

North York Moors National Park Authority

Town and Country Planning Act 1990

Appeal by: Mr R Walker

Against: Refusal of planning permission for change of use of land to form 1 no. grass runway and construction of pilot/restroom building (revised scheme following dismissal at appeal of NYM/2015/0781/FL)

Location: South Moor Farm, Langdale End, Scarborough

Statement by Local Planning Authority For Written Representations Appeal

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A – Proposed Conditions

Mrs H Saunders, BA BTP MRTPI
For North York Moors National Park Authority

1.0 Introduction

1.1 This Statement refers to the refusal of planning permission for the change of use of land to form 1 no. grass runway and construction of pilot/restroom building (revised scheme following dismissal at appeal of NYM/2015/0781/FL) at South Moor Farm in Langdale End near Scarborough, by the North York Moors National Park Authority (NPA) as the Local Planning Authority (LPA). The decision notice was dated 17th February 2017.

1.2 Site and Surroundings

1.3 The appeal site, South Moor Farm, is located within **Dalby Forest**, which is situated on the southern slopes of the North York Moors National Park. The Forest is part of the Forestry Commission's (FC) public forest estate and is managed, not just to supply timber, but also 'to *protect and enhance (its) biodiversity*'¹. The forest supports a distinctive fauna and flora and is well known not only for its extensive forests and woodlands but for a characteristic bird community including highly vulnerable and protected species such as goshawk, nightjar, turtle dove and honey buzzard amongst others.

1.4 The FC works with a range of partners and stakeholders, including private individuals, farms, businesses, national conservation groups and the North York Moors National Park to deliver this and other goals. The southern part of the forest is divided by a number of valleys creating a 'Rigg and Dale' landscape whilst to the north the forest sits on the upland plateau; which is where South Moor Farm is situated.

1.5 Dalby is a significant tourist destination in the region and is termed by the Forestry Commission as "The Great Yorkshire Forest". It is used for quiet outdoor active recreation as well as timber production and consequently contributes greatly to the local economy. Whilst the majority of the land and forestry is owned by the Forestry Commission there are also a number of private households, farms and tourist related businesses within the forestry area.

1.6 It offers over 8,000 acres of upland woodland to explore and enjoy. The main visitor centre is located at the western edge of the forest and is adjacent to a selection of other businesses including a bike hire centre and shop; this is the area of concentrated activity, although there are several informal and low key small car parks throughout the forest to explore other parts of the site.

1.7 The Dalby Observatory is located adjacent to the visitor centre and is recognised as being one of the best places to enjoy the night sky in the country and was declared a Dark Sky Discovery Site on BBC Two's Stargazing LIVE in January 2013.

¹ Forestry Commission Corporate Plan 2016-17

- 1.7 **South Moor Farm** itself is located on the Dalby Forest Drive, approximately 1.5km to the south west of the Dalby Forest Toll gate at Bickley and approximately 5.5km to the north east of the Dalby Forest Visitor Centre. The farm is situated within a large clearing within the forest on undulating land with the existing farm buildings visible from the Forest Drive. This is at the north eastern edge of the Forest and is in an area characterised by a feeling of remote rurality and peaceful valleys well away from the main visitor focus of Dalby Forest.
- 1.8 The farm is run as a small agricultural business with 40 hectares of grazing land for sheep and cows and a Bed and Breakfast facility comprising four rooms operating from the main farmhouse.

2.0 Relevant Site History

- 2.1 Planning permission was refused by the LPA and subsequently dismissed at appeal in 2014 for the change of use of land to provide 2 no. grass runways, an aircraft hangar building and pilot/restroom building.
- 2.2 This application was refused on the grounds of unacceptable levels of noise and activity which would be detrimental to the amenities of local residents and the experience of visitors as well as harm to the tranquillity of the area; that the building would be substantial in size with poor quality materials and design and that the proposed development would have an adverse impact on the enjoyment of users of the Public Rights of Way.
- 2.3 The proposal was dismissed at appeal, but the Planning Inspector considered that the greater harm was likely to be the size, design, material and location of the proposed hangar building rather than disturbance to users of the rights of way network and noise disturbance.
- 2.4 A second planning application for a similar development to the first proposal was refused by the LPA and subsequently dismissed at appeal in 2015, for similar reasons to the first application. The revised application differed only from the previously refused scheme in terms of the size, design, materials and location of the proposed hangar building. The second Inspector accepted the first Inspectors view that the proposal would not have a detrimental impact on the tranquillity of this part of the National Park, but dismissed the Appeal due to the impact of the proposed hangar building on the character of the locality.

- 2.5 In response to this, Members of the National Park Authority asked that the Acting Chief Executive of PINs (Steve Quartermain) be contacted as they were specifically concerned about the lack of explicit reference in the Inspector's report to legislation and government policy on National Parks in the NPPF and the 1995 Environment Act. The Authority considered that there was no evidence in the reporting of the two previous appeal decisions that the issue of tranquillity in its wider sense as a 'Special Quality' of the National Park (and which therefore is recognised by legal statute) was properly addressed. The clear conflict between the proposed development and the Purposes for which National Parks were designated and protected were still at the heart of the Authority's objection.
- 2.6 Both of these applications proposed that the main runway would comprise a 600 metre grass strip aligned south west to north east, with an auxiliary runway, comprising a 400 metre grass strip aligned west to east to be used when there were strong cross winds. It was also stated within both applications that the facility would be restricted to experienced pilots flying to and from the area with no training flights, practice circuits or aerobatics.
- 2.7 A third application was then submitted for the change of use of land to form two grass runways and to construct a pilot/restroom building, but without any proposals for an aircraft hangar building. This application was again refused by the Planning Committee, for five reasons relating to harm to tranquillity, adverse impact on the enjoyment of users of the Public Rights of Way, impact of the visible presence of standing aircraft/aircraft movements/activity and noise; insufficient information to determine whether the proposal will have a likely significant effect on protected species; and impact on designated heritage assets.
- 2.8 The applicant appealed this decision and the appeal was heard in the form of a Hearing in July 2016 with a large number of local residents present. The appeal was again dismissed.
- 2.9 The third Inspector accepted the previous two Inspectors views that, in the absence of any new information the proposal would not have a detrimental impact on tranquillity; and although the appeal was dismissed, this was on the basis of the potential impact on protected species only. The Inspector concluded as follows:

"based on the information before me I cannot conclude that the proposal would not harm protected species. I take into account the conservation of wildlife is explicit in the statutory purposes of the National Park, and that having regard to the Sandford Principle, this harm must carry greater weight than the stated benefits."

3.0 The Proposal and the Decision

- 3.1 The Inspector's conclusion on the third appeal, that the impact or otherwise on protected species needed to be established before any planning permission could be granted, gave the appellant the opportunity to submit a further application with a bird species survey and mitigation information to try to address that reason for refusal.
- 3.2 Consequently, the planning application to which this appeal relates was submitted on 4th November 2016 accompanied by a bird assessment report. The proposal differed from the previously refused schemes in that the auxiliary runway as well as the hangar building were omitted from the scheme.
- 3.3 The Bird Assessment Report was undertaken by Quants Environmental and was based on an ecological field survey which involved walking along the majority of paths, tracks and roads within the survey area, and a desk-based study. The report acknowledged that the survey was undertaken outside the main bird breeding season and it was therefore not possible to confirm the presence or absence of nightjar or goshawk as breeding species. It was also noted that many species records are not supplied to records centres due to various reasons including the threat of illegal egg-collecting particularly for the rarer raptors such as Goshawk.
- 3.4 In support of the proposal, the appellant's agent suggested that the applicant would be prepared to accept the following restrictions:-
- The site only used for the operation of light private aircraft (under 2,000 kg)
 - No circuit training flights, parachuting or aerobatic flights taking place from the site
 - No glider towing by powered aircraft except after an emergency landing
 - No more than 20 aircraft movements on any one day, with a movement representing a take-off or a landing
 - No more than 500 flights in any one year (bearing in mind that on 20 flights per day, with permitted development rights there could at present be up to 560 movements without any planning control)
 - No landing or taking off of aircraft prior to 7am or after sunset on any day (except in emergencies)
 - No taking off until at least 30 minutes after sunrise nor landing after 30 minutes before sunset in order to preserve Nightjars
 - The operator will maintain a record of all aircraft movements and, on request, make such records available to the North York Moors Planning Authority
 - Provision of signage on the Bridleway to warn users that flying may be taking place
- 3.5 It was again stated within the application that the facility would be restricted to experienced pilots flying to and from the area with no training flights, practice circuits or aerobatics.

3.6 The National Park's Planning Committee refused the application at its meeting on 16th February 2017, and also authorised the serving of an **Article 4 Direction to remove permitted development rights set out in Class B, Part 4, Schedule 2 of the Town and Country Planning (General Permitted Development) (England) Order 2015, to prevent the use of the land as an airfield for 28 days in a calendar year.**

3.7 The reason for refusal was as follows:

The Local Planning Authority considers that it cannot be satisfactorily demonstrated that protected bird species, notably Goshawk (Schedule 1, Wildlife & Countryside Act) and Nightjar (Section 41, NERC Act, Annex 1, EU Birds Directive) would not be adversely affected by the proposed development, or that it would not have a significant effect on the interest features of the North York Moors Special Protection Area (SPAs), because flights to and from the proposed airstrip could potentially cause disturbance to the species for which the special protection area is designated. The proposal is therefore contrary to the statutory purposes of the National Park Authority where conservation of wildlife is explicit, and Core Policies A and C of the Local Development Plan. Furthermore, the failure to demonstrate that protected species would not be harmed runs contrary to national policy contained in the online National Planning Guidance and Chapter 11 of the NPPF which state that conservation of wildlife is important and that it is essential for the presence or otherwise of protected species, and the extent that they may be affected by a proposed development to be established before planning permission is granted.

3.8 The Article 4 Direction was confirmed on 21st September 2017 and will come into force on 14th April 2018.

4.0 Planning Policy Background

4.1 This section covers both the Development Plan and the general implications of the location in a National Park.

4.2 **Location in the National Park** - The two purposes of the National Parks in England and Wales were originally stated in the 1949 National Parks and Access to the Countryside Act and were revised in the 1995 Environment Act and stated in the English National Parks and the Broads UK Government Vision and Circular 2010. They are:

- “to conserve and enhance the natural beauty, wildlife and cultural heritage of the National Parks” and
- “to promote opportunities for the understanding and enjoyment of the special qualities of the Parks by the public”.

When these purposes are in conflict the 'Sandford principle' confirms that greater weight should be given to the conservation of the landscape (English National Parks and the Broads Circular 2010), 'Environment Act 1995, part III: *National Parks*' DoE, 11 September 1996.

- 4.3 Section 62(2) of the Environment Act places a requirement for all 'relevant authorities, statutory undertakers and other public bodies' to have regard to the purposes of National Parks in exercising or performing any functions in relation to or so as to affect land in a National Park. The importance of National Park purposes in decision making is therefore given legal support in addition to government policy in the determination of this appeal.
- 4.4 At the time of the decision, the Development Plan for the area formally consisted of:
- **The North York Moors Local Development Framework Core Strategy and Development Policies.** Adopted by the NPA on 13 November 2008.
 - **Whitby Business Park Area Action Plan** Adopted November 2014.
 - **Helmsley Local Plan Adopted July 2015**
- 4.5 **The National Planning Policy Framework** – Planning law requires that applications for planning permission must be determined in accordance with the development plan unless material considerations indicate otherwise. The NPPF does not change the statutory status of the development plan as the starting point for decision making. Proposed development that accords with an up to date Local Plan should be approved and proposed development that conflicts should be refused unless other material considerations indicate otherwise. The Core Strategy and Development Policies document was adopted on 11th November 2008 under the provisions of the 2004 Act and although predating the publication of the NPPF is considered not to conflict with its policies and is therefore up to date and should be the starting point for any decision making in the North York Moors National Park.
- 4.6 The Government's commitment to the protection of National Parks is clearly set out in the NPPF. Paragraph 115 says that great weight should be given to conserving landscape and scenic beauty in National Parks, which have the highest status of protection in relation to landscape and scenic beauty. Furthermore, the NPPF, in Footnote 9, also confirms that the Framework specifically indicates that development, including the "presumption in favour of sustainable development" should be restricted within a National Park. It is clear that the NPPF expects a different approach to be taken in National Parks to both plan making and decision taking compared with other areas outside of designated National Parks.

4.7 The National Planning Policy Framework sets out that economic growth should be supported in rural areas to promote a strong rural economy, rural tourism and leisure developments that benefit businesses in rural areas, communities and visitors and which respect the character of the countryside. This however needs to be balanced against the specific policy protection afforded to National Parks in paragraph 115 and footnote 9 as set out in paragraph 4.6 above. The support for economic development in National Parks must therefore be delivered within the concept of sustainable development as set out in the English National Parks and Broads Circular 2010 which at paragraph 29 states:

“ Within the Parks, conserving and enhancing the landscape biodiversity, cultural heritage, dark skies and natural resources, and promoting public understanding and enjoyment of these should lie at the very heart of developing a strong economy and sustaining thriving local communities.”.

4.8 **National Planning Guidance** (Chapter 11 of the NPPF) advises that “The planning system should contribute to and enhance the natural and local environment by:

- minimising impacts on biodiversity and providing net gains in biodiversity where possible, contributing to the Government’s commitment to halt the overall decline in biodiversity, including by establishing coherent ecological networks that are more resilient to current and future pressures

4.9 It also sets out that “Great weight should be given to conserving landscape and scenic beauty in National Parks, the Broads and Areas of Outstanding Natural Beauty, which have the highest status of protection in relation to landscape and scenic beauty. The conservation of wildlife and cultural heritage are important considerations in all these areas, and should be given great weight in National Parks and the Broads

4.10 Circular 06/2005 sets out that it is essential that the presence or otherwise of protected species, and the extent that they may be affected by the proposed development, is established before the planning permission is granted. It also states that all species of wild birds are protected within Great Britain under the provisions of the Wildlife and Countryside Act 1981 and that the breach of protected species legislation can give rise to a criminal offence.

4.11 It is considered that whilst the proposal might be of financial benefit to the applicant and provide a facility for private pilots across the country, there is no pressing public need for the facility other than personal desire and this is insufficient justification to set aside the objectives of National Park Policy. It is not considered that this proposed development would benefit the wider rural economy or the local community.

4.12 The English National Parks and Broads Circular 2010 is clear (page five) that Government expects all relevant bodies with an influence on the management of National Parks to work towards the achievement of the vision set out in that document, which includes the vision for conserving and enhancing the natural beauty, wildlife and cultural heritage of the Parks. We would therefore contend that allowing this development would not conserve or enhance the natural environment of this part of the National Park and thus conflicts with the vision set out in this circular and the National Planning Policy Framework.

4.13 **8-Point Plan for England's National Parks, Department for Environment, Food & Rural Affairs, March 2016**

This document has recently been published by Defra and sets out the Government's ambition to put National Parks at the heart of the way in which it thinks about the environment and how it is to be managed for future generations. Its ambitions are to be delivered by the Government working closely with all ten National Park Authorities and National Parks England as part of its wider 25 year plan for the Environment. Point 2 of this 8 point plan seeks to "Create *thriving* natural environments". It acknowledges that National Parks are amazing natural assets which are havens for native plants and animals and that conserving and enhancing these precious areas, for the benefit of current and future generations, is a vital role of the National Park Authorities.

4.14 **Local Development Framework:** The relevant policies are:

- Core Policy A "Delivering National Park Purposes and Sustainable Development"
- Core Policy C "Natural Environment, Biodiversity and Geodiversity"

Core Policy A of the NYM Local Development Framework seeks to ensure that new development conserves and enhances the Park's special qualities; with priority being given to ensuring development does not detract from the quality of life of local residents and supports the character of a settlement.

Core Policy C of the Local Development Plan seeks to ensure that the quality and diversity of the natural environment is conserved and enhanced, and to maintain, and where appropriate enhance conditions for priority habitats and species identified in the North York Moors Local Biodiversity Action Plan.

These LDF Policies and supporting text have been supplied for the Inspector with the questionnaire.

5.0 Local Planning Authority's Case Biodiversity

5.1 There are two main issues under consideration (1) potential impacts of the proposed airfield on the North York Moors Special Protection Area (SPA) to the north, and (2) potential impacts on the protected bird populations of Dalby Forest. All the species potentially affected share specific protection from harm under the Wildlife and Countryside Act 1981 (as amended), whilst individual species also benefit from enhanced protection under a range of other domestic and European legislation and policy.

5.2 In determining the previous (third) appeal in relation to this proposal, the Planning Inspector considered the effect of the proposal on Wildlife as follows:

- *The North York Moors Special Protection Area (SPA) lies around 6km to the north-west of the site. The Troutsdale and Rosekirk Dale Fens Site of Special Scientific interest (SSSI) lies around 2.5km to the south and the Bride Stones SSSI is a similar distance to the west. Advice from the Royal Society for the Protection of Birds (RSPB) indicates that the site also lies close to areas of forest identified as a breeding site for Nightjar and Goshawk, the latter of which is a species protected under Schedule 1 of the Wildlife and Countryside Act. Natural England have advised that if representations are received during the planning process which indicate that protected or priority species may be present on the site, further survey work should be carried out to determine their presence prior to determination.*
- *At the hearing I was provided with evidence from a Mr Gary Marchant, a consultant ecologist and local ornithologist who stated that a number of species were present in the area around the site, including Goshawks, a species which I was advised are very sensitive to noise. Although I was provided with no firm evidence that these species nest close to the appeal site, I take into account that as a protected species Goshawk breeding sites are kept confidential. I also take into account that he has extensive professional experience which includes work in and around Dalby Forest. This evidence, along with the written comments of the National Park Ecologist leads me to the view that there is a reasonable prospect of both species being present.*
- *Based on the information before me I am nonetheless conscious that there is a reasonable prospect of protected species being present and that the development proposed has the potential to adversely affect them. However, in the absence of any detailed habitat survey for the presence and likely effect on protected species in and around the site, I cannot be sure of the extent of likely harm, if any. Circular 06/05 advises in paragraph 99 that it is essential that the presence or otherwise of protected species, and the extent that they may be affected by the proposed development, is established before the planning permission is granted. The need to ensure ecological surveys are carried out should therefore only be left to coverage under planning conditions in exceptional circumstances.*

- *I also take into account that the conservation of wildlife is explicit in the statutory purposes of the National Park, and is reflected in Core Policy C of the Core Strategy. Accordingly I must conclude that the failure to demonstrate that protected species would not be harmed runs contrary to local and national policy and must be given significant weight.*

The Inspector concluded that based on the information before her, she could not determine whether or not the proposal would harm protected bird species. She took into account that conservation of wildlife is explicit in the statutory purposes of the National Park, and that having regard to the Sandford Principle, this harm must carry greater weight than the stated benefits. Therefore the appeal was dismissed.

- 5.3 During consideration of the Appeal proposal, the National Park's Ecologist was consulted, and advised that the main ecological concerns related to the impact of the development on various bird species, including the following:
- 5.4 **Nearby internationally and nationally protected sites** - The North York Moors SPA is classified for the breeding populations of Merlin and Golden Plover.
- 5.5 The suite of breeding birds which supported the designation of the North York Moors Site of Special Scientific Interest (SSSI, same boundary as SPA) are Merlin, Peregrine, Hen Harrier, Golden Plover, Short-eared Owl, Red Grouse, Curlew, Redshank, Snipe, Whinchat, Wheatear, Ring Ouzel and Lapwing.
- 5.6 The Bird Assessment submitted with the planning application briefly mentioned the SPA and SSSIs, but did not assess any impact of the proposals on them. In the Planning Statement, it was stated that "there is unlikely to be any significant increase in disturbance to birds as a result of the proposed development." However, nothing was said regarding flying over the SPA (unlike over houses, for example, which are to be avoided) and this risk was not assessed any further.
- 5.7 The SPA/SSSI is 6km from the application site, which is only a short distance for an aircraft. No information was presented to say where aircraft will fly once they have taken off, at what minimum height, or how the breeding bird species listed above might react to additional aircraft in the vicinity. **It was therefore judged to not be possible to assess the impact of the application on the birds using this protected site and it was not possible to complete the required Habitats Regulations Assessment in relation to the SPA.**
- 5.8 **Protected species in Dalby Forest** - Two protected and vulnerable species, goshawk and nightjar are important components of the forest avifauna. There are records of both in the vicinity of the airfield, although those describing the former are confidential. All wild birds are afforded protection under Section 1 of the Wildlife and Countryside Act (as amended) which makes it an offence to intentionally kill, injure or take any wild bird, or take, damage or destroy the nest (whilst being built or in use) or its eggs.

- 5.9 **Goshawk** is also afforded special protection under Schedule 1 of the same Act to reduce to reduce the risk of illegal persecution and other activities. It is an offence to intentionally or recklessly disturb this species while building a nest or in, on or near a nest containing eggs or young; or to disturb dependent young of this species. The local forests support an established, stable breeding population. The national population is estimated to be around 400 pairs.
- 5.10 **Nightjar** is also listed in Annex 1 of the EU Birds Directive. This requires member states to designate (or classify) SPAs for those rare or vulnerable species listed in the Annex. Whilst Dalby Forest is not classified as a SPA, the range and extent of the UK SPA network is currently undergoing review by the Joint Nature Conservation Committee (JNCC).
- 5.11 It is also listed on Section 41 of The Natural Environment and Rural Communities (NERC) Act 2006 as a Species of Principal Importance for the conservation of biodiversity in England. Inclusion within s41 means that bodies such as the LPA are encouraged to take '*reasonably practical*' steps '*to further the conservation of the*' particular species or habitat.
- 5.12 Significant numbers breed in clear-fell sites and young plantations across Dalby Forest and nightjars have been heard this year within the vicinity of the proposed airfield. A national survey in 2004² found that together, the forests of the North York Moors supported over 200 'churring' males (the equivalent of up to 5% of the GB population) making the area one of the top five sites in the country and of clear national importance. The North Yorkshire Moors (including adjacent forests) has been identified as Important Bird Area (IBA)³ by RSPB.
- 5.13 It is considered that both goshawk and nightjar could be vulnerable to disturbance and harm caused by operation of the airfield and the use of aircraft within or in close proximity to territories and nests.
- 5.14 **No other species** were evaluated in the applicant's Bird Assessment. This was despite the opinion of the previous Inspector who, in paragraph 27 reminded us that '*Circular 06/05 advises us in paragraph 99 that it is essential that the presence or otherwise of protected species, and the extent that they may be affected by the proposed development is established before the planning permission is granted.*' Both Honey Buzzard, which is also specially protected under Schedule 1 of the Wildlife & Countryside Act, and Turtle Doves (listed under s41 of the NERC Act 2006 as a species of principal importance) are both known to breed in the area.

² Conway, G, Wooton, I, Langston, R, Drewitt, A & Currie, F. (2007). Status and distribution of European nightjars *Caprimulgus europaeus* in the UK in 2004. *Bird Study* (2007) 54, 98-111

³ IBAs represent one of the cornerstones of bird conservation world-wide with over 11,000 in 200 countries. A rigorous site selection process ensures they are supported by robust data and, within the EU, it is the intention that these will be promoted as SPAs.

- 5.15 Despite omitting to address other protected species, the Bird Assessment Report submitted with the appeal application considered potential disturbance to nightjar and goshawk although it failed to make firm or clear conclusions. For instance, in terms of nightjar, it stated that *'its nocturnal behaviour and its use of crypsis to avoid detection, suggests that this species may be relatively tolerant of daytime flights of light aircraft'* (emphasis added). For goshawk, it simply provided no conclusion at all. Despite this uncertainty, suggesting that harm could not be ruled out, the report made only vague suggestions for mitigation as follows:

For nightjar: '...it may be appropriate to avoid flight activity during the periods 30 minutes after dawn and 30 minutes before sunrise during the main nightjar breeding period of May to August inclusive. Additionally, flight activity in the vicinity of suitable breeding habitat (clear-fell) should be limited to direct 'in-and-out' flights rather than circling and/or erratic flight activity at low altitude.'

And for goshawk: 'As a best practice measure in order to minimise the potential for disturbance of goshawk, the runway operator should liaise with local Forestry Commission ornithologists on a regular basis so that pilots can aim to avoid flying close to any known goshawk nest sites ...'

- 5.16 The LPA concluded that the report failed to meet accepted standards and that it failed to present convincing evidence that disturbance of the protected species could be avoided. Indeed, it was considered that reference to both the Scottish Natural Heritage⁴ and English Nature⁵ reports presented convincing evidence of the opposite.
- 5.17 As was shown in the report, the movement and noise associated with light aircraft can disturb and displace birds. Given the absence of compelling reasons to dismiss these concerns, this was considered to be contrary to the statutory purpose of the National Park, and the Sandford Principle.
- 5.18 It was considered that if this proposal was allowed, local populations of threatened and vulnerable species which are protected in policy and law could decline, adversely affecting their wider conservation status.
- 5.19 In order to properly consider the appeal proposal at application stage, the National Park Authority employed the services of a consultant Ornithologist and Ecologist (Garry Marchant) to assess the Bird Assessment Report that was submitted. This summary of this assessment is set out below (a full copy was sent with the Appeal Questionnaire):

⁴ Scottish Natural Heritage. (2015). Guidance. The use of helicopters and aircraft in relation to disturbance risks to Schedule 1 & 1A raptors and wider Schedule 1 species.

⁵ Drewitt, A. (1999) Disturbance effects of aircraft on birds. English Nature Birds Network Information Note.

5.20 Assessment of Bird Report -

The consultant gave a critical review of the bird report submitted in relation to the proposal and concluded the following:-

- The field survey and desk top research failed to show neither presence nor absence of the nightjar or goshawk within the survey area. In addition, no scientific research was found to show the birds were not affected by aircraft.
- The literature review from the bird assessment report showed that birds can be disturbed and disrupted severely by the presence of aircraft activity not only during breeding but in their everyday lives as well. The assessment failed to show that the protected bird species would not be affected not only in the immediate area around the proposed development but also in the adjacent and surrounding areas.
- It is quite possible that both species of bird will be present in the area surveyed and this report has shown there are other important bird species that may also be present. There is no evidence to suggest that they will not be disturbed, however this review has shown there is a good chance they will be disturbed.
- To mitigate in an attempt to show that birds would not be disturbed when there is no supporting evidence is supposition. If there is any doubt as to whether the proposed development would disturb wildlife in general or protected species of birds, then the doubt should go in favour of the wildlife as according to the Sandford Principle National Parks Authority (2016).

It was concluded that the evidence submitted failed to demonstrate that protected bird species would not be affected by the proposed development.

6.0 Assessment of Bird Report submitted with current appeal

6.1 **Background to the Report** – In response to the refusal of the application, the appellants and Quants Environmental submitted an updated bird report (May 2017).

Unlike the initial report, this version was able to draw on a survey of goshawk behaviour during the spring of 2017. In addition to confirming the presence of abundant suitable breeding and foraging habitat for both goshawk and nightjar in the vicinity of the airstrip (as first identified in the previous report), it was able to confirm the presence of adult goshawks as well, going so far as to identify two potential territories whilst acknowledging that up to four territories might be present in the vicinity of the airfield.

Otherwise, little else had changed. Importantly, there was no survey of nightjar numbers, distribution or behaviour, no consideration of impacts on the North York Moors SPA and no evaluation of any other protected species.

Key issues

- 6.2 The two main issues remain the same: (1) the potential impact of the proposed airfield on the North York Moors SPA to the north, and (2) the potential impact on the protected bird populations of Dalby Forest.
- 6.3 Taking these in turn, the refusal notice identified concern regarding the potential impact of light aircraft on the SPA which have already been explained above in section 5. The first report failed to address this matter and so has the second. Therefore, the LPA's opinion that insufficient evidence was provided to allow the completion of the HRA still stands; the Regulation 61(2) makes clear 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*⁶. It is considered that this alone represents a reason for refusal alone.
- 6.4 In terms of the second issue, the updated report applies solely to matters in the vicinity of the proposed airfield. Its aim is stated as '*... to determine the potential for nightjar *Caprimulgus europaeus* and goshawk *Accipiter gentilis* to be affected by the proposed development*⁷.
- 6.5 This description is important as the report is taken by the Authority to represent a formal Ecological Impact Assessment (EclA). The purpose of EclA and both the information and standards they are meant to deliver is fully described in the Guidelines for Ecological Impact Assessment by the Chartered Institute of Ecology and Environmental Management (CIEEM)⁷ of which the report author is a member.
- 6.6 It describes EclA as 'a process of identifying, quantifying and evaluating potential effects of development-related or other proposed actions on habitats, species and ecosystems'. Further elaboration is provided by the British Standard on Biodiversity – Code of practice for planning and development: BS 42020⁸.

The CIEEM Guidelines are designed, *inter alia*, to:

- Promote good practice;
- Promote a scientifically rigorous and transparent approach to Ecological Impact Assessment (EclA); and
- Provide decision-makers with relevant information about the likely ecological effects of a project.

⁶ The Conservation of Habitats and Species Regulations 2010 SI No 490 (as amended)

⁷ CIEEM (2016) Guidelines for Ecological Impact Assessment in the UK and Ireland: Terrestrial, Freshwater and Coastal, 2nd Edition. Chartered Institute of Ecology and Environmental Management, Winchester

⁸ BS 42020:2013. Biodiversity – Code of practice for planning and development.

- 6.7 The Guidelines have been endorsed by a range of statutory nature conservation bodies, NGOs and professional institutes. Indeed, the British Standard Code identifies the Guidelines as the acknowledged reference on ecological impact assessment before going on to provide recommendations regarding the adequacy of ecological information and its role in effective decision-making. Elements of chapters 3, 4, 5 and 6 of the former are all relevant as are sections 5.2, 6.2 and 6.6 of the latter.
- 6.8 Themes expressed in the Code and Guidelines, such as the need for accurate data can be found in paragraph 99 of Circular 06/05, which predated both, and, for example, the use of the mitigation hierarchy, in the more recent National Planning and Policy Framework.
- 6.9 Together, these provide consistent and complementary advice and set the standards for best practice in ecological impact assessment. Unless compelling reasons apply, there is no reason why any report should not adopt these standards. Therefore, it is the LPAs opinion that the report should, as a minimum, accurately describe and evaluate features of biodiversity interest and, by use of the mitigation hierarchy, avoid, mitigate or compensate any adverse effects, to ensure no net loss of biodiversity. Where possible, measures should be adopted that provide biodiversity gain. The conclusions should be presented with as much certainty as possible. The highlighted terms are explored below.

Description

- 6.10 The updated report includes the habitat survey from the original edition. Whilst not proving presence or absence of any protected species, it does confirm the presence and extent of habitat suitable for breeding and foraging goshawk and nightjar. It therefore represents valuable evidence in support of the Inspector's opinion at the previous hearing that there is '*a reasonable prospect of protected species being present*' in proximity to the proposed development site. As such it adds weight to the comprehensive evidence provide by Garry Marchant at the previous hearing, and that provided by the Forestry Commission and RSPB during consultation.
- 6.11 The report also provides the outcomes of a bespoke survey of goshawk behaviour in the vicinity of the airfield. This confirmed the presence of '*two likely goshawk breeding areas*' and acknowledged the possibility that there may be four territories overall. This again provides valuable evidence in particular confirming the presence of this vulnerable species in the vicinity of the airfield.
- 6.12 In contrast, the report made no attempt to estimate the numbers of nightjar in the area or the distribution of individuals. Whilst of some use, the habitat survey carried out can only suggest the suitability of a location to host a particular species; it cannot confirm its presence or absence. This omission is unfortunate given the importance and vulnerability of nightjar in this location; the National Park Forests, including the land in the vicinity of the airstrip, are considered to be of national significance for nightjar, supporting up to 5% of the Great Britain population in one of its most northerly locations in the UK as described in section 5.

- 6.13 Nightjar is listed on Annex I of the EC Birds Directive and member states are required to identify suitable sites for designation (or classification) as Special Protection Areas (SPAs). SPAs are heavily protected sites that are designated (or classified) under the Birds Directive⁹ for rare and vulnerable birds (as listed on Annex I), and for regularly occurring migratory species. Along with Special Areas of Conservation, they form an EU-wide network of protected areas that form the cornerstone of EU biodiversity policy.
- 6.14 JNCC is currently undertaking a review of the SPA series in the UK. Whilst the review is not yet complete, and no recommendations made, it has identified that the existing suite of SPAs is '*Insufficient, especially in the northern parts of the range*' for nightjar¹⁰. In a separate review in 2010¹¹, RSPB recommended that the 209 territories recorded in the forests of the North York Moors in the 2004/05 national survey met the criteria for SPA status.
- 6.15 This is relevant as it not only highlights the importance of this large, northern population but also because a similar situation has arisen previously elsewhere. In 2011, the Secretary of State¹² refused planning permission for an Energy Recovery Facility on land at the former Rufford Colliery site near Sherwood Forest. The likely effect on the breeding populations of nightjar (and woodlark, a similarly protected species) in the forest nearby was a key factor in this decision even though it wasn't classified as an SPA and, indeed, like the appeal site here, it did not benefit from any nature conservation designation at all.
- 6.16 To take account of this uncertainty, Natural England subsequently recommended the adoption of a risk-based approach to future development in proximity to Sherwood Forest suggesting that new proposals are accompanied by a '*robust assessment of the likely impacts arising from the proposals on breeding nightjar ...*'¹³ – an approach that is similar to that adopted here by the LPA. None of the application documents make reference to this case.
- 6.17 The report also fails to describe the populations of other protected species. Honey buzzard nest locations are kept confidential to protect birds, eggs and nests but they have been regularly observed at the nearby 'Raptor Viewpoint' this year, as in many previous years. However, whilst we are not aware that the local honey buzzard population has nested particularly close to South Moor Farm, new evidence, which has admittedly emerged since the production of the second report suggests that the population of turtle doves is of greater significance than first thought.

⁹ Council Directive 2009/147/EC on the conservation of wild birds (30 November 2009)

¹⁰ JNCC. The status of YK SPAs in the 2000s: the Third Network Review:

http://jncc.defra.gov.uk/pdf/UKSPA3_Nightjar%20Caprimulgus%20europaeus.pdf (accessed 22 Sept 2017)

¹¹ Bright, J. A, Dodd, A, Jennings, K and Langston, R. H. W. (2010). Review of the nightjar SPA network based on the 2004/05 national survey

¹² Secretary of State (DCLG) Decision letter dated 26 May 2011 (APP/L3055/V/09/2102006)

¹³ Advice Note to Local Planning Authorities regarding the consideration of likely effects on the breeding population of nightjar and woodlark in the Sherwood Forest region. Natural England. March 2014

- 6.18 Turtle doves are considered vulnerable to global extinction (IUCN Red List of Endangered Species) and European populations have been in decline since the 1970s. In the UK, where the population has fallen by 91% since 1995 and suffered a 51% contraction of range since 1970, it is included on the Red List (high conservation concern) in The Population Status of Birds. At this current rate of change, scientists calculate that complete UK extinction as a breeding species is a real possibility (RSPB).
- 6.19 The potential significance of Dalby Forest was first highlighted in the annual reports of the North Yorkshire Forest Bird Study Group. The 2016 report showed a clear upward trend in turtle dove numbers since these surveys began in 1997. In 2017, the new, Heritage Lottery Funded North Yorkshire Turtle Dove Project has recorded all the sightings of Turtle Doves within the defined project area which includes Dalby Forest.
- 6.20 This supplemented records provided by the Group and other records with a formal survey, employing a selective, random sampling technique, of 30 one-kilometre squares across the forest. This (still unpublished) work recorded a number of active territories in five of the eight surveyed squares within approximately 2km of South Moor Farm.
- 6.21 This is perhaps not surprising. Turtle doves require dense scrub or young conifers for nesting and access nearby to suitable foraging areas – forest rides and edges where they can search for their preferred food source, eg the seeds of climbing corydalis or chickweed, both frequent components of the forest floor flora post-felling. Both habitats are found in proximity to the airfield and resemble that used by nightjars.
- 6.22 A total of 156 individuals (including juveniles) have been recorded. A group of 13 birds on 25 July 2017 on the southern edge of Dalby Forest is considered to be the largest flock recorded in the North of England in 2017; only 50 years ago it was regarded as fairly common in Yorkshire. North Yorkshire is now recognised as the last stronghold for this species north of the Humber.
- 6.23 Overall, the failure to evaluate the size or significance of the nightjar population, allied to the lack of consideration of turtle doves ensures that the report fails to provide the baseline evidence sought by the Inspector, and demanded by both policy and best practice. This weakness of the baseline information obviously compromises any positive conclusions especially in the context of paragraph 99 of Circular 06/05¹⁴.

¹⁴ Circular 06/05: Biodiversity and Geological Conservation – Statutory Obligations and Their Impact Within the Planning System.

Evaluation

- 6.24 The previous Inspector stated that *'the development proposed has the potential to adversely affect'* goshawk and nightjar. Whilst the second report devotes considerable space to a general review of bird disturbance by aircraft, little can be directly applied to these two species (or turtle doves). For such a specific topic, the lack of clear, applied evidence is understood. However, the positive conclusions drawn, relying in some cases on research on geese and wading birds (which display very different behaviours and occupy very different habitats) and, in some cases speculation (eg the opening sentence and the entire third paragraph) must be treated with caution.
- 6.25 Perhaps this is recognised by the author as there is regular use of cautious language and qualifying terms which suggest a lack of confidence in the outcomes as shown below (with emphasis added):
- *It is likely that nightjars will tend to be largely tolerant of potential sources of disturbance* (p15);
 - *Nightjar may be relatively tolerant of daytime flights of light aircraft'* (p23);
 - *Birds appear to become better habituated to aircraft* (p23)
- 6.26 Furthermore, the reliance on crypsis¹⁵ behaviour by nightjar to suggest tolerance to disturbance is flawed. A lack of a visible response in nightjar does not mean a lack of disturbance, and there is abundant evidence of reduced breeding performance by nightjars from human disturbance (albeit not from planes). Crypsis can be considered as a response to disturbance. The same cautionary language is evident in the discussion on goshawk:
- *This suggests there that there is no known goshawk nest in the immediate area* (p23);
- 6.27 The report also claims that there is *'Clear evidence from webcam-monitored goshawk nests that goshawks exhibit tolerance of aircraft'* yet no context is provided for the webcam footage leaving questions surrounding the altitude of the plane, the frequency of flights, whether landing or taking off amongst others, unanswered. This and the other examples therefore carry little weight.
- 6.28 There is no evaluation of the impact of aircraft on turtle doves that utilise land in the vicinity of the airfield. They form part of a small population at the edge of its range which has suffered and continues to suffer alarming declines nationally and regionally and a precautionary approach would suggest that an increased number of flights could reduce the viability of the local population.

¹ <http://www.operationturtledove.org/> Operation Turtle Dove home page, RSPB

¹⁵ The ability of an animal to avoid detection by camouflage or behaviour amongst other strategies

6.29 At best, the impact assessment provided in the second report simply confirms that birds exhibit a wide range of responses to aerial disturbance and that this can vary between seasons, circumstances, habitats, species and even individuals. It does not show that one species or individual will or will not be disturbed or displaced by aircraft, but it does show that it is difficult to predict and especially difficult to rule out. As such it fails to bring the certainty expected by best practice and policy.

Consequently, in these circumstances, positive outcomes drawn from such evidence must be treated with caution.

Mitigation

6.30 The same caution prevails in the suggested mitigation measures. However, this uncertainty does not appear to drive the development of strong, practical mitigation measures as might be expected. Instead, only brief and vague suggestions are made with no indication of appropriateness or effectiveness including, for instance (with emphasis added):

- *As mitigation for nightjar, it may be appropriate to avoid flight activity from 30 minutes before sunset until 30 minutes after sunrise ...' and*
- *The runway operator should liaise with the Forestry commission ... so that pilots can aim to avoid flying close to any known goshawk nests*

6.31 The location of goshawk nests is kept confidential to protect the birds and their eggs from persecution, so explaining the FC's refusal to reveal recent known locations. Although they often do use the same nests from year to year, this is not a certainty and nest sites will inevitably change as trees are felled (in accordance with agreed measures in the FC Research Information Note 267¹⁶) and habitats exhibit natural change.

6.32 If nest locations are shared with airfield operators and avoidance measures taken, that would effectively show potential criminals where the birds are nesting that year. Experience shows this is not a contrived concern. Egg collection and other persecution represents a serious threat to the success of this population or otherwise.

6.33 This therefore compromises the effectiveness of this proposed measure and so rules it out as a potential condition or restriction.

6.34 Overall, the proposed mitigation measures suggested are vague and fail to meet the standards required. Fundamentally, the sharing of goshawk nest locations is unacceptable.

¹⁶ Petty, SJ (1996) 'Reducing disturbance to goshawks during the breeding season' Forestry Commission Research Information Note 267

Summary

- 6.35 Two main issues determined the Planning Authority's refusal of this case (1) potential impacts of the proposed airfield on the North York Moors SPA to the north, and (2) potential impacts on the protected bird populations of Dalby Forest.
- 6.36 In terms of the potential impact on the North York Moors SPA, no further information has been submitted and so the LPAs opinion remains unchanged that insufficient evidence has been provided by the appellant to enable the LPA to carry out the necessary Habitats Regulations Assessment. This represents reason to dismiss the appeal alone.
- 6.37 In terms of the impact on protected bird populations in Dalby Forest, the updated survey brings new, direct observations of goshawk which confirms its presence in close proximity to the airfield.
- 6.38 However, no attempt has been made to confirm the presence of nightjar by survey or explore its distribution or behaviour. Furthermore, the author has also chosen not to explore impacts on any other protected species, notably turtle doves, despite specific reference in the committee report and the advice of the previous Inspector when quoting Circular 06/05.
- 6.39 This failure to adequately describe or confirm the presence of such key, vulnerable and protected components of the forest fails to meet the expectations laid down in policy and ecological best practice; habitat surveys are not an adequate substitute and do not provide definitive evidence of presence or absence. This fails to satisfy the test in Circular 06/05.
- 6.40 Not only does this alone provide adequate reasons to dismiss the appeal but the lack of evidence then compromises all subsequent stages of the report. In particular, it further compromises the evaluation of the potential impacts which already relied too heavily on generic information and some speculation.
- 6.41 Whilst the flawed evaluation hindered a full and proper evaluation of the impact on goshawks, which at least did benefit from a bespoke survey, the lack of evidence regarding the numbers and distribution of nightjar and turtle doves ensured that any positive outcomes should be treated with great caution. The report therefore fails to provide compelling evidence to rule out adverse effects on any of the protected species concerned. Importantly, it failed to take account of the Sherwood Forest case where similar issues were raised.
- 6.42 In turn, this lack of certainty only generated vague mitigation measures with no indication of effectiveness. Overall, this part of the report failed to describe either '*the extent of likely harm*' sought by the Inspector or the mechanisms by which to avoid it.

The updated report therefore failed to present and scrutinise data in a way that would meet the expectations of ecological best practice laid out in CIEEM documents and BS 42020, and failed to meet the expectations of Circular 06/05.

7.0 Conclusion

7.1 At the previous hearing the Inspector stated:

Based on the information before me I am nonetheless conscious that there is a reasonable prospect of protected species being present and that the development proposed has the potential to adversely affect them. However, in the absence of any detailed habitat survey for the presence and likely effect on protected species in and around the site, I cannot be sure of the extent of likely harm, if any.

The Inspector then added:

Circular 06/05 advises in paragraph 99 that it is essential that the presence or otherwise of protected species, and the extent that they may be affected by the proposed development, is established before the planning permission is granted.

7.2 These comments still apply. The report fails to meet the standards expected, fails to provide compelling evidence that there will be no net loss of biodiversity and so fails to provide the information that could allow permission to be granted.

Consequently, it conflicts with Core Policies A and C of the Local Development Plan and national policy contained in the online National Planning Guidance, Chapter 11 of the NPPF and Circular 05/2006.

7.3 As stated in 4.2 above, policies and decisions that could have an impact upon National Parks have to take the two National Park purposes into consideration. If there is conflict between the two purposes, the first must take precedence. It is considered that, due to the likely adverse impact upon specially protected (i.e. goshawk) and important (nightjar and turtle dove) bird species, the proposal is in conflict with the first statutory National Park purpose which is:-

‘To conserve and enhance the natural beauty, wildlife and cultural heritage of the National Parks’.

7.4 In addition, the LPA has international duties under the Birds Directive to protect wild birds, especially those listed under Annex 1 (i.e. nightjar). The Authority also has domestic responsibilities to safeguard nightjar and turtle dove which are listed under s41 of the NERC Act (2006).

Therefore the LPA respectfully requests that the Inspector dismisses the appeal. However, should the Inspector be mindful to allow the appeal, a list of conditions which the LPA would wish to see imposed are attached at Appendix A.

APPENDIX A

Proposed Conditions:

1. The development hereby permitted shall be begun before the expiration of 3 years from the date of this permission.
2. The development hereby approved shall be only carried out in strict accordance with the detailed specifications and plans comprised in the application hereby approved or in accordance with any minor variation thereof that may be approved by the Local Planning Authority.
3. The site shall only be used for the operation of light private aircraft (under 2,000 kg).
4. No aircraft shall take-off from or land at the site before 08.30 hrs and after 17.00 hrs on any day in any one year without the prior written agreement of the Local Planning Authority.
5. No more than 10 aircraft shall be on the site at any one time without the prior written agreement of the Local Planning Authority with no more than 20 movements per day (where one movement equates to one landing or one take-off).
6. No flying training, parachuting, acrobatics or other flying erratically, or flying below 1000 feet over forestry or within 1km of the SPA moorland in this National Park shall be undertaken by aircraft taking off from or landing on the site and no aircraft shall take off or land from the site other than those being operated solely by fully licensed pilots.
7. Prior to the commencement of any works required to implement the permission hereby granted, a diversion order shall be secured to re-route the public bridleway, public footpath and Highway Ratione Tenurae away from the runways on the site.
8. There shall be no glider towing except following an emergency landing.
9. The operator shall maintain a record of all aircraft movements and, on request, make such records available to the North York Moors Planning Authority.