IN THE MATTER OF GCC'S WASTE CORE STRATEGY

OPINION

1. I am asked to advice GCC about the approach which it has adopted towards the preparation of its WCS. I am asked a number of specific questions set out below but before considering them I make some general observations about the legal context of plan preparation in the context of the stringent demands of the Habitats Directive and the approach to the examination.

2. I see that the Inspector has been provided with a note of the consultation on 29th January 2012 but I am told he retains some questions about the legal approach adopted by the Council towards the preparation of the plan. It is not entirely clear to me what these problems are except that there is a reference in my present papers to queries concerning AA and in-combination effects. This is an intractable and developing area of the Law and is therefore necessarily discursive. I do think that a better approach to trying to assist the Inspector is for me to attend on 12th

March rather than exchanging written memos as this is not an area for dogmatic statements one way or another.

3. My second general observation is that in Feeney the Inspector has a clear guide as to the Law in this area and it makes his task easier since he just has to apply the principles which arise from that case. One of the most important of those is that it is legally permissible to be comfortable in a state of ignorance. There is an understandable temptation when reading Regulations 61 and 102 to think that no plan may be approved until the highest state of certainty has been reached as to the absence of harm to any SAC. That was the legally misconceived basis in which the Claimant in Feeney argued his case. It is important to note that that approach was wholly rejected by the Court in Feeney.

4. The key here is to understand the approach of Advocate General Kokott in Commission v. UK [2005] ECR I-9017 ECJ paragraph 49 of which provides:

> "*49. The United Kingdom Government is admittedly right in raising the objection that an assessment of the implications of the preceding plans cannot take account of all the effects of a measure. Many details are regularly not settled until the time of the final permission. It would also hardly be proper to require a greater level of detail in*

preceding plans or the abolition of multi-stage planning and approval procedures so that the assessment of implications can be concentrated on one point in the procedure. Rather, adverse effects on areas of conservation must be assessed at every relevant stage of the procedure to the extent possible on the basis of the precision of the plan. This assessment is to be updated with increasing specificity in subsequent stages of the procedures" (emphasis added).

5. In Feeney the Judge cited this passage with approval and remarked:

"*However at §49 of her opinion, the Advocate General expressly accepted that an appropriate assessment at the "land use state" will necessary be more general and less precise and that sequential appropriate assessments, of increasing specificity over time, are proper and to be expected".*

6. I am not suggesting any plan making authority is allowed to be cavalier in their approach to the Habitats Directive but I am pointing out that the Law recognises that high level strategic plans which make land allocations which anticipate further, more detailed proposals are allowed to be more general in their anticipation of effect. You can only know what you can know. You can only assess what you can assess. If a strategic high level

plan can only be brought forward three years in advance of a detailed proposal then it plainly cannot discount all the possible effects of such a proposal on a SAC. The most it can do is provide a framework within which the later application will be approved only if it meets the requirements of the Habitats Directive. Any other solution would bring an end to forward planning. The Judge in Feeney dealt with this point in this way:

> "*Secondly, if the use of a "safeguard" condition such as the present was impermissible, proposals would have to be ruled out altogether at the core strategy stage and there could be no scope for subsequent appropriate assessment at a later stage, as specifically envisaged by Adv. Gen. Kokou. If the Claimant's argument were correct, a core strategy could never be approved where, as is likely, the specific detail of future particular development is not known. No core strategy could ever involve detailed consideration of the impact on SAC of specific development proposals*".

7. This endorses the principle of a safeguarding policy which secures the ecological interest against future adverse harm whilst encouraging development to come forward in the public interest.

8. The approach of introducing a caveat or qualification into a policy which has the effect of assuring the integrity of the ecological interest is plainly the way forward here and the Inspector should be invited to carefully consider the utility of this approach in the context of the WCS. In this regard it is highly significant that:

(i) NE have endorsed this approach in addressing the Oxford Core Strategy:

> "*Mrs Charlotte Frizzell of Natural England wrote in an email dated 29 June 2011 as follows: 'We take the position that it is legitimate under the Habitats Regulations to include a caveat in policy which has the effect of requiring subsequent lower tier plans to be subject to its own Habitats Regulations Assessment'*".

(ii) The Court in Feeney found that the qualifying wording, in practice, amounted to an alternative solution:

> "*Here, in practice, the qualifying wording was an alternative solution – and that could be, and was, properly approved under Article 6.3 and at a stage after the appropriate assessment"*

(iii) A similar approach has been adjudged appropriate in the context of PPS12 and the P&CA 2004 at Stockton, Tees Valley, Holt, North Walsham, Haverton, Sharingham, and Wells-next-the-Sea.

9. The final general point which needs to be made is to remind the Council of the position of AA in the legal structure of the Habitat Regulations. The first task for the HRA is to consider whether the negative proposition may be established; whether it may be ascertained there will not be an adverse effect. If that proposition is established then it is not necessary to move to the next stage which requires an AA. This may give rise to a consideration of whether the qualifying words in a high level strategic plan is sufficient to establish the negative proposition and, if so, whether any criticism of the AA for any of the allocated sites is relevant.

Question 1

10. This appears as the third question in my instructions but it seems more logical to take it first. I am instructed that the Council are proposing an additional criteria to WCS4 along these lines:

"*Proposals are supported by sufficient information for the purposes of an appropriate assessment of the implications of the proposal, alone or in-combination with other plans and projects, for any Special Area of Conservation (SAC), Special Protection Area (SPA) and Ramsar site. The conclusions of the assessment, in accordance with Council Directive 92/42 EEC and the Conservation of Habitats and Species Regulations 2010, must show that a proposal can be delivered without adverse effect on the integrity of any SAC or Ramsar site."*

11. This will complement a similar piece of additional text added to WCS7 to deal with in-combination effects as follows:

> *"In relation to the Council Directive 92/42 EEC and the Conservation of Habitats and Species Regulations 2010 the WCS will only make provision for a level and location of residual waste management development where there will be no adverse effect on the integrity of any SAC, SPA or Ramsar site, even if this is below the indicative residual waste recovery capacity set out in this WCS"*.

12. For reasons discussed above the Inspector is not looking for evidence that adverse effects will be avoided but, rather, for evidence that the plan contains a mechanism for avoiding adverse effects arising from subsequent applications. The qualifying wording referred to above amounts to such evidence.

Question 2: "*Whether the evidence test for soundness in relation to the assessments undertaken to assess the impacts of the Habitats Directive and Regulations provide a robust and credible evidence base in line with PPS12 and the Planning and Compulsory Purchase Act?"*

13. The short answer is yes but here again, I think a written opinion is a somewhat two dimensional way of trying to engage with this question. It

may be that the Inspector has a particular concern with regard to a particular aspect of the evidence. A two way discussion is a much more satisfactory way of engaging within that issue.

Question 3: "*If the County Council has undertaken the correct approach, will Leading Counsel please specifically point to the aspects of the assessment which provide details of meeting the evidential test?"*

14. In this regard I would point out, globally, to the HRA final report December 2010 noting in particular annex D which addresses in-combination effects across a range of interest, together with the supplementary updates and the Issue 4 Topic Paper dated January 2012.

Question 4: "*Whether the County Council is required to carry out any further HRA at this stage in the development of the Waste Core Strategy"*

15. Upon the assumption the qualifying wording proposed by the Council is incorporated into the plan, the answer is No.

Question 5: "*Is the County Council's approach to the duty to cooperate (s.110 and s.112 of the Localism Act) correct – see Enclosures 18A and 18B"*

16. The Banes Inspector has received instructions from the Inspectorate that the duty does not apply to plans submitted for examination before 15 November. In my view that advice is legally incorrect and I have said so on behalf of clients concerned with land in that administrative area. The

Inspector has ruled that the duty does not apply and notice has been given that the Banes Core Strategy will be the subject of a legal challenge under S113 P&CA 2004 when the Council give notice of an intention to adopt.

17. At the Banes Core Strategy Inquiry the Inspector has taken the sensible and pragmatic approach of arranging for an additional session to consider the plan against the duty in the event that High Court disagrees with him.

18. Enclosure 18B of my instructions adopts this pragmatic approach in which evidence is given of an ongoing process of cooperation with other relevant bodies. This will allow the Inspector to find the plan sound on the duty to cooperate regardless of any subsequent judgment of the Court. Therefore, the approach adopted is correct.

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26th February 2012
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OPINION

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