis that groundwater abstraction might continue at a level that could not be excluded from resulting in harm to protected habitats, relying on the concept of "imperative reasons of overriding public interest" (IROPI) under the regulation 64 (1) Habitats Regulations. The claimant argued this was not applicable in this case because there were other alternatives. It was held that the Inspector did not misdirect himself in law. Furthermore, his findings, based on the evidence before him, were a lawful exercise of his planning judgment, and could not be characterised as irrational.

Ground 2: The Inspector and the First Defendant erred in their approach to the uncertainty in the appropriate assessment under the Habitats Regulations. The claimant argued that the lack of specificity about the future actions of the Environment Agency (EA) and Southern Water was not a proper basis for a finding of uncertainty, as these bodies could be expected to fulfil their legal obligations. The claimant contended that what was required was certainty as to the outcome, not the method by which that certainty would be achieved. The Inspector and the First Defendant therefore erred in the interpretation of regulations 9(3) and 63 of the Habitats Regulations, and by failing to have proper regard to the application of regulation 63 to the discharge of the EA's functions under section 52 of the Water Resources Act 1991 ('WRA 1991'). The court found it was not irrational to conclude that reliance on "unspecified future action of parties fulfilling responsibilities under the Habitats Regulations under other regulatory regimes" did not provide the necessary "reasonable certainty" required.

**Background:**

The claimant, Crest Nicholson Operations Limited, challenged a decision made by the First Defendant, the Secretary of State for Housing, Communities and Local

Government, to approve a development of 280 dwellings in Horsham. The Claimant, who is the developer, appealed under section 78 TCPA 1990 against the failure of the Second Defendant ('the Council') to determine its application for reserved matters approval for layout, appearance, landscaping and scale for Phase 3 DEFG of the Kilnwood Vale development. A public inquiry was held in March 2024. On 8 April 2024, the appeal was recovered for the First Defendant's determination, pursuant to section 79 TCPA 1990. In granting the appeal, the Inspector imposed a condition, Condition 6, which stipulated that no dwelling could be occupied until water neutrality was demonstrated. This condition was imposed to comply with the Conservation of Habitats and Species Regulations 2017.

The development is located in an area where the water supply is abstracted from the River Arun, near a group of nature conservation sites known as the Arun Valley Sites, which are designated for their rare habitats. Natural England had previously issued advice stating that it could not be concluded with certainty that the existing water abstraction was not having an adverse impact on these protected sites. As a result, new developments were advised to demonstrate "water neutrality," meaning the total water use in the area after the development would be the same as or less than the use before it.

### The Court's Findings

Mrs. Justice Lang, who heard the case, dismissed both grounds of the claimant's challenge.

On Ground 1: The court found that the Inspector did not misdirect himself on the IROPI test. The Inspector correctly noted that the IROPI test applies when there are "no alternative solutions". The Inspector's report stated that the substantive evidence did not make the case for IROPI and that there appeared to be feasible alternative solutions if conditions were used, such as Condition 6. The court agreed that the Inspector's findings were a lawful exercise of planning judgment and could not be characterised as irrational.

On Ground 2: The court rejected the claimant's argument that the Inspector had overlooked key evidence, specifically a letter from the EA dated 11 July 2023, which referenced the *Harris* judgment. The court confirmed that the Inspector did, in fact, refer to this letter in his report.

The court also upheld the Inspector's distinction between the duty under Regulation 9(3) and the more stringent duty under Regulation 63(5) of the Habitats Regulations. Regulation 9(3) is a general duty to "have regard" to the requirements of the directives, while Regulation 63(5) imposes a specific duty to approve a project only after "having

ascertained that it will not adversely affect the integrity of the European site". The court stated that the duty to ascertain "cannot have lacunae and must contain complete, precise and definitive findings and conclusions capable of removing all reasonable scientific doubt".

The court concluded that the Inspector and the First Defendant were correct in their assessment that there was insufficient certainty to approve the development without Condition 6. The evidence showed that a sustainability study by Southern Water was still ongoing, with a completion date of March 2025, and that Southern Water's voluntary abstraction reduction was only a short-term measure. The court found it was not irrational to conclude that reliance on "unspecified future action of parties fulfilling responsibilities under the Habitats Regulations under other regulatory regimes" did not provide the necessary "reasonable certainty" required.

#### Final Judgment

The court dismissed the claim for statutory review on both grounds. The judgment affirms that planning authorities can require mitigation measures like water neutrality when there is scientific uncertainty about the environmental impact of a development on a protected site, even if other regulatory bodies are also taking steps to address the issue. The decision to impose Condition 6 was found to be a lawful and rational exercise of the First Defendant's planning judgment.

*Case summary prepared by Rebecca Craig*