Proof of Evidence of Simon Slatford
Appendix 4 – Note on issue raised in para. 2.9 of Natural England's Statement of Case

<u>Note on issue raised in para. 2.9 of Natural England's Statement of Case</u>

1. In Natural England's ("NE") SoC it says that:

   > "2.9 It is well established that Natural England's views on issues within its remit "*deserve great weight*", and that while an authority is not "*Bound to agree with them […] it would need cogent reasons for departing from them*"; <u>R (on the application of Prideaux) v Buckinghamshire CC [2013] Env LR 32</u>".

2. This note sets out the position of the Applicant on this matter.

3. This note refers to a number of legal authorities. The most relevant are contained either in the CDs or are attached. Other authorities referred to in passing are not provided but can be if the Inspector so requires. Attached to this note are the following:
   1. ***Gallagher Properties Limited v SSCLG*** [2016] EWHC 674 (Admin);
   2. ***Visao v SSHCLG*** [2019] EWHC 276 (Admin);
   3. ***Steer v SSCLG*** [2017] EWHC 1456 (Admin);
   4. The White Book Vol 1 section 35.0.3.

4. In ***R. (Prideaux) v Buckinghamshire CC*** [2013] Env. L.R. 32 (CD 20.1) Lindblom J. (as he then was) said:

   > "116. As the committee was well aware, by the time FCC's proposals came before it for a decision, the effects of the development on ecological interests, including European Protected Species, had been discussed over a long period, both with the County Council's officers and with Natural England. It is clear that the committee gave considerable weight to the conclusions reached by Natural England. This is hardly surprising. It is exactly what one would expect. Natural England is the "appropriate nature conservation body" under the regulations. Its views on issues relating to nature conservation deserve great weight. An authority may sensibly rely on those views. It is not bound to agree with them, but it would need cogent reasons for departing from them (see, for example, the judgment of Sullivan J., as he then was, in ***R. (Hart District Council) v Secretary of State for Communities and Local Government*** [2008] EWHC 1204 (Admin) (2008) 2 P. & C.R. 16 , at paragraph 49), and the judgment of Owen J. in ***R. (Akester) v Department for the Environment, Food and Rural Affairs*** [2010] Env. L.R. 33 , at paragraph 112)."

5. It will be noted that what was said concerned NE in its role as the "appropriate nature conservation body" under the Habitats Regulations. In the present case the dispute between the Applicant and the Council on the one hand and NE on the other relates not to such matters, but to landscape and visual issues, and planning issues generally.

6. All of the cases that articulate the principle (e.g. ***Prideaux*** itself and the other cases cited therein such as ***Hart*** and ***Akester*** (see above) hereafter "the ***Prideaux*** principle") are examples of great or considerable weight being given to the views of Natural England or, as it was previously, English Nature in the habitats context. And all of these cases also involved challenges by way of judicial review to decisions by local planning authorities to grant permission and not s. 288 challenges to decisions made on appeals under s. 78 of the TCPA 1990 or other decisions following an inquiry (e.g. a call-in under s. 77 of the TCPA 1990).

7. Following these cases on the position relating to Natural England there are High Court cases applying these principles to other statutory consultees e.g. the local highway authority and Historic England: see below.

8. Thus in ***R (Hawkhurst) v Tunbridge Wells*** [2020] EWHC 3019 Admin (CD20.6) it was held by James Strachan QC (sitting as a Deputy Judge of the High Court) (emphases added) said:

> "122. In the case of impacts on the highway network, the local highway authority is a consultee. But it is also particularly well placed to assist a local planning authority in making the sort of judgment required under paragraph 109 of the NPPF. As Mr Mills correctly points out, the judgment still remains that of the local planning authority, rather than the local highway authority as a consultee. A local planning authority can ultimately disagree with a consultee (subject to the normal principles of administrative law to which I have already referred). It may then have to defend that disagreement at appeal. But equally, it is entitled to agree with a consultee of this kind. It is axiomatic the weight it chooses to attach to such views is a matter for its own judgment.
>
> 123. Ms Thomas and Mr Cannock rely on cases which address the potential requirement of a local planning authority to attach considerable, or great, weight to the views of Natural England, when it acts as the "appropriate nature conservation body" statutory consultee in respect of certain ecological matters: see ***Prideaux v Buckinghamshire County Council*** [2013] EWHC 1054 (Admin) at 116; R***. (Akester) v Department for the Environment, Food and Rural Affairs*** [2010] Env. L.R. 33 , at 112, ***R (Morge) v Hampshire County Council*** [2011] UKSC 2 at 45.
>
> 124. I do not consider it necessary for me to decide how far that principle can be extended beyond that particular situation so as to require considerable weight to be attached to the views of a local highway authority in relation to highway impacts. It is sufficient in the context of this challenge to apply conventional principles, namely that the Defendant is entitled (if not obliged) to take into account the views of KCC on such impacts as material to its decision, but thereafter it is a matter for the Defendant's judgment as to what weight it applies to those views as material considerations."

9. As noted above the main cases setting out the ***Prideaux*** principle concern judicial review challenges to decisions by local planning authorities to grant permission and not to appeals under s. 78 of the TCPA 1990 or other decisions following an inquiry (e.g. a call-in under s. 77 of the TCPA 1990). In terms of other cases the following are relevant:
    1. The ***Prideaux*** principle was applied in the context of a DCO examination: see ***R. (Mynnyd y Gwynt Ltd) v Secretary of State for Business Energy and Industrial Strategy*** [2018] P.T.S.R. 1274 at para. 8(8). This concerned written objections by NRW to a scheme and which were outstanding at the end of the process and which in a critical regard the applicant failed through its experts to respond to;
    2. The ***Prideaux*** principle was applied to the views of a highway authority in a planning appeal in ***Visao v SSHCLG*** [2019] EWHC 276, see paras. 65 – 68. This was a written representations case not one determined by an inquiry with expert witnesses being called and cross-examined;
    3. In ***Steer v SSCLG*** [2017] EWHC 1456 (Admin)[1] the ***Prideaux*** principle was applied to the views of Historic England in the context of a planning appeal that was determined following an inquiry: see para. 52. In that case Historic England had raised written objections but did not appear at the inquiry or call any witnesses;
    4. In ***Gallagher Properties Limited v SSCLG*** [2016] EWHC 674 (Admin) there was a s.288 challenge to an Inspector's decision following an inquiry. The Inspector relied on the views of a local councillor on wildlife impacts. This approach was challenged under s.288 on the basis of the ***Prideaux*** principle. The judge (Collins J) rejected this argument (emphases added):

> "41. Ground 3 relates to concerns which were raised by a local councillor, Mr Harwood, who gave evidence about the risk of an adverse impact on the River Len and its wildlife, and on the local wildlife reserve managed by the Kent Wildlife Trust. There were no material objections raised by the Wildlife Trust or by the Environment Agency[2], and indeed in the environmental statement it was clearly stated that the view taken was that there was no risk of any adverse effect. Mr Harwood was a local wildlife enthusiast who said that in his experience, in particular his having dealt with the silting of the river resulting from the construction of the M20, it was in his view inevitable that some adverse effect would be likely to result.
>
> 42. He had, it was submitted, no expertise, and the inspector therefore acted irrationally in accepting his evidence against that of the experts, including in particular what was set out in the environment statement and bearing in mind the lack of any objection by, perhaps in particular, the Kent Wildlife Trust, who could be expected to

[1] Note that the decision in the ***Steer*** case was reversed in the Court of Appeal ([2018] EWCA Civ 1697), albeit not on any point related to the ***Prideaux*** principle**.**
[2] This is an error the Judge meant to refer to Natural England.

> have real concerns were there any chance of any adverse effect, it is said, and a judgment of Beatson J is relied on for this proposition in ***Shadwell Estates v Breckland District Council*** [2013] EWHC 12 (Admin) , that there was a need for cogent and compelling reasons to depart from the views of a statutory consultee.
>
> 43. That depended of course upon the facts of that particular case, and it certainly is not the case that the evidence given by an expert can only be properly contradicted by evidence given by an expert. Mr Harwood stated that he had considerable experience in dealing with the River Len and the wildlife around it, and that despite indications that there would not be any damage from the M20, there was. It seems to me that the inspector was, in the circumstances, having regard to the evidence given by Mr Harwood, entitled to give it some weight, as I say, bearing in mind his experience and his local knowledge of the relevant conditions. It is quite unnecessary that there be an expert.
>
> 44. What she said in paragraph 81 in this connection was as follows:
>
>> "81 there is concern that the substantial remodelling of the land form would have an impact on the Kent Wildlife Trust's local wildlife reserve and the River Len through the deposit of silt. This has apparently already proved to be a problem following the construction of the M20 and the CTRL, although the ES found that there would be a negligible impact.
>>
>> 82. Natural England has not objected on these grounds, but I have noted the arguments of the CPR witness [that is Mr Harwood] on this topic, who is a well informed and enthusiastic supporter of local wildlife conservation products. He made the point that he is likely to have more direct and detailed experience of the specific effects of similar construction sites on the River Len and the wildlife in its environs than may be available to other less local consultees. I consider that his evidence raised valid concerns, particularly given the proximity of the proposed development platforms to the river and the consequent changes in land levels that would result from their construction."
>
> 45. I do not regard that as being in any way irrational, because that is the test that is applicable in deciding whether the inspector was entitled to have regard, as she did, and give some weight to, the evidence before her of Mr Harwood. Accordingly, ground 3 is not made out."

10. The issue that arises is about the application of the ***Prideaux*** principle where there is to be a full inquiry with witnesses called and evidence tested. So here, NE has objected on landscape and visual and planning grounds. NE is to appear at the inquiry and call two witnesses. NE's position on these matters is not accepted by either the Applicant or the Council as local planning authority. Thus the Applicant is to call two expert witnesses on these matters. The Council is also calling expert witnesses on these matters. All of these witnesses will give oral evidence to the inquiry and this will be tested via cross-examination. None of the above cases deal with that situation.

11. There seem to be two possibilities in this context.

12. First, that the ***Prideaux*** principle cannot apply at all. Instead the evidence to be given to support NE's view as put forward by its two witnesses should attract such weight as it deserves depending on how those witnesses perform in oral evidence as against how the other opposing witnesses (called by the Applicant and the Council) perform on those matters. So on this analysis NE's evidence cannot start with some added weight in this scenario. It is evidence that is only as good as the witness who appear to defend it at the inquiry. The evidence given on behalf of NE carries only such weight as the Inspector considers in her judgment that it should having heard all the oral evidence on these issues. That judgment on which expert evidence to prefer where there is a contested technical issue cannot properly or sensibly be influenced by attaching more weight to start with to the witnesses appearing for one party over another. There is a further point here. If NE's evidence on planning and landscape and visual issues is to be given some added weight because it is a statutory consultee must not also the evidence of the Council, as local planning authority, be given added weight? Where the views of NE and the Council are opposed, as they are here, it is difficult to see how this works. The better view must be that the ***Prideaux*** principle is not applicable in the inquiry context.

13. Second, the alternative approach is to accept that NE 's view as statutory consultee carries great weight to start with but to recognise that an Inspector is perfectly well entitled to reject the view of such a consultee where there is evidence to the contrary. The ***Gallagher*** case (see above) can be seen perhaps as supporting that view. There the written views of statutory consultees was overridden by the Inspector relying on evidence provided by a local objector. This shows that the bar for "compelling" or "cogent" reasons for departing is really not that high. The position must be *a fortiori* where there is expert evidence that contradicts the views of the statutory consultee. So, where a statutory consultee objects in writing but does not appear at the inquiry and the appellant or applicant calls expert evidence to expressly contradict the views of the statutory consultee that evidence would very readily provide a basis for departing from the views of the statutory consultee. Where instead the statutory consultee appears at the inquiry and calls a witness, and so does the applicant/appellant, the Inspector must in the ordinary way weigh up all that evidence and reach a view on it. If the Inspector concludes the expert evidence of the appellant/applicant is to be preferred then that clearly provides provide a ready basis for departing from the views of the statutory consultee. In those circumstances saying the view of the statutory consultee carries "great weight" to start with and that cogent and

compelling reasons are needed to depart from that view adds little. If there is expert evidence to contradict those views, and that evidence is preferred, then the views of the statutory consultee may be readily overridden.

14. All of this is supported by the general principles that where a Court is faced with competing expert evidence it must properly weight that evidence and give sufficient reasons for why the evidence of one expert is preferred over that of another: see the notes in the White Book at 35.0.3 and the reference to ***Flannery v Halifax Estate Agencies*** [2000] 1 WLR 377. It is submitted that the expert evidence of one party could not be preferred over another merely because, for example, one of the witnesses was called by a statutory consultee and the other was not.

Appeal decisions

15. There are various appeal decisions that apply the ***Prideaux*** principle following an inquiry, but in many of these the situation is a written response from the statutory consultee – often a non-objection - which one or other party (appellant or local planning authority) is seeking to rely on and with no contradictory expert evidence having been called, rather than a case where there is competing expert evidence including from the statutory consultee.

16. The (limited) relevance of the ***Prideaux*** where there is competing expert evidence is supported by a recent call-in decision by the Secretary of State in respect of land at Citroen Site, Capital Interchange Way, Brentford, TW8 0EX (APP/G6100/V19/3226914, CD 19.6). In that case Historic England opposed the scheme at inquiry and called a witness. In its submissions (see the Inspector's Report at para. 9.1) it referred to its role as the Government's principal advisor on the historic environment, and submitted that "*[a]s a statutory consultee and with its specialist role its views should be given considerable weight and only departed from for good reason*". The Inspector and Secretary of State in rejecting Historic England's view and granting planning permission did not appear to accord any added weight to the view of Historic England and its witness, just because they were Historic England. Rather the evidence on those issues was assessed on its merits.

JAMES MAURICI Q.C.

Sunday, 15 August 2021

45. The Appellant has indicated that the Council has failed to evidence a sustainable 5 year housing land supply. However, little evidence of this has been provided to me and the Council have not made any reference to this either in their Officers report or appeal statement.

46. Reference is also made to the evidence base for the Council's new Local Plan and the need to identify further sites to meet the housing requirements up to 2036, including potential releases of land within the Green Belt and relying upon a neighbouring Council to provide housing to meet the needs of the area. However, this does not in itself indicate that there is a current shortfall in the five year supply of housing. Therefore, from the limited evidence before me, it is unclear whether the Council does have a five year housing land supply.

47. Notwithstanding that, the 2018 Framework indicates that planning decisions should apply a presumption of sustainable development. For decision taking, where Development Plan policies which are the most important for determining the application are out of date6, permission should be granted unless any adverse impacts of doing so would significantly and demonstrably outweigh the benefits when assessed against the policies in the 2018 Framework taken as a whole.

48. In this case, I have found that the proposal would not provide a safe and suitable access, would harm the amenity of the occupiers of 54 The Warren, would not provide a suitable amenity space for the future occupiers of plot three and would harm the character and appearance of the area. These factors weigh heavily against allowing the proposed development.

49. Notwithstanding that, the development would give rise to some minor social benefits in that it would provide much needed additional housing. The development would also bring some minor economic benefits through the construction process. These matters are in favour of the proposed development.

50. However, the provision of four additional dwellings would be unlikely to have any significant effect in reducing the deficit to the housing land supply for the Chiltern District should there be such a deficit. Against this background, the harm identified significantly and demonstrably outweighs the minor benefits when assessed against the policies in the 2018 Framework when taken as a whole. The proposal cannot therefore be considered to be sustainable development.

16. After this claim had been made the inspector provided a witness statement dated 8th January 2019. In that witness statement the inspector states (inter alia):

i) He considered Drawings 10E and 12A.

ii) As the site layout and context plan and the transport statement were based on Drawing 10E he had to consider that plan.

iii) Paragraphs 16 to 20 of the decision letter relate to Drawings 10E and 12A.

The Legal Framework

17. Section 288(1) of the Town and Country Planning Act 1990 ("TCPA 1990") provides:

"288.— Proceedings for questioning the validity of other orders, decisions and directions."

(1) If any person—