

6. Key points from the Inspector's report (Department of the Environment, Transport & the Regions 1998a)

Numbers in parentheses denote the section from the Inspectors report and Secretary of State's letter.

6.1 General

Extracts from the Inspector's opening paragraphs essentially set the scene for the subsequent consideration of habitat translocation.

"The material considerations in the case require weighing the need in national, local and economic terms for the production of ball clay against the national importance and obligation to protect the SSSI at Brocks Farm." [10.2]

".....that but for the SSSI at Brocks Farm there would have been no basis for refusing the application and no need for the appeal and Inquiry" [10.3].

6.2 Translocation

The Inspector and the Secretary of State concluded that the potential success or failure to translocate the SSSI should not feature in the argument as to whether the merits of a development outweigh the need to protect the SSSI *in situ*. In this case the Inspector went further than the Maryport determination (Department of the Environment North West Regional Office 1992) (see Appendix 3, paras 14.32 & 14.59), and the Secretary of State agreed that *"even in the circumstances where the conclusion is finely balanced, I can find no compelling argument which supports the view that the potential success or otherwise of translocation should become material along with any other relevant factors"* [10.5, SOS letter paras 2 & 10]

In his report, the Inspector went on to state *"SSSIs should be retained in situ, and translocation is, as EN claims, a last resort when faced with the inevitable loss of the SSSP"*. [10.5]

This confirms that translocation is material only after the planning application has been determined, endorsing the previous planning determination at Maryport (see Appendix 3) and should settle the argument that translocation should not be viewed as a way of overcoming harm to SSSIs.

While the Inspector acknowledged that the 1988 translocation at Brocks Farm had produced a grassland of high nature conservation value [10.33], nevertheless he went on to state that *"For my part, in addition to the uncertainty over continuing divergence, I am more inclined to EN's contention that the transplanted sites can no longer be described as natural/unimproved. The engineering of the ground and transplant aftercare would preclude this and make the site of far less interest in the national context. In addition, the transplanted site would not be in its historic context. It would exhibit a poorer relationship with Brocks Farm and, being close to the A38(T) and the overhead power line and not being contained by hedgerows, would have far less intrinsic appeal. Finally, because the whole SSSI would be translocated, there would be nothing against which to measure the success or failure. Thus, although ECC would create something of local interest with the transplant, I do not anticipate that it would ever be seen as an example of*

unimproved grassland of sufficient quality to qualify for SSSI status. Accordingly, in terms of the national network of SSSIs, transplantation would constitute a loss.

I appreciate that the knowledge gained over previous years in terms of ground preparation, the physical transfer of turves and aftercare would be put to good use and the best practices followed. However, there is no certainty based on other schemes that this transplanted area would reach a more favourable comparison with the SSSI than the departure illustrated by the 1988 transplant. Accordingly, whereas translocation may be the best form of mitigation when the loss of the SSSI is inevitable, I do not see the potential success at replication as justifying the transplant when the arguments are less forcible. The bottom line is that the SSSI would be lost.” [10.34, 10.35]

The Secretary of State agreed with this [paragraph 13] and stated “*The Secretary of State fully supports the Inspector’s conclusions in paragraphs 10.32 to 10.35 of the report on the issue of possible translocation of the SSSI, or its loss, and is satisfied the translocation of the SSSI in its entirety would constitute, for all intents and purposes, a loss of habitat which would be best avoided*”

The Inspector clearly attached much weight to the Ratcliffe criteria of naturalness and intrinsic appeal (Ratcliffe 1977) as well as the historical context and cultural value. This point is important as it stresses that there are other considerations attached to retaining a site *in situ* in addition to the ‘scientific’ interest, ie the more intangible values of intrinsic appeal and the historical and cultural context of semi-natural habitats. Ratcliffe (1984) recognised this in his definition of the purpose of nature conservation, much of which is primarily cultural:

“The conservation of wild flora and fauna, geological and physiographic features of Britain for their scientific, educational, recreational, aesthetic, and inspirational value” .

There is a clear connection here between ‘scientific’ and cultural values. The scientific value of lowland hay meadows is the product of a long history of human activity, particularly low-intensity farming practices while the intrinsic appeal stems from the richness and diversity of plant species coupled with associated features such as tall hedgerows and willow-fringed ditches. The appeal is enhanced by the knowledge that such biological richness and beauty is of some antiquity and the product of a continuity of meadow management.

In his final paragraph the Inspector made the point that should the Secretary of State be minded to allow the appeal the next-best scenario to conserving the site *in situ* would be turf translocation. He went on to state “*However, the expectation should not be one of replication, but more the creation of a habitat of interest, and the best that could be achieved under the circumstances*” [10.51]

This vindicates EN’s view that transplanted grasslands have lesser nature conservation value than ancient semi-natural examples but that if loss of the site is inevitable, then translocation remains as an option of ‘last resort’.

Interestingly, this supports the outcome of an earlier Public Inquiry in 1988 into a housing development affecting a Hampshire SSSI (Department of the Environment South East Regional Office 1988) where the Inspector considered transplantation to be an acceptable alternative to site safeguard but where the Secretary of State overturned this and concluded “*The Secretary of*

*State remains unconvinced about the likely success of the appellants' proposals for plant habitat transfer" [SOS letter para 7]. However, it should be remembered that in the late 1980s, translocation was more widely regarded as a potential mitigation for loss of *in situ* habitats and the weight given to nature conservation in planning matters was less than today. The 1988 case also pre-dates significant conservation policy such as the UK becoming a signatory to the Biodiversity Convention in 1992, implementation of the EU Habitats & Species Directive (Council of the European Communities 1992) and publication of Planning Policy Guidance Note Number 9 on nature conservation (Department of the Environment 1994b)*

Overall the position taken by EN on habitat translocation is vindicated by the Inspector's report on the Brocks Farm case and by the earlier cases cited. EN's position can be summarised as follows:

- translocation is not a substitute for *in situ* conservation;
- translocated grasslands are of lesser nature conservation value and are different to the original *in situ* vegetation;
- the potential success or failure to translocate a SSSI should not feature as a material consideration in the argument as to whether the merits of a development outweigh the need to protect the SSSI *in situ*.

6.3 National importance of SSSI

The Inspector and Secretary of State confirmed EN's view that Brocks Farm SSSI is of national importance for nature conservation. While not included in the Nature Conservation Review (Ratcliffe 1977), it nevertheless forms part of a national series of neutral grassland sites which are of national importance.

"The material considerations in the case require weighing the need in national, local and economic terms for the production of ball clay against the national importance and obligation to protect the SSSI at Brocks Farm." [10.2]

*"I am in no doubt that the Brocks Farm SSSI forms a part of the network of SSSI, which collectively are of national importance. As to its importance in its own right, I acknowledge that it contains no nationally rare species, nor has it been identified as an NNR. Notwithstanding, the SSSI is an example of an MG5c unimproved neutral grassland, and this is a rapidly diminishing resource. Thus, even though it forms only a small part of the national network, I believe its future should be protected unless the most rigorous examination of the proposals show that the ball clay resource would be lost and/or the economic consequences would be so significant that the balance of advantage in the national interest is greater than the need to retain the SSSI *in situ*."*

[10.31]

The recent consultation document on the protection and management of SSSIs (DETR 1998b) makes it clear that the Government believes that all sites included within the SSSI series should be regarded as being of at least national conservation importance. A proposal is put forward to distinguish only between international sites, and other nationally important SSSIs.

6.4 Moving towards sustainable development

The Inspector's report addressed a number of points that are pertinent to ongoing discussions of the theory and practice of sustainable development (English Nature 1992) and its relationship to strategic planning and the planning system.

This is especially the case given that the Secretary of State not only acknowledged that the continued winning/production of ball clay was of national importance, but was also satisfied that there was a need to provide the tipping capacity sought by the developer.

In particular, the Inspector and the Secretary of State drew attention to the following issues:

a) The need for a 'rigorous examination' of all alternatives

Where alternative locations/solutions for development are relevant, they are material considerations that must be taken into account when deciding whether planning permission should be granted. A robust view of alternatives was taken. The Inspector decided, in this case, that alternatives existed which should be more rigorously examined, but in a note of caution, he dismissed alternatives that have no "*reasonable prospect*" of materializing [10.6-10.9, 10.27 - 10.30 SOS letter paras 11&12]

b) The onus is on the applicant to investigate all the potential options.

Normally it is for the Local Planning Authority to show demonstrable harm to an interest of acknowledged importance, not for the developer to prove a need for the development. However, the LPA and then the Inspector did identify demonstrable harm - loss of the SSSI *in situ*. The Inspector's view was that "*the onus was on the Company to investigate all the potential options*". The Inspector noted that the appellants had not done so, and had not examined all the alternatives at Board level prior to the Inquiry taking place. [10.28-10.30, 10.43&10.50]

c) Prematurity of the planning application.

Without a comprehensive assessment and "*rigorous examination*" of the alternatives, and in the absence of a geographically wide-ranging agreed strategy for exploitation of the mineral in question (the Ball Clay Strategy for the Bovey Basin), the Inspector felt that the planning application had been premature. The Inspector noted that the LPA had not progressed the Strategy. While acknowledging that the Strategy would not deal with many of the relevant site-specific issues, the Inspector still clearly felt that this was a key 'missing' document, the contents of which would be highly pertinent to his consideration of the planning application. [10.8-10.9, 10.46, SOS letter para 13]

d) Market competition

The appellants claimed that if the appeal was not allowed, closure of the business might follow, with the only other ball clay operator being left in a monopoly situation (in other words, the SSSI would need to be sacrificed if market competition between the two companies were to be maintained). The Inspector, whilst acknowledging that such issues are given prominence in MPG6, was not convinced that the appellants would abandon Newbridge and their established markets if a reasonable alternative could be found. In his opinion, the evidence provided in

support of the appellants' argument was "*subjective and incomplete*". [10.12-10.14, 10.29, 10.45 & 10.48]

The Inspector also drew attention to the way in which market competition had hindered an agreement to joint working between the two companies. In his view, such an agreement would help to resolve the apparent shortfall of tipping capacity in the area. "*I do not think that it is acceptable to continue sanctioning the ad hoc arrangement that currently exists, and which involves fuelling the competitive element of the two companies at the expense of the historic environment*". [10.29, 10.45 and 10.48]

e) Balance between the public interest and the interest of individuals or companies

The Inspector drew attention to the fact that PPG1 makes quite clear that the planning system does not exist to protect the interests of one individual, or group of individuals, over another. He saw no reason why "*applicants should assume to have the right to a favourable outcome, if such an outcome can be shown to adversely affect the wider public interest*". At Newbridge, even the worst scenario (from the appellants' viewpoint) would not, in the Inspector's view, result in sterilization of the ball clay resource, which would in all probability be worked by another. The Inspector acknowledged, however, that such a scenario might lead to some adverse employment and economic consequences; but his view was that these consequences should not be assumed to be automatically overriding, but rather should be balanced against the wider public interest (in this case the conservation of the SSSI).[10.46 and 10.47]

f) More effective balancing of interests in working minerals of national importance

The Inspector suggested that the difficulties at Newbridge had "*arisen, in part, because each recent planning application had been dealt with on its individual merit, based on the national importance of ball clay, without regard to the overall need for the resource or any long term strategy for its recovery*". Neither had any historic shortfall in tipping capacity been addressed. He noted that these were issues that the emerging Ball Clay Strategy would need to deal with, and was concerned that, if it did not, similar arguments to those presented at the Newbridge Inquiry would be employed elsewhere in the Bovey Basin *to justify the destruction of other designated sites*. [10.46 & 10.47]

The case would thus seem to provide hope for those wishing to see a more conciliatory and consensual approach to resolving planning disputes. There can be little doubt that the present adversarial approach does not contribute greatly to meeting the objectives of sustainable development. In this case, the Inspector drew attention to the way in which the pursuit of narrow sectoral interests is counter-productive, while at the same time highlighting ways in which a more constructive approach (particularly with the formulation of a Ball Clay Strategy for the Bovey Basin) would be likely to lead to greater benefits to all concerned.

Reconciling sustainable development with market competition and business survival is likely to prove to be a very difficult task. Hopefully, this case provides some indication as to how this might be achieved.

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[* includes all references including those cited in the annexes to the proofs of evidence - Appendices 4 and 5]