

Case Name: *Ward & Anor v Secretary of State for Housing, Communities and Local Government & Anor* [2024] EWHC 1780 (Admin) (16 July 2024)

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Commentary:

This was an unsuccessful claim for judicial review of a dismissed appeal regarding a retrospective planning application for a residential unit in West Sussex. The claim was brought by the residents of the unit. It concerned the effect of the development on the Arun Valley Special Protection Area (the "SPA") and the application of regulation 63 of the Conservation of Habitats and Species Regulations 2017 in the light of Natural England's position statement dated September 2021.

In its position statement, Natural England stated that it could not be concluded that existing water abstraction in this part of Sussex was not having an impact on the SPA. Therefore, it advised that all future residential developments in the area must not add to this impact. One way of achieving this would be to demonstrate 'water neutrality', which is achieved when the use of water at a development site is the same or lower after the development is in place.

The claimants had been residing on the site since December 2020, prior to the publication of Natural England's advice. They argued that granting retrospective permission for their home would not increase water usage above the levels that existed prior to the publication of the guidance in September 2021, and that their continued residence "would merely maintain the status quo".

Natural England was consulted during the appeal. Its view in its consultation response was that, unless the claimants could demonstrate that the residential unit had planning permission or was "otherwise accounted for" prior to the publication of its position statement, they would need to consider water abstraction impacts on the SPA when applying for retrospective permission.

The inspector determining the appeal concluded that only developments which either had the benefit of planning permission or were immune from enforcement action prior to Natural England's position statement being issued were exempt from the requirement to demonstrate water neutrality.

The claimants challenged this decision on the following two primary grounds:

1. that the inspector drew the wrong conclusion as to which developments were exempt from the requirement to demonstrate water neutrality; and
2. having found the development to be otherwise acceptable in planning terms, the inspector should have held the appeal in abeyance until a strategic mitigation solution was available.

The court dismissed both of these grounds. On the first ground, the court was satisfied that treating the reference to “otherwise accounted for” in Natural England’s consultation response as akin to “immune from planning control” was within of the range of reasonable approaches open to the inspector. The court considered that the inspector gave an adequate explanation of the approach he was adopting, and that his approach could not be characterised as simply adopting Natural England’s view.

Regarding the second ground, the court held that the request to put the appeal in abeyance did not indicate with sufficient clarity what the inspector was being asked to do and begged a number of questions. How would the rationale for holding the appeal in abeyance be communicated to the parties – would the inspector be expected to publish some kind of interim decision indicating that he was minded to grant permission subject to a suitable mitigation solution coming forward? What would happen if circumstances changed while the appeal was being held in abeyance? What would happen if a mitigation scheme did not materialise? The abeyance request was not sufficiently articulated to make it a practical suggestion, so the inspector’s failure to address it was neither unlawful nor a breach of his duty to give reasons for his decision.

Case summary prepared by Safiyah Islam