

SVEA COURT OF APPEAL
[Seal] Land and Environment Court of Appeal
Section 060101

JUDGMENT
9 March 2015
Stockholm

Case nos
P 5593-14
P 5594-14

RULING APPEALED

Land and Environment Court, Nacka District Court, judgment of 15 May 2014 in cases P 635-12 and P 1924-12, see annex

APPELLANT

Diocese of Strängnäs, Prästlönetillgångar, Box 84, SE-645 84 Strängnäs
Representative: Tove Andersson, Member of the Swedish Bar Association, Wistrand Advokatbyrå, Box 11920, SE-404 39 Gothenburg

OPPOSITE PARTIES

1. Johan Andersson, Väla gård, Helgarö, SE-645 92 Strängnäs
Representative: Bernd Stümer, Väla Gård, Helgarö, SE-645 92 Strängnäs
2. Lennart Andersson, c/o Föreningen Landskapsskydd i Strängnäs [*Association for Landscape Protection in Strängnäs*], Rällinge, Stenhammar 2, SE-645 92 Strängnäs
Representative: Gun Lövgren, Rällinge, SE-645 92 Strängnäs
3. Karin Asplund, Knutsberg 6, SE-645 92 Strängnäs
4. Göran Zetterlund, same address as 3
5. Torsten Johansson, Östgötagatan 42 Flat 1001, SE-116 64 Stockholm
6. Birgitta Jönsson, same address as 5
7. Kerstin Karlsson
8. Apinunt Thornefors
Representative of 7 and 8: Wilhelm Thornefors, Member of the Swedish Bar Association, Birger Jarlsgatan 42, SE-114 29 Stockholm
9. Wilhelm Thornefors, c/o Advokatfirman Wilhelm Thornefors, Birger Jarlsgatan 42, SE-114 29 Stockholm
10. Håkan Lindström, Åsbygård, Helgarö, SE-645 92 Strängnäs
Representative of 10: Gun Lövgren, Rällinge, SE-645 92 Strängnäs
11. Planning and Building Committee of the Municipality of Strängnäs, SE-645 80 Strängnäs

MATTER

Building permit under the Planning and Building Act (1987:10) for two wind turbines on the properties Näs 1:4 and Knutsberg 1:2 in the Municipality of Strängnäs

Postal address
Box 2290
SE-103 17 Stockholm
Sweden

Visiting address
Birger Jarls Torg 16

Telephone
+46 8 561 670 00
+46 8 561 675 50
Email: svea.avd6@dom.se
www.svea.se

Fax
+46 8 561 675 59

Office hours
Monday-Friday
09.00-15.00



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THE RULING OF THE LAND AND ENVIRONMENT COURT OF APPEAL

1. The Land and Environment Court of Appeal refuses the claims for a hearing and a viewing of the site and the request to obtain an expert opinion and rejects the oral evidence cited.
 2. The Land and Environment Court of Appeal refuses the appeals.
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CLAIMS IN THE LAND AND ENVIRONMENT COURT OF APPEAL

The Diocese of Strängnäs has presented the claim, in the first place, that the Land and Environment Court of Appeal affirm the decision of the County Administrative Board and the Planning and Building Committee to grant a building permit and the claim, in the alternate, that the Court refer the matter back to the County Administrative Board, or to the Planning and Building Committee, for a new examination with respect to the suitability of the land for windpower in terms of the effect on birds.

Johan Andersson has opposed a variation of the judgment of the Land and Environment Court. He has requested that the Land and Environment Court of Appeal hold a hearing and oral examinations and view the site in the case.

Lennart Andersson and Håkan Lindström have opposed a variation of the judgment of the Land and Environment Court. They have requested that the Land and Environment Court of Appeal hold a hearing in the case.

Torsten Johansson, Birgitta Jönsson, Karin Asplund and Göran Zetterlund have, in the first place, opposed a variation of the judgment of the Land and Environment Court. In the alternate, they have requested that the case be referred back for a new examination. They have requested that the Land and Environment Court of Appeal hold a hearing in the case and have asked to be heard about their observations of white-tailed eagles [Translator's note: also called sea eagles].

Kerstin Karlsson, Apinunt Thornefors and Wilhelm Thornefors have, in the first place, opposed a variation of the judgment of the Land and Environment Court. In the alternate, they have requested that the case be referred back for further examination. They have requested that the Land and Environment Court of Appeal hold a hearing and oral examinations and view the site in the case. They have also requested that the Land and Environment Court of Appeal obtain an expert opinion from an expert on white-tailed eagles.

The Planning and Building Committee of the Municipality of Strängnäs has not submitted an opinion.



PRESENTATION OF ACTIONS IN THE LAND AND ENVIRONMENT COURT OF APPEAL

Diocese of Strängnäs

The case law of the Land and Environment Court of Appeal makes it possible to supplement the supporting investigations for an application for a building permit at a later stage than in the first instance, especially if an authority raises such a question for the first time in a higher instance. The County Administrative Board stated for the first time in its opinion to the Land and Environment Court that the effect on white-tailed eagles and any osprey can only be assessed if flight corridors for a pair of white-tailed eagles are mapped and more knowledge is obtained about osprey in the area affected since there is no investigation of whether osprey nest in the vicinity. When the Diocese was given the opportunity to state an opinion on the information presented by the County Administrative Board to the Land and Environment Court, the Diocese of Strängnäs contacted an ornithological expert. However, the expert opinion of 14 October 2013 states that the assessment made on the basis of foraging sites assessed as suitable in relation to the white-tailed eagle nest and the possible osprey nest, as well as the distance to the white-tailed eagle nest concerned, was that the two wind turbines would probably not constitute an increased collision risk. To confirm this assessment the possibility was raised of carrying out an inventory and studying flight corridors in the coming spring/summer. The Diocese of Strängnäs stated that the Diocese was not opposed to supplementing the supporting information with an investigation of that kind. However, the Diocese was not given the opportunity to do so before the case was decided. The Diocese of Strängnäs has now had a bird inventory conducted to follow up the ornithological assessment made in the Land and Environment Court. The relevant point is the safeguarding distance in the breeding season. For this reason June–July was chosen as the study period. The young are in the nest for about 60 days. The study relates to ten per cent of these breeding days. This follows the established procedure which provides that at least 10 per cent of the subject of the study should be covered in order to provide a good overall assessment. The study verifies the previous assessment of probability. It shows that the white-tailed eagles do not fly in the direction of or over the planned wind turbines. The siting of the wind turbines more than one kilometre away from the white-tailed eagle nest is said to be fully adequate in terms of protection. As regards osprey, the assessment is still that there is no risk of disturbance from the wind turbines. So, the question of the presence of birds is not an impediment to the issuing of a building permit.



Johan Andersson

The Diocese of Strängnäs has been aware since 2008, when the application for a building permit was made, that the public affected has provided the information that white-tailed eagles and other birds were breeding in the vicinity and that the public has requested that an investigation of the flora and fauna in the area must form part of the supporting information for the decision. The County Administrative Board's opinion about white-tailed eagles did not add any new substantive information. The Diocese of Strängnäs has admitted that there is no disputing that eagles are breeding in the area. The information in the Diocese's investigation to the effect that the eagles do not fly in over land is contradicted by the almost daily observations made by Helgö residents of eagles gliding over land, often between Rällinge/Lake Mälaren and Sörfjärden. The Diocese of Strängnäs has not fulfilled its obligation to carry out the investigations that are to form the basis for a building permit before the decision on the building permit.

Lennart Andersson and Håkan Lindström

The Municipality's supplement to its comprehensive plan, Theme Windpower [*Tema Vindkraft*], which was adopted on 22 January 2010, states that when a windpower facility is established the developer is responsible for investigating the existence of important migratory bird flight corridors and important breeding and foraging areas for large birds of prey. In the case of white-tailed eagles a free zone of 3000 metres from their nesting sites to windpower may, for example, be necessary. When it became known that the Diocese of Strängnäs had applied for two wind turbines on Näs and Knutsberg, a working group was set up that provided information in letters to the building committee and the environment committee that there are breeding sites in the area for osprey and white-tailed eagle and other species and that large quantities of geese fly between Sörfjärden and Rällinge Bay [*Rällingeviken*] for night-time stays. Professional fishermen and local residents in the area can attest to the presence of white-tailed eagles. Most observations are made in the winter and spring months. There is active hunting in the vicinity, which means that food in the form of entrails is left behind. This shows that the Diocese of Strängnäs has been aware of the presence of white-tailed eagles and osprey in the area of the planned wind turbines. The Diocese of Strängnäs has not fulfilled the requirement in Chapter 8, Section 20 of the former (1987) Planning and Building Act for a full investigation of the presence of birds of prey and the consequences of construction for these birds. The Diocese's investigation cannot be deemed to meet the survey requirements set out in the Windpower Handbook [*Vindkraftshandboken*]. According to that handbook a survey of the birds in the area affected over at least one yearly cycle is necessary so as to be able to assess the effect.



Torsten Johansson, Birgitta Jönsson, Karin Asplund and Göran Zetterlund

They have made the same reference to the comprehensive plan as Lennart Andersson and Håkan Lindström and also stated that in opinions to the Municipality about the building permit they have pointed out that there are several red-listed birds in the area and that there is no bird inventory. Through their own observations, most recently on 12 occasions in July–September 2014, they have been able to note that white-tailed eagles often fly in over land and are often over the forest areas where it is intended to build the wind turbines.

Kerstin Karlsson, Apinunt Thornefors and Wilhelm Thornefors

The area proposed for development contains very high natural values, especially birds of prey worthy of protection. Species listed in the EU Birds Directive and in the Swedish red list of threatened species breed there every year or regularly. The presence of wintering and breeding white-tailed eagles was well known even before the Diocese submitted its application for a building permit. The sites of certain white-tailed eagle and osprey nets were known to ornithologists. But there has been no inventory of species including white-tailed eagles and osprey in the area affected as a whole. The presence of white-tailed eagles and osprey in the area is shown by the accounts submitted by the appellants to the Land and Environment Court. The investigation cited by the Diocese is not an inventory of the type required. The supplement now made to the investigation consists of limited observations. The eagle's breeding period lasts much longer than the months covered by the report. The breeding eagles stay in the area throughout the year and their flight habits and foraging areas vary in different periods of the year.

The area is a very attractive area for species including osprey and white-tailed eagle since the conditions are very good in terms of closeness to food, suitable nesting sites and the undisturbed character of the area. Through what is known about the presence of osprey and white-tailed eagle in the area it can be concluded that the two proposed wind turbines would have substantial negative impact on these species. The negative impact on white-tailed eagle and osprey would come about by the birds being killed or injured when they try to pass the wind turbines. In that way, the wind turbines will have a negative impact on the population of these birds of prey in Lake Mälaren and also on



the white-tailed eagle population in Finland and the Baltic region since white-tailed eagles breeding in these areas overwinter in the area each year. Nothing at all is known about the impact on bats.

The osprey is a species for which Sweden has an international conservation responsibility since Sweden accounts for a large part of the European population. Lake Mälaren as a whole is one of the most important of reproduction areas in Sweden. In recent years there has been a strong decrease in the number of breeding starts in many parts of the country. In one area studied in the west of Lake Mälaren the decrease has reached 33 per cent according to information on the County Administrative Board's website. There has not been any specific inventory of the area affected, but recurring osprey breeding in the area in nesting sites in the immediate vicinity of the planned wind turbines has been well known to ornithologists, fishermen and residents for many years. The osprey lives on fish and hunts in both Granfjärden and Sörfjärden, flying to these places over land, when it also passes the area intended for the wind turbines. The osprey builds its nest close to the beach, but particularly during mating flight in the spring the birds move not only over water but also a bit from and high above the nest. When the young start to fly, there are excursions around the nest. Osprey nests 350 and 700 metres from the planned wind turbines have been documented since the 1970s. Even if breeding in nests could not be demonstrated with certainty in 2013 and 2014, the existence of the nest shows that the area is attractive to ospreys. If the breeding cannot continue every year, it is often resumed. Recurring breeding in the future can therefore be expected. Buffer distances as short as 350 and 700 m are obviously insufficient. The Swedish Environmental Protection Agency recommends 2–3 km as a buffer distance. Observations made by residents and fishermen in 2014 also suggest another probable osprey nesting site in the vicinity of the planned wind turbines. A large number of observations by residents and people active in the area clearly show that white-tailed eagles often fly over or in the vicinity of the sites of the planned wind turbines. The correctness of these observations is supported by what is known to ornithologists about the presence of white-tailed eagles in the area. The Swedish Environmental Protection Agency recommends a buffer distance of 2–3 km. The white-tailed eagle nest would be situated within this distance of both the planned wind turbines, increasing the risk of a collision. The breeding eagles fly regularly in all directions of flight. The young behave in an unpredictable way when flying during their excursions from the nest. In addition to the risk of collisions for the breeding adult birds, which would result in the young not surviving either, there is a



considerable risk of the young colliding with the wind turbines and being killed or injured. It is also probable that the young will establish themselves in the vicinity. In addition to breeding eagles, there are a large number of other young birds and other overwintering white-tailed eagles in the area. These eagles also often fly over Granfjärden to Sörfjärden and then pass the sites of the planned wind turbines.

The investigation cited by the Diocese makes it clear that the required general buffer distance with a radius of 2–3 km around osprey and white-tailed eagle nests cannot be attained in this case. These grounds alone mean that it is not possible to grant a building permit. The correctness of the conclusions in the investigation is contradicted by statements from professional fishermen, local residents and others in the area who confirm that white-tailed eagles often fly in over land in the immediate vicinity of the sites of the planned wind turbines.

The proposed windpower development is not unsuitable solely on account of its effect on birds of prey and bats. Other large flights of birds, such as heron, crane and various types of geese, pass over the sites of the planned wind turbines before migrating. The location is also unsuitable on account of other reasons previously cited in the case.

THE LAND AND ENVIRONMENT COURT OF APPEAL'S REASONS FOR ITS JUDGMENT

Joint processing

The appeals by the parties concerned of the Committee's decision to grant a building permit have been processed in terms of their substantive legality by the County Administrative Board and the Land and Environment Court in two matters and, as a result, the substantive examination in the Land and Environment Court of Appeal has been split between case numbers P 5593-14 and P 5594-14. However, the Land and Environment Court of Appeal has decided to process the cases jointly in case number P 5593-14.

The question in the case

The question in the case is whether a building permit for the wind turbines at the site applied for can be granted in view of the balance that has to be struck between the interest of using the site for windpower and the public interest of protecting birds, including white-tailed eagle and osprey.



Applicable regulations

The applicable regulations are set out in the decisions of the County Administrative Board.

The assessment of the Land and Environment Court of Appeal

The municipality's comprehensive plan is a document that provides guidance when assessing the suitable use of land and water areas.

The thematic supplement to the comprehensive plan, "Theme windpower", adopted on 22 January 2010, states that the conditions in the area of the windpower establishment for which a permit is being sought are such that the siting of wind turbines there is problematic, partly on account of the rich bird life, and that these conditions require that their location is adapted carefully to the natural values in the area. Subsequently, on 29 September 2014, the Municipality of Strängnäs adopted a new comprehensive plan. According to the County Administrative Board's review statement on the draft plan, the draft is a strategically oriented plan in which the balancing of different interests has largely been moved to the next level of planning or decision-making. The Land and Environment Court of Appeal notes that the presentation of the different interests is more general than in the thematic supplement, but that the plan stresses the importance, in early stages of various projects in which land and water use may be altered, of examining whether great biological diversity and/or threatened species are present and, when this is the case, how they may be affected (p. 94). In the view of the Land and Environment Court of Appeal, the new plan does not provide any reason, in the present case, to set lower requirements than before on the investigation with respect to the public interest of protecting birds, including white-tailed eagle and osprey.

All wild birds are protected under the Species Protection Ordinance and white-tailed eagles and osprey have a conservation status that requires special protection from harm and disturbances (see the Swedish Environmental Protection Agency's report number 5938 from January 2009 *Åtgärdsprogram för havsörn 2009–2013 [White-tailed eagle action plan 2009–2013]*). The protection requirement covers not only the period when there are young in the nest but also the period from establishment in the nest until the young have left it. This period is said to cover February to August for white-tailed eagles and April to August for osprey (see the Swedish Environmental Protection Agency's *Handbok för artskyddsförordningen [Handbook to the Species Protection Ordinance] 2009:2*, annexes 2 and 4).



Vindval's report no 6467 *Vindkraftens effekter på fåglar och fladdermöss [The effects of windpower on birds and bats]* recommends a buffer zone of 2–3 km from nesting sites and concentrations in the case of white-tailed eagles.

The applicant's investigation notes the following. There is a white-tailed eagle nest and the wind turbines are intended to be sited on a site that is within the recommended buffer zone. The flights by white-tailed eagles at the site in question were studied for six days in June–July 2014 from a place 1.5 to 2 km from the nest. Forty flights were documented. One instance of foraging towards land was noted at a distance of more than 1 km from the site of a planned wind turbine, but the others were out over Lake Mälaren. No osprey nest could be observed in the vicinity of the site of planned wind turbines during studies for 34 hours. Seven osprey flights were documented. The report draws the conclusion that the wind turbines will probably not result in any major impact on white-tailed eagles [or in any] increased risk for osprey and that the building permit can be granted.

The report submitted by the company to the Land and Environment Court of Appeal has confirmed that the site where the two wind turbines are intended to be sited is of special importance for white-tailed eagle because of the nest in the buffer zone of the planned wind turbines. The area can also be assumed to be of similar interest to osprey, as is indicated by information about earlier osprey nests close to the site for the location of the wind turbines. During the processing of the matter by the Committee a number of reports were received from both environmental organisations and individuals to the effect that white-tailed eagles and other birds are frequently found at the site. A large number of reports have been received continuously from individuals during the processing of the cases.

The establishment being applied for is in an area that is also said in the new comprehensive plan to have a high natural value in terms of regional and local interest and that is surrounded by areas that are protected in various ways. The Land and Environment Court of Appeal notes that, within a distance of a couple of kilometres of the site where the wind turbines are intended to be sited, Sörfjärden is one site reported as a national interest for nature conservation designated by the County Administrative Board, partly on account of its value for bird life.



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In an overall consideration of what that has emerged in the case, the Land and Environment Court of Appeal makes the assessment that the investigation in the case does not provide sufficient support for the conclusion that the siting of the turbines on the site in question meets the requirements for an adaptation to the natural values in the area. The appeals in the case should therefore be refused. This means that the application for building permission for the proposed siting of the wind turbines is not granted.

The respondents' claims for a hearing and evidence, etc.

Given the assessment made by the Land and Environment Court of Appeal there is no reason to take the oral evidence cited. Nor is there any reason to obtain an expert opinion or hold a hearing to view the site.

The Land and Environment Court of Appeal does not find any reason to examine the other objections made by Kerstin Karlsson, Apinunt Thornefors and Vilhelm Thornefors in the Land and Environment Court of Appeal.

Under Chapter 5, Section 5 of the Land and Environment Courts Act (2010:921) this judgment cannot be appealed.

The following took part in this ruling: Judges of Appeal Lars Borg and Eywor Helmenius, Technical Judges Mikael Schultz and Karina Liljeroos and Associate Judge of Appeal Anita Seveborg, rapporteur.



Translated from Swedish by Ian MacArthur, public translator authorised by the Swedish Legal, Financial and Administrative Services Agency for translation from Swedish to English (Stamp no 393).

Ian MacArthur
Stockholm, 11 June 2015