

Bat Conservation Trust

Supporting legislation

The Planning System



Planning authorities have a statutory duty to have regard to conserving biodiversity (which includes restoration and enhancement of biodiversity) in the exercise of their planning functions; this includes having due regard to and safeguarding bats

In summary, the main criminal offences in England and Wales are to:

Under the Conservation of Habitats and Species Regulations 2010:

- deliberately capture, injure or kill a bat
- deliberately disturb bats including in particular (i) any disturbance which is likely to impair their ability to survive, to breed or reproduce, or to rear or nurture their young; (ii) any disturbance which is likely to impair their ability in the case of hibernating or migratory species, to hibernate or migrate; or (iii) any disturbance which is likely to affect significantly the local distribution or abundance of the species to which they belong
- damage or destroy a breeding site or resting place of a bat.

Under the WCA 1981:

- intentionally or recklessly disturb a roosting or hibernating bat ie disturbing it whilst it is occupying a structure or place used for shelter or protection)
- intentionally or recklessly obstruct access to a roost (ie a structure or place used for shelter or protection).

Some major bat roosts carry statutory protection; in such cases planning authorities will have further obligations under the above statute for any *Sites of Special Scientific Interest* and/or *Special Areas of Conservation* designated for their bat interest.

Statutory obligations to planning authorities

Planning authorities are a *competent authority* under Regulation 7(1) of the Conservation of Habitats and Species Regulations 2010, under which they must have regard to the requirements of the Habitats Directive.

The Directive includes a strict system of protection for certain European Protected Species including bats. These requirements have been implemented by Part 3 of the Habitats Regulations so planning authorities must have regard to the contents of Part 3 prior to granting planning permission where European protected species – such as bats - may be affected.

- In England and Wales this duty falls under Section 40 of the Natural Environment and Rural Communities (NERC) Act 2006
- In Scotland the duty is contained within Part 1 Section 1 of The Nature Conservation (Scotland) Act 2004

It is by referencing the duty placed on Local Planning Authorities that you add weight to your concerns

Other references to the specific planning policy will support your case as will understanding the intricacies of the Habitats Directive and case law.

The following is a summary of planning policy advice that applies to all protected species - see TAN 5 for Wales, Defra ODPM Circular 06/2005 for England and NPPG 14 Natural Heritage for Scotland.

England

- The presence of a protected species is a material consideration, when a planning authority is considering a development proposal that, if carried out, would be likely to result in harm to the species or its habitat (see PPS 9; paragraph 98).
- LPAs should consider attaching planning conditions/entering into planning obligations to enable protection of species. They should also advise developers that they must comply with any statutory species protection issues affecting the site (see PPS 9; paragraph 98).
- The presence and extent to which protected species will be affected must be established before planning permission is granted. If not, a decision will have been made without all the facts (see PPS 9; paragraph 99).
- Any measures necessary to protect the species should be conditioned/planning obligations used, before the permission is granted. Conditions can also be placed on a permission in order to prevent development proceeding without a Habitats Regulations Licence (see PPS 9; paragraph 99).

Wales

- Planning decisions should be based on adequate and up to date information about the potential effects of development on nature conservation (TAN 5; 6.2.4).
- The issues of whether development could give rise to a breach of the Regulations, and whether there may be a potential need for a licence to avoid such a breach, are therefore a material consideration in a relevant planning decision, and where a licence may be needed, the three licensing 'tests' required by the Directive should be considered by the local planning authority (TAN 5; 6.3.6)
- An LPA should consider attaching appropriate planning conditions or entering into planning obligations under which the developer would take steps to secure the long-term protection of the species (TAN 5 6.2.1.)

- The LPA should also advise developers that they must comply with any statutory species' protection provisions affecting the site concerned (TAN 5; 6.2.1)

Scotland

- Planning authorities should seek to prevent further fragmentation or isolation and identify opportunities to restore links which have been broken (paragraph 19, NPPG)
- The presence of a protected species or habitat is a material consideration in the assessment of development proposals. (paragraph 20, NPPG)

Case Law

An important judgment was handed down by His Honour Judge Waksman QC sitting as a judge of the High Court at the start of June 2009 in the case of R (on the application of Simon Woolley) v Cheshire East Borough Council. The judgment clarifies for the first time the legal duty of a Local Planning Authority ("LPA") when determining a planning application for a development which may have an impact on European Protected Species ("EPS"), such as bats, great crested newts, dormice or otters.

The court considered that in granting planning permission the LPA had failed in its duty under Regulation 3(4) of the 1994 Habitats Regulations by failing to give consideration to the three derogation tests contained in the species protection provisions of the Habitats Directive.

Furthermore the Court held that a LPA cannot discharge its duty simply by adding a condition to the grant of planning permission which requires a licence from a statutory nature organisation to be obtained.

Relationship between licensing and planning permission - 'The three tests'

The statutory requirements include a system of strict protection for European protected species, such as bats. A derogation (deviation) from this strict protection - by way of a licence granted to a person under the Regulations - is only allowed in certain limited circumstances and only after three specific tests have been satisfied.

Where bats may be harmed by a development proposal (e.g. such that one or more criminal offences is reasonably likely to be committed), the local planning authority must have regard to the three tests required by the Regulations as well as the licensing authority (due to the duty under Regulation 7(1)).

Consequently, for all planning authorities, the following are important material considerations:

- firstly, **is a criminal offence likely** e.g. is an applicant when implementing the proposed development reasonably likely to commit a criminal offence under the Habitats Regulations – such as causing harm to bats?

and where this is the case

- **can the three tests can be satisfied** e.g. is the eventual grant of a licence likely - so as to permit activities which would otherwise be unlawful?

In other words, the planning authority should not grant consent where they suspect a criminal offence might result and where the three licensing tests are unlikely to be satisfied.

The three tests

A licence cannot be granted until the licensing authority is satisfied that:

- the purpose of the intended action (development) is for preserving public health or public safety or for other imperative reasons of overriding public interest including those of a social or economic nature and beneficial consequences of primary importance for the environment

And as long as:

- there is no satisfactory alternative; and
- the action authorised will not be detrimental to the maintenance of the population of the species concerned at a Favourable Conservation Status in their natural range

The Habitats Directive is transposed into UK legislation through the Habitats Regulations; and licences are issued under:

- Regulation 53 The Conservation (Natural Habitats, &c.) (Amendment) Regulations 2010 – in England and Wales Regulation
- Regulation 44 The Conservation (Natural Habitats, &c.) Amendment (Scotland) Regulations 2007
- Regulation 39 The Conservation (Natural Habitats, &c.) (Amend.) Regulations (Northern Ireland) 2007

This means in proposals where bats may be affected, a planning application must provide sufficient information (in the form of a survey and a report on mitigation measures) for the planning authority to consider it against the three licensing tests.

If there isn't evidence that the LPA has gathered enough information, or the LPA have not referenced that an application has satisfied the three tests then an application can be subject to challenge and you are within your rights to request more information is gathered.

Further information

Association of Local Government Ecologists
www.alge.org.uk for information and advice on planning and biodiversity

Planning Portal

www.planningportal.gov.uk for Area Plans, PPSs, council schedules and complaints information

BCT

www.bats.org.uk/planning for more information on bats and planning

Other relevant BCT leaflets

- The planning system – get your voice heard
- The planning system - submitting a written objection