FARRER&Co

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7 February 2020

Dear Sir or Madam

In the matter of the application for planning permission for residential development at land south of White Rock, also known as Inglewood, Paignton (P/2017/1133) ("The Application")

We write further to our letter dated 13 January 2020 (and previous correspondence) on behalf of our clients Mark and Rosemary Yallop and Andrew and Christina Brownsword. We do not repeat the content of that letter but note that its contents have plainly not been properly addressed by the Application. As a consequence, the Application must be refused for reasons of law as well as policy.

Unlike the other reasons for refusal before you, which relate quite properly to matters of planning policy and judgment, compliance with the requirement of the Habitats Directive as incorporated into English law by the Conservation of Habitats and Species Regulations 2017 ("the Habitats Regulations") set out legal requirements prohibiting the grant of development consent unless certain thresholds are met. Compliance must be demonstrated to a very high standard. It follows that the Council is obliged to state that it would also have refused to grant planning permission on grounds relating to compliance with the Habitats Regulations.

The high threshold necessary for the Application to be acceptable has been recently reiterated and arguable even extended by Court of Justice of the European Union (The CJEU) (NB its judgments are still binding in the UK during the current transition period, thereafter has yet to be agreed).

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In *Grace v An Bord Pleanala*[1] the CJEU looked at the extent to which mitigation can be taken into account at Stage 2 of the Appropriate Assessment (AA). The CJEU repeated orthodox principles relating to the need for very high certainty in the AA. It rejected the dynamic management of the habitat which was proposed in that particular case as appropriate for passing AA and considered them to be compensation under art 6(4).[2]

In *Coöperatie Mobilisation for the Environment and Vereniging Leefmilieu* [3] also the CJEU took the opportunity to reinforce the high levels of certainty required as the efficacy of mitigation before it could be taken into account at Stage 2 of the AA. The CJEU makes it clear that:

> "126 Moreover, according to the Court's case-law, it is only when it is sufficiently certain that a measure will make an effective contribution to avoiding harm to the integrity of the site concerned, by guaranteeing beyond all reasonable doubt that the plan or project at issue will not adversely affect the integrity of that site, that such a measure may be taken into consideration in the 'appropriate assessment'... "
>
> "130 The appropriate assessment of the implications of a plan or project for the sites concerned is not to take into account the future benefits of such 'measures' if those benefits are uncertain, inter alia because the procedures needed to accomplish them have not yet been carried out or because the level of scientific knowledge does not allow them to be identified or quantified with certainty."

It is clear that the proposed measures in the present case fail these tests.

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[1] C-164/17 *Grace v An Bord Pleanála* [2018] EUECJ C-164/17

[2] The CJEU concluded that [57]. ... where it is intended to carry out a project on a site designated for the protection and conservation of certain species, of which the area suitable for providing for the needs of a protected species fluctuates over time, and the temporary or permanent effect of that project will be that some parts of the site will no longer be able to provide a suitable habitat for the species in question, the fact that the project includes measures to ensure that, after an appropriate assessment of the implications of the project has been carried out and throughout the lifetime of the project, the part of the site that is in fact likely to provide a suitable habitat will not be reduced and indeed may be enhanced may not be taken into account for the purpose of the assessment that must be carried out in accordance with Article 6(3) of the directive to ensure that the project in question will not adversely affect the integrity of the site concerned; that fact falls to be considered, if need be, under Article 6(4) of the directive."

[3] Case C-293/17, C-294/17

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In *Holohan v An Bord Pleanála*[4] the CJEU went even further than before in terms of the scope of the AA which may have to extend beyond designated habitats and the species for which the habitat has been listed:

> "40 … an 'appropriate assessment' must, on the one hand, catalogue the entirety of habitat types and species for which a site is protected, and, on the other, identify and examine both the implications of the proposed project for the species present on that site, and for which that site has not been listed, and the implications for habitat types and species to be found outside the boundaries of that site, provided that those implications are liable to affect the conservation objectives of the site"

As we have noted previously no such assessment has been carried out in the present case.

Accordingly, we request that the committee adds to its putative reasons for refusal one based on the following:

> **It has not been demonstrated beyond reasonable scientific doubt that the proposed development will not have an adverse effect on the integrity of a European Protected Site contrary to article 6(3) of the Habitats Directive and that it has not been demonstrated that the necessary conditions in article 6(4) have been met.**

No doubt this reason can be further refined to add relevant development policies associated with habitats protection and we are happy to discuss this further with officers.

Yours faithfully

[4] Case C-461/17 *Holohan v. An Bord Pleanála* ECLI:EU:C:2018:649