

Town and Country Planning Act 1990

Appeal by Banks Property Ltd

Land West of Brigg Road and South of Horkstow Road, Barton Upon Humber

North Lincolnshire Council Reference: PA/2021/2151

Planning Inspectorate Appeal Reference: APP/Y2003/W/22/3307310

Response of the Appellant to the submissions of Natural England dated 15 May 2023

**Eversheds Sutherland (International) LLP
Bridgewater Place
Water Lane
Leeds
LS11 5DR**

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1. Introduction

1.1 This document forms the Appellant’s response to the submissions of Natural England. The submissions were provided to the Appellant directly by Natural England on 15 May 2023.

2. The Appellant’s Response to Natural England

2.1 Natural England has made submissions in response to queries raised by the Inspector on 30 March 2023. The Appellant would like to further assist the Inspector in understanding the potential impacts of the proposed scheme upon the Humber Estuary. Whilst Natural England’s responses are factually correct in many respects, the responses may fall short of providing full answers to the queries raised and therefore the Appellant wishes to assist the Inspector further.

2.2 The Appellant’s responses to these submissions are taken in turn below.

Inspector’s Query	Natural England’s Response
<p>Having regard to the characteristics of the proposed development and the additional information provided with the Appellant’s case, would you agree that the proposed development would not have likely significant effects on the Humber Estuary SPA and Ramsar site either alone or in combination with other plans and projects?</p>	<p>Natural England regards that the proposed development is likely to result in a Likely Significant Effect on the Humber Estuary SPA/ SAC/ Ramsar site from recreational pressure impacts as identified in the shadow HRA. We therefore advise that PINS undertakes an Appropriate Assessment in order to determine whether there will be an adverse effect on the integrity of the designated site. Similar advice was provided to the Local Planning Authority in our response dated 20/05/22.</p> <p>We note that the Appellant has proposed a suite of mitigation, in particular the provision of an onsite SANG. The Appropriate Assessment needs to ensure that any mitigation, in particular the SANGS and any other measures proposed by the Applicant are adequate to avoid impacts on the Humber Estuary designated site and are secured by appropriate legal mechanisms. We advise that the management of the SANG is secured in perpetuity. We note that the shadow HRA has not been updated by the Applicant. In our previous response we highlighted our concerns regarding recreational use of the Humber in-combination with other plans/ projects, which had not been fully assessed in the sHRA. We advise that this is considered in the AA. We note that the Applicant has offered the provision of leaflets, signage and resident surveys in the PAMMS,</p>

	however we would like to highlight that the provision of surveys are not mitigation in themselves and that the appropriateness of these measures will need to be assessed in the Appropriate Assessment.
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- 2.3 It is common ground between Natural England and the Appellant that the proposed development would give rise to 'Likely Significant Effects' from increased recreation pressures and therefore must be considered at the Appropriate Assessment stage. This is clearly set out in the Appellant's Shadow Habitats Regulations Assessment ("**sHRA**") (**APP1.15**). This is because mitigation is proposed to address recreation pressures and consequently in accordance with the *People Over Wind* judgment¹ an Appropriate Assessment must be carried out.
- 2.4 At the Appropriate Assessment stage, the legal test which must be considered is whether it can be ruled out that the proposed project would give rise to 'adverse effects upon the integrity' of the Humber Estuary. Natural England has however chosen to remain silent on this question, despite the fact that the Inspector must evidently address this in the formal Habitats Regulations Assessment ("**HRA**") of the scheme.
- 2.5 The remaining query is therefore whether the proposed mitigation measures, namely the Suitable Alternative Natural Greenspace ("**SANG**") and Project Access Monitoring and Management Scheme ("**PAMMS**"), are sufficient to mitigate the risk of recreational impacts. Although Natural England has remained silent on this issue in its response of 15 May 2023, the Inspector can refer to Natural England's response of 20 May 2022 (**APP2.1.15**) where it clearly stated that "*the proposed Suitable Alternative Natural Green Space (SANG) mitigation measure is of a suitable scale and location*".
- 2.6 Subsequent to receipt of this consultation response, the Appellant has proposed further mitigation measures in the form of a bespoke PAMMS. As the Appellant has noted previously, if the SANG is of a suitable scale and location it must mean that the recreational impacts are mitigated. Furthermore, the Inspector can note that Natural England has not moved away from its position of not opposing the proposed development as set out in its email of 13 June 2022 (**APP6.7**). Since receiving Natural England's response of 13 June 2022, the Appellant has also offered to secure the management of the SANG in perpetuity by way of a Section 106 Unilateral Undertaking, submitted as part of the planning appeal, on which Natural England has not commented.
- 2.7 Natural England then turns to the subject of in-combination recreational effects and its view that these have not been fully assessed in the sHRA. The Appellant refers the Inspector to paragraph 5.5.1 of the sHRA (**APP1.15**) where in-combination effects are clearly addressed. The proposed SANG (which Natural England has said is of a suitable scale and location) is accompanied by further mitigation through the bespoke PAMMS, providing further assurance that there will be no residual impacts from the scheme for recreational access.
- 2.8 There are therefore no residual impacts arising from this project that could give rise to in combination effects. Furthermore, and adding even more confidence (if any were needed) that residual impacts will not arise, there are the Local Plan policies H1 and CSC3 that further reduce the potential for in-combination effects arising. It is the Appellant's view therefore that the Inspector can be assured that not only have the in-combination effects

¹ People Over Wind & Peter Sweetman v Coillte Teoranta [Case C-323/17]

been fully assessed, but they will also be fully mitigated.

2.9 Natural England has said the visitor surveys cannot be considered as mitigation; however this advice contradicts the advice which is published on the UK Government’s website on HRA², in the paragraph entitled ‘Example of appropriate mitigation and conditions’. For ease, the text of this paragraph is set out below.

“An appropriate assessment of a proposed industrial development shows that lights and traffic from construction work could disturb a significant number of birds on a nearby European site designated for breeding birds.

You can attach conditions to the proposal so that it passes the integrity test. For example, to make sure that a proposer:

- *installs temporary visual and acoustic screens around the construction work*
- *times the work to start and finish outside the birds’ breeding season*
- *monitors the site to confirm whether the mitigation is successful*
- *adds extra measures if the original measures do not work as expected.”*

2.10 Such surveys provide further confidence that the proposed project will not result in any effects upon the Humber Estuary and the data collected can be used by the Local Planning Authority should it wish to progress with a Strategic Access Mitigation and Monitoring Strategy (“**SAMMS**”) within the area.

2.11 Finally, it is correct that the sHRA document has not been updated; this is however of no procedural or legal significance whatsoever. Regulation 63(2) of the Conservation of Habitats and Species Regulations 2017 (as amended) states that:

“A person applying for any such consent, permission or other authorisation must provide such information as the competent authority may reasonably require for the purposes of the assessment or to enable it to determine whether an appropriate assessment is required.”

2.12 The Appellant has provided full ecological survey data and reports, various responses to Natural England and the Local Planning Authority containing additional information, as well as the ‘shadow HRA’ and this response. The Appellant has complied fully with Regulation 63(2) to allow the competent authority to carry out a formal Appropriate Assessment and conclude that the proposed development does not give rise to any adverse effects upon the integrity of the Humber Estuary. Of course, if the Inspector requires any further information or clarification, then the Appellant will be happy to assist further.

Inspector’s Query	Natural England’s Response
Do you consider that the proposed conditions (including additional condition at paragraph 2.91) and Unilateral Undertaking are appropriate, and would they adequately secure the SANG and PAMMS?	Natural England does not provide comments on the wording of conditions, but we would like to direct you to our previous comments in our response dated 20/05/22, in that we advise that the long-

² <https://www.gov.uk/guidance/habitats-regulations-assessments-protecting-a-european-site>

	<p>term management of the SANG is secured in perpetuity of the development by suitable legal mechanism. Natural England is unclear from as to how long the SANG will be managed for and request clarification on this.</p> <p>By the word 'appropriate' we assume that the inspector wishes to know whether Natural England consider the proposed mitigation measures are sufficient to adequately mitigate the potential for a significant increase in recreational pressure that would threaten the integrity of the Humber Estuary. Although Natural England has remained silent on this it has (as mentioned above) said that the SANGS is of an appropriate size and location. Regarding the PAMMS measures it is our view that the provision of the PAMMS is a 'belt and braces' approach to provide added confidence that adverse effects upon the integrity of the of proposed development upon the Humber estuary can be ruled out.</p>
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- 2.13 The Appellant proposed the additional planning condition wording in paragraph 2.91 in its response to the Statement of Case of North Lincolnshire Council (the "**Council**"), the consultation responses to the appeal, and to the representations of third parties. No comments have been received from the Council regarding the wording of the proposed planning condition. The Appellant considers that the proposed planning condition which requires the PAMMS to be approved by Natural England and the Council prior to the occupation of any dwelling and to be fully implemented in accordance with its terms will adequately secure the PAMMS.
- 2.14 With regard to the measures for delivery and maintenance of the SANG, Schedule 3 of the Section 106 Unilateral Undertaking provides obligations regarding the delivery of open space on site. The obligations set out in Schedule 3 include the following:
- 2.14.1 A Landscape and Ecological Management Plan ("**LEMP**") (including the details of the provision of the SANG, Sustainable Urban Drainage System(s) ("**SUDS**"), Open Space and ecological mitigation) shall be submitted to and agreed in writing by the Council prior to the commencement of development;
 - 2.14.2 Prior to the occupation of the first dwelling, the Owner or the Developer shall lay out, install and complete the SANG in accordance with the approved LEMP and no dwelling shall be occupied until the SANG has been provided;
 - 2.14.3 The SANG shall be maintained in accordance with the approved Management Scheme by the Owner or Developer to the reasonable satisfaction of the Council until they are transferred to a management company;
 - 2.14.4 If there is a transfer to a management company, its primary operating procedures must be approved by the Council and its objects must require it to

maintain the SANG; and

- 2.14.5 Any transfer to a management company shall be a transfer of the entire freehold interest of the SANG and be the subject of a covenant which prohibits the use of SANG for any other purpose.
- 2.15 Schedule 3 of the Section 106 Unilateral Undertaking will adequately secure the SANG prior to the occupation of the first dwelling and in perpetuity.
- 2.16 It should be noted that the Council provided draft Heads of Terms which informed the drafting of the Section 106 Unilateral Undertaking. Following the submission of the Unilateral Undertaking, no comments have been received from the Council, which the Appellant takes to mean that it is content with the wording of the Unilateral Undertaken. This position has been endorsed in the Council's CIL Compliance Statement dated February 2023.

3. Conclusions

- 3.1 The Appellant has considered the submissions of Natural England and remains of the view that it has provided full ecological survey data and reports, various responses to Natural England and the Local Planning Authority containing additional information, as well as the 'shadow HRA' and this response, so as to fully comply with Regulation 63(2) to allow the competent authority to carry out a formal Appropriate Assessment and conclude that the proposed development does not give rise to any adverse effects upon the integrity of the Humber Estuary.
- 3.2 The Appellant also remains of the view that the mitigation measures it has proposed can be appropriately secured through the planning conditions it has proposed, together with the Section 106 Unilateral Undertaking, so as to satisfy Natural England's requirements.
- 3.3 It therefore remains the Appellant's position that the proposed development should obtain planning permission without delay.

25 May 2023