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ASSOCIATION OF  
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Donald Rumsfeld  
United States Defence Secretary Feb 12th 2002

“As we know, there are known knowns.

There are things we know....

We also know there are known unknowns.

That is to say we know there are some things  
we do not know....

But there are also unknown unknowns, the ones we don't know  
we don't know”.

## The Stuff We Should Already Know

- Wildlife & Countryside Act 1981
- Habitats Directive 1992
- Habitat and Species Regulations (1994) 2010
- Circular 06/2005 Biodiversity
- Section 40/41 NERC Act 2006 *Duty for Biodiversity etc*
- National Planning Policy Framework (NPPF)

## Plus This Other Stuff

- The Lawton Report *Making Space for Nature* (2010)
  - More
  - Bigger
  - Better
  - Connected
- The Mitigation Hierarchy (NPPF paragraph 118)
  - Avoid
  - Reduce/Mitigate
  - Compensate
  - Enhance
- Biodiversity Offsetting

## And the Biodiversity Stuff

Habitats & Designated Sites

Species

Ecosystem services

Landscape connectivity

Green Infrastructure

## So .... planning for biodiversity:

- Knowledge about local biodiversity
- Legislation (both duties and powers)
- Government policy
- Local policy
- Relevant guidance and advice
  - The above is perhaps increasingly questionable now !
- Vision – what we want to achieve
- National and local biodiversity action plans
- Local Nature Partnerships (LNPs)
- Nature Improvement Areas (NIAs)

BUT ... at its worst ... we currently have ...

- Too much pressure in the system
- Not enough time and resources
- Political/economic priorities – focused elsewhere
- Sometimes - poor understanding of how to implement legislation and policy
- Lack of ecological expertise within LPAs (>60% of LPAs)
- Inconsistency
- Poor delivery of biodiversity mitigation
- Confusion (e.g. new GDPO and permitted development)

How Can We Make the System More  
Efficient and Effective?

## M.Sc or Phd Thesis ?

What proportion of time and effort goes into:

- Ecological surveys
- Impact assessment
- Design of truly effective mitigation
- Report writing
- Decision-making and scrutiny of applications
- Appropriate planning conditions
- Comprehensive delivery of ecological works on site
- Enforcement action
- Adequate monitoring to establish success

My guess ...!

- **Ecological surveys**
- **Impact assessment**
  - Design of truly effective mitigation
- **Report writing**
- **Decision-making and scrutiny of applications**
  - Appropriate planning conditions
  - Comprehensive delivery of ecological works on site
  - Enforcement action
  - Adequate monitoring to establish success

And the **consequence** of all of this ?

- Ecological surveys
- Impact assessment
- Design of truly effective mitigation
- Report writing
- Decision-making and scrutiny of applications
- Appropriate planning conditions
- Comprehensive delivery of ecological works on site
- Enforcement action
- Adequate monitoring to establish **success !**

## Permitted Development

“... there are known knowns  
there are things we know....

... there are known unknowns  
we know there are some things  
we do not know....

... also unknown unknowns  
the ones we don't know we don't know”

## Permitted Development

*Class Q Agricultural Buildings to Residential*

*Town and Country Planning*

*General Permitted Development Order (GPDO) 2015*

## Permitted Development

Where the development proposed is development under Class Q(a) together with development under Class Q(b), development is permitted subject to the condition that before beginning the development, the developer shall apply to the local planning authority for a determination as to whether the prior approval of the authority will be required as to:

- (a) transport and highways impacts of the development,
- (b) noise impacts of the development,
- (c) contamination risks on the site,
- (d) flooding risks on the site, or
- (e) whether the location or siting of the building makes it otherwise impractical or undesirable for the building to change from agricultural use to a use falling within Class C3 (dwelling houses),
- (f) the design or external appearance of the building

## Permitted Development

It has been argued that the Council, when deciding whether to grant or refuse prior approval, is only allowed to assess the issues that are specifically set out by the relevant Class.

So for agricultural buildings this would be the issues set out by condition Q.2 (i.e. transport and highways impacts, noise impacts, contamination risks, flooding, etc).

## Permitted Development

None of the limitations and conditions of any of the Classes refers to ecological impacts.

Furthermore, although the GPDO refers to planning permission being granted -

*“Subject to Regulations 73 to 76 of Conservation of Habitats and Species Regulations 2010”*

these regulations only relate to a designated *“European site”* or a *“European offshore marine site”*.



## Permitted Development

An LPA therefore appears constrained in its consideration of the prior approval application to the criteria listed in the relevant class.

OR IS IT?

## Permitted Development

1. Can the need to protect bats or other protected species be a material consideration in the determination of a prior approval application under Class Q?
2. Can pre-commencement conditions relating to ecological surveys and protection measures be attached to a notice of prior approval under Class Q?

## Permitted Development

*DCLG state:*

*“All changes under permitted development are required to meet necessary habitats and environmental legislation and regulations.”*

Section 40 of the Natural Environment and Rural Communities Act 2006 (NERC) requires all public bodies to have regard to biodiversity conservation when carrying out their functions.

In the exercise of its functions the Council is also required to have regard to the requirements of Regulation 9 of The Conservation of Habitats and Species Regulations 2010 (as amended) (Habitats Regulations).

## Permitted Development

In the case of Class Q the criteria that the LPA must take into account are more wide-ranging than they are under certain other classes.

In particular, these criteria include consideration as to whether the location or siting of the building makes it impractical for any other reason (besides the others that are listed) or undesirable for the building to change from agricultural use to residential use.

This seems potentially to introduce all sorts of other factors that might arguably militate against the residential conversion of the building.

Including ecological considerations i.e. the presence of protected species, such as bats.

## Permitted Development - Appeal Decision

Joanne Jones  
Appeal Ref APP/L3245/W/15/3004467  
Bridgenorth, Shropshire

6. The application was refused by the Council because no ecological surveys had been provided to assess the likely impact of the proposal on protected species, which have a reasonable likelihood of being effected by the proposal. No surveys have been provided with the appeal documentation.

## Permitted Development - Appeal Decision

Joanne Jones  
Appeal Ref APP/L3245/W/15/3004467  
Bridgenorth, Shropshire

7. In this regard the appellant has brought to my attention an appeal decision said to be made in similar circumstances, of which an extract is presented in the appellant's Grounds of Appeal. In that case the Inspector considered that a bat survey had no relevance and that the issue of bats would fall to be considered by other legislation

## Permitted Development - Appeal Decision

Joanne Jones  
Appeal Ref APP/L3245/W/15/3004467  
Bridgenorth, Shropshire

8. I am mindful that although protected species are not specifically referred to in the GPDO, regulation 9 of 'The Conservation of Habitats and Species Regulations 2010' would still apply. This states that the "*competent authority must exercise their functions which are relevant to nature conservation... so as to secure compliance with the requirements of the [Habitats] Directive*". Accordingly, competent authorities must consider the Directives in making decisions relating to any of their planning functions.

## Permitted Development - Appeal Decision

Joanne Jones  
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9. Therefore, even though there is no "reminder" in the GPDO, European protected species must still be taken into account. As I have been alerted to the Council's concerns about protected species, it is incumbent on me to consider whether there is a reasonable likelihood of protected species being present and affected by the development.

## Permitted Development - Appeal Decision

Joanne Jones  
Appeal Ref APP/L3245/W/15/3004467  
Bridgenorth, Shropshire

10. From what I saw on my site visit the appeal premises would offer a suitable habitat for bats and this position is supported by the comments made by the Council's Ecologist, whose professional opinion I afford significant weight. Bats are protected species and I cannot give approval without adequate evidence to be satisfied the Regulations won't be breached and subsequently being able to establish if works may be licensed.

## Permitted Development - Appeal Decision

Joanne Jones  
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- 11. In the light of the strict protection afforded to bats, and that survey information is missing, I am not satisfied that there would not be a material adverse effect on the protected species. As such, I conclude that the proposed works would fail to satisfy the requirements of paragraph Q.2(e). Accordingly, it would not be permitted development as set out under Class Q of the GPDO.

## Wildlife Crime !

*"... the issue of bats would fall to be considered by other legislation"*

## Wildlife Crime !

Between 2006 and 2009

Five successful prosecutions out of 288 reported incidents

2% conviction rate

Average fines £1500 - £2000

## Wildlife Crime !

In 2014

The police report a total of 159 incidents

30% increase on 2103

Significant increase on any previous year

## Crime and Disorder Act 1998

Crime and Disorder Act 1998 - Section 17

Duty to consider crime and disorder implications

*(1) Without prejudice to any other obligation imposed on it, it shall be the duty of each authority to which this section applies to exercise its various functions with due regard to the likely effect of the exercise of those functions on, and the need to do all that it reasonably can to prevent, crime and disorder in its area.*

## Wildlife Crime !

Taken together, wildlife legislation and the Crime and Disorder Act provide planning authorities with both obligations and powers to prevent wildlife crime wherever they are in a position to do so.

## Wildlife Crime !

Accessories and Abettors Act 1861 S.8  
Magistrate's Courts Act 1980, S.44.

The accessory would be liable for the activity if he/she foresaw a real risk that it would happen; and either encouraged it, assisted with it, or failed to intervene to prevent it if he was in a position to do so

(R v R [1993] 1 WLR 1005, CA; R v *JF Alford Transport Ltd* [1997] 2 CrAppR 326).



How can LPA 'intervene' to prevent wildlife crime?

## Adequate Scrutiny & Conditions

BS42020 Biodiversity – Code of Practice for  
Planning and Development

Sections 8 and 9

Biodiversity Target for Year 2020

Hence BS42020

## Biodiversity

Manual for Planning and Development  
For all models in the BS 2012 – 2020 series

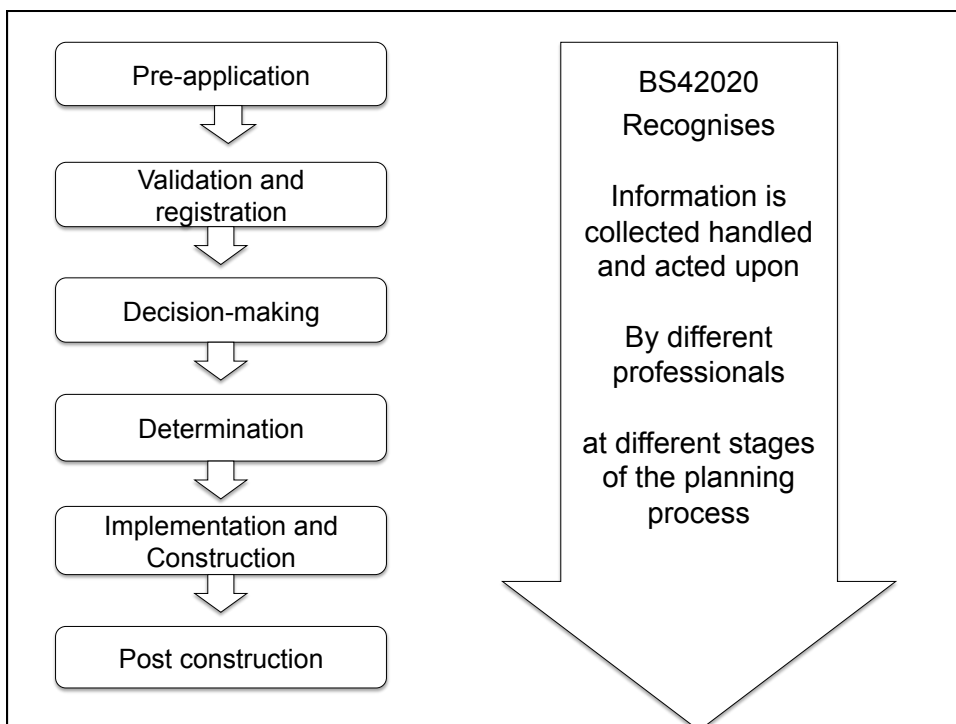
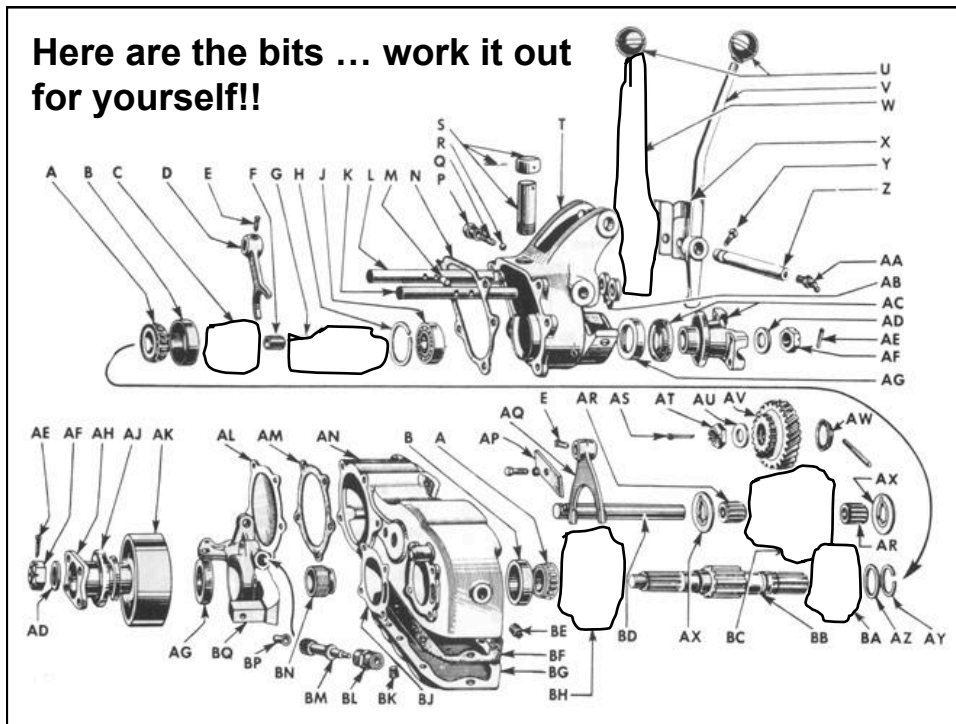


- Owners Workshop Manual – broken down and taken off the road **NOT FIT FOR PURPOSE**
- Roadside Repairs – running repairs when we are travelling **NEEDS ADJUSTMENT TO CONTINUE**
- MOT Test Checks – Statutory requirements **MUST BE COMPLIANT (RELIABLE AND TRUSTED)**
- Service and Repair – periodic routine inspection and maintenance **KEEPS EVERYTHING THAT'S ALREADY WORKING RUNNING SMOOTHLY**

What' the problem ?



It looks OK on the Outside !



## Key Elements of BS42020

- Specifications for required standard of ecological surveys and reports
- Registration and validation (the benefit of validation requirements)
- Decision-making
  - issues to consider
  - Scrutiny
  - Consultation
  - Resolving outstanding issues
- Planning consent
  - Conditions
  - Obligations
  - EPS licences
- Compliance during construction (construction environmental management plans)
- Long-term management
- Ecological Monitoring
- Annex D Model planning conditions to address biodiversity issues

## Pre-Applications Problems?

- Inadequate or no ecological surveys undertaken before application submitted
- Lack of project design detail
- Lack of early/timely engagement of ecological consultant
- No pre-application discussions
- Poor quality ecological reports
- Inadequate information to determine the application
- Prioritisation of other issues over biodiversity
- Lack of awareness by developer
- Lack of biodiversity ecologist/advocate in LPA
- Lack of funding/resources
- Outside commercial pressures
- Lack of appropriate ecological skills (applicant and LPA)
- 'Wrong' season (e.g. cant do bat surveys)!
- Apathy – just cant be bothered with an additional problem

## BS42020 Pre-application

- Pre-application discussions
- Adequacy of information
- Ecological reports
- Undertaking ecological surveys
- Non-technical summaries (net loss and gain)
- Providing certainty
- Identifying limitations
- Summary EPS form
- Declaration of compliance
- Full disclosure of scientific methods
- Provision of original field results
- Sub-contractors' reports
- Composite reports

## Ecological Reports – Fit for Purpose

- CIEEM PGS 9 *Ecological Report Writing* (March 2015)
- ID different types of reports for different purposes  
e.g. EclA, PEA, etc
- Stress need to be 'fit for purpose'
- Templates to guide content and structure

## ALGE and CIEEM

### Brief Joint Statement on Preparation of *Adequate* Ecological Reports

#### Ecological Constraints and Opportunities Plan (ECOP)

The results of the survey and impact assessment should be used to identify an ECOP on a plan/map

- Features present
- Areas to be impacted
- Areas to be avoided
- Areas suitable for mitigation and compensation
- Areas suitable for enhancement
- Areas to be subject to ongoing conservation during development
- Areas needing protection during construction

## Validation / Registration Problems?

- Lack of ecological information (quality / quantity) submitted with the application
- Registering an application that cannot lawfully be determined without further key ecological information
- Registered 'inadequate' application effects performance targets
- Application should either be:
  - Withdrawn by applicant
  - Judged as not valid and not registered
  - Registered and then refused on the grounds that there is insufficient information to make a lawful determination
  - Given planning consent – potentially unlawfully – where protected and important biodiversity is then harmed or lost !

## BS42020 Validation and Registration

- Validation Requirements
- Registration
- ALGE Validation Requirements for Biodiversity
- Bat Conservation Trust  
*Online Planning Tool with Trigger Lists*

## Decision-making Problems?

- No or very poor ecological report
- Uncertainty over significance of impacts and consequent legal/policy implications
- Lack of or inadequate ecological surveys
- Lack of mitigation details
- Lack of information on development proposals
- Lack of ecological expertise within the LPA
- Statutory consultees unable to help and/or provide a response/guidance
- Questionable competence of the ecological consultants
- Pressure from senior management or politicians
- Heavy workload and inadequate resources
- Unrealistic or unfeasible mitigation measures
- No certainty over deliverability of proposals

## BS42020 Decision-making

- Making decisions based on adequate information
- Professional scrutiny
- Consulting on biodiversity issues
- Requests for further information
- Resolving outstanding issues & agreeing/securing outcomes



### **Biodiversity Issues To Be Considered In Determining A Planning Application**

*(Extract from Clause 8.1 of BS42020 Biodiversity – A Code of Conduct for Planning and Development)*

The decision-maker should undertake a thorough analysis of the applicant's ecological information ... in reaching a decision ... should take the following into account.

- a) The soundness and technical content of ecological information;
- b) Whether biodiversity is likely to be affected and whether all potential impacts are described adequately;
- c) Whether effects are significant and, if so, capable of being mitigated;
- d) Whether the mitigation hierarchy has been applied;
- e) Whether it has been adequately demonstrated that the proposals will deliver the stated outcomes if consent is granted;
- f) Whether the measures are capable of being secured through appropriate planning conditions and/or obligations and/ EPS licences;
- g) Whether the proposals are compliant with statutory obligations and policy considerations;
- h) Whether there is a clear indication of likely significant losses and gains for biodiversity;
- i) Whether any material considerations have been identified that might require changes to the application.

NOTE With regard to level of scrutiny, the British Standard recommends a proportionate approach.

## **Determination Problems?**

- Assumption that adequate information has been submitted !
- Planning conditions are not fit for purpose and appropriate to achieve desired outcome
- Earlier assessment should have highlighted lack of survey information or mitigation
- Political pressure to grant consent
- Reliance on other bodies for approval (e.g. EPS licenses)
- LPS ecologist's advice not taken on board by planning colleagues (e.g. conditions)
- Ditto ... for statutory and non-statutory consultees' recommendations
- Unrealistic or unenforceable conditions
- Necessary mitigation, compensation, enhancement measures are not fully secured

## BS42020 Determination (Approval / Refusal)

- Using planning conditions
    - method statements
    - restrictions & controls
    - strategies and plans
    - surveys by condition!
    - conditions & EPS licenses
  - Planning obligations
  - Other consent regimes
    - EPS
    - Water Related Consents
    - Listed Build/Con. Areas
    - Demolition
    - TPOs
- Model conditions – Annex D
- 22

## Implementation Problems?

- Eager developer starting works in advance of some important mitigation measures (e.g. clearance of vegetation during bird breeding season)
- No ecologist on site to 'supervise' ecological mitigation
- Poor understanding/lack of commitment to ecological planning conditions
- Contractors ignore ecological constraints
- Poor delivery or mitigation measures resulting in very poor outcome for wildlife
- Seasonal issues conflict with construction programme
- Lack of compliance monitoring
- Lack of enforcement
- Cost of mitigation not previously understood by developer
- Disproportionate mitigation !!!
- No contingencies if something goes wrong
- EPS licence requirements not carried out

## BS42020 Implementation

- Construction environmental management plans (CEMPs)
- Risk assessment of potentially damaging activities
- Identification & protection of biodiversity protection zones
- Practical measures to avoid or reduce impacts
- Timing of sensitive works
- Responsible persons and lines of communication
- Ecological clerk of works
- Protective fencing and exclusion barriers

## Post-construction Problems?

- No or inadequate long-term management
- Inadequate funding for long-term management
- Agreed obligations/commitments 'change'
- Break in continuity with change of land ownership
- No long-term monitoring
- No contingencies if something goes wrong
- Mitigation fails to achieve desired results in the long-term
- No means of collating or analysing monitoring results
- No idea whether there is an overall net loss or gain

## BS42020 Post Development

- Post development management (LEMPs)
- Monitoring & reporting biodiversity outcomes

## Ecological Clerk of Works

- ECoW contractor/operator
- ECoW Advisor/ Supervisor
- ECoW Inspector (no contractual authority)

## BS42020 Annexes

- Determining Significance
- Biodiversity and the law
- Professional codes of conduct
- **Model planning conditions**
  - Other consent regimes
  - CDM Regulations
  - Construction activities - potential to affect biodiversity
  - Ecological surveys and reporting
  - Useful web sites

Deontology

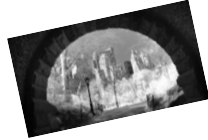
Consequentialism

Process

Outcome

Ecological  
Surveyor

Ecological Clerk of  
Works



Does the '*means*' justify the '*end*' ?

or

Does the '*end*' justify the '*means*' ?



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