

## **The Road to a Road**

1 ). The Swedish Road Administration (SRA = Swedish "Vägverket") is the authority assigned the overall sectoral responsibility for the entire road transport system. SRA is also responsible for drawing up and applying road transport regulations. In addition, SRA is also responsible for the planning, construction, operation and maintenance of the state roads.

This sectoral responsibility involves representing the State at a national level in issues relating to the environmental impact of the road transport system, road traffic safety, accessibility, level of service, efficiency and contributions to regional balance, as well as in issues relating to intelligent transport systems, vehicles, public transport, modifications for the disabled, commercial traffic in addition to applied research, development and demonstration activities within the road transport system.

Prior to constructing a new road, it must be planned and designed. Road planning means studying the preconditions for building the road. Road design is the process whereby it is decided in detail what the road would look like.

The legal framework related to building a road is laid down in the Swedish Road Act from 1971 (Väglagen 1971:948). The process that applies to a case concerning building a new motorway starts with a Feasibility Study that will answer the question as to whether a road should be built at all.

When working out Feasibility Study counties, municipalities, the public concerned and associations for the protection of the environment shall be consulted. Then after those consultations, the county where the main part of the road will be built shall decide whether the project may have a vital impact on the environment. The building of a motorway with at least four traffic lanes with a length of more than ten kilometres will however always be considered to have a vital impact on the environment.

After the Feasibility Study is finished, SRA will decide about the continuation of the road project. If the decision is to go on with the project and there is a need to look at alternative road corridors a Preliminary Design Plan is worked out.

The Preliminary Design Plan is based on the Feasibility Study. It is more in-depth and supplementary analysis of the impact on traffic, the environment, safety and accessibility. The preliminary design plan is intended to lead to suggestions on the choice of road corridor. The traffic-engineering standard is also decided in the Preliminary Design Plan, and an analysis is made of the impact on the environment, road safety and accessibility and if the project is considered to have a vital impact on the environment, an environmental impact assessment is carried out. A detailed alignment is however not decided in the Preliminary Design Plan.

During the Preliminary Design Plan, once again the counties, municipalities, the public and organisations concerned are consulted. The counties concerned also have to give its approval of an environmental impact assessment and if the road project concerns a new motorway, the Government has to examine the allowability of the project.

So far the counties', SRA's and the Government's decision during the planning process as a rule cannot be appealed.

After all the preplanning formalities have been carried out, a Final Design Plan is worked out.

A Final Design Plan – answers the question as to how the road will be built. The final design plan is a detailed plan of the road project, showing the alignment in detail and what the road will look like. It includes among others:

- Cost calculations for the capital expenditure,

- Impact assessments on the level of service, road safety, accessibility and the road user experience,
- An environmental impact assessment, approved by the counties concerned, with environmental aspects – related to the chosen road alternative – such as measures to prevent environmental disturbances, places where excess earth materials can be deposited, etc.,
- Complete list of stakeholders and other parties concerned;
- Information on the land need.

It is up to SRA – once again after consultations with all parties concerned – to decide upon the Final Design Plan and its confirmation of the plan can be appealed to the Government. The decision from the Government can then be examined by the Supreme Administrative Court under the Act on Judicial Review of Certain Administrative Decisions (lagen om rättsprövning av vissa förvaltningsbeslut, 1988:205).

The SRA's decision, if not appealed, is to be seen as a legally binding judgement which makes it possible for SRA to take over all land needed for the project while questions of compensation is solved separately, voluntarily or in accordance with rules laid down in the Act of Expropriation

2 ). As mentioned above there is a public involvement in different stages in the planning process before the SRA finally decide upon the Final Design Plan. The consultation with the public is, depending on the circumstances, carried out with announcement or proclamations or by meetings to give information. The affected parties do however do not loose their right to challenge the planning decision before the Supreme Administrative Court if they do not make use of their right to public involvement in the planning

process. However, as a rule they cannot ask for judicial review unless they have been a party to the proceedings before the Government.

### 3 ). Pursuant to article 1 of Act on Judicial Review of Certain

Administrative Decisions a person who has been a party to administrative proceedings before the Government or another public authority may, in the absence of any other remedy, apply to the Supreme Administrative Court, as the first and only judicial instance, for review of any decisions in the case which involve the exercise of public authority vis-à-vis a private individual. The kind of administrative decision covered by the Act is further defined in Chapter 8, sections 2 and 3 of the Instrument of Government, (the foremost fundamental law of the Swedish Constitution), to which article 1 of the 1988 Act refers. The referred sections in the Instrument of Government have in view situations when the parliament's participation is mandatory in instituting new laws; i.e. matters concerning the right to real estates. Article 2 of the 1988 Act specifies several types of decisions, which fall outside its scope, none of which is relevant in the instant case. The 1988 Act has been enacted in order to ensure that Swedish law complies with the standards of Article 6 of the European Convention on Human Rights and the case law from the European Court of Human Rights in Strasbourg. Since there has been some doubts whether or not the relevant sections in the instrument of Government cover the concept of civil right in the Convention there is now a law-proposal to introduce into 1988 Act the wordings of the Convention "civil rights" instead of a reference to certain sections in the Instrument of Government. – Nowadays, after the incorporation of the rules of the Convention of Europe into Swedish law statues, a continuous transfer of competency is also carried out to examine appeals from different types of cases from local and governmental authorities to administrative courts.

The affected parties must apply for Judicial Review within three months after the Government's decision on the case and during the proceedings, it is possible to ask for interlocutory injunctions. The procedure before the Supreme Administrative Court is in principle a written procedure, but the Supreme Administrative Court may decide to hold oral hearing on specific

matters if this is likely to assist in its examination of the case or to expedite the proceedings. Since normally persons civil rights are at stake – e.g. a farmer who will lose parts of his farmlands – there will be an oral hearing if this has been requested by the person seeking Judicial Review and if it is not manifestly unnecessary.

4 ). According to the Swedish Administrative Procedure Act, if otherwise isn't specifically stated, as a general only those who an administrative decision concerning an administrative matter is more or less directly aimed at and concerns the exercise of public power could be seen as parties to a case. That means only a person, legal or natural, who on reasonable grounds could claim infringement on his or hers individual rights, in this case civil rights, could act as a complainant or an applicant. So even if all in the questionnaire listed person have a saying in the planning process it may be only the farmer or the inhabitant of the residential area, if he lives close to the planned motorway, that will be directly influenced by the motorway in a way that they can appeal the SRA's confirmation of the Final Design Plan and then apply for review under the 1988 Act. For the others it depends whether or not they own properties close to the planned road or on other grounds can appeal against the planning decision to the Government.

When it comes to a municipality, it must first be cleared up that according to article 14 of the Road Act a motorway cannot be built through a territory where the municipality has made a project plan for other projects. If that is not the case the municipality which a motorway runs through always have a vital part in the planning of the motorway and in many ways have a word in the process and shall also be informed of SRA's decision to confirm the Finally Design Plan. Due to those facts, the planning of the motorway in this case concerns the municipality in question in such a way that it could appeal the planning decision to the Government.

The Swedish Environmental Protection Agency ( Naturvårdsverket) has, as environmental issues are at stake in this case, accordingly to what is clearly stated in the Road Act a right to appeal SRA's planning decision to the

Government. As a result of the implementation of the Aarhus convention (The UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters; adopted 1998 in the Danish city of Aarhus) that also, from the 1<sup>st</sup> of May 2004, goes for national associations for the protection of the environment if they fulfil certain criteria's – the association must have been in operation in Sweden for at least three year and have no fewer than 2000 members. Those criteria are most likely to exclude association from neighbouring states. On the other hand – due to the implementation of the Esboo-convention (The Convention on Environmental Impact Assessment in a Transboundary Context; adopted in the Finish city of Esboo 1991) – when a project that could have seriously affect on the environment in a neighbouring state the competent authorities in that state should be informed and when an environmental impact assessment is worked out that state and the public concerned have a possibility to participate. In that way, also an association in a neighbouring country may have a word in the decision-making process.

When it comes to the possibility to apply to the Supreme Administrative Court for Judicial Review it could, as mentioned above, only be done in cases, which involve the exercise of a public authority vis-à-vis a private individual. In this case, it consequently excludes municipalities and state agencies and most probably associations for the protection of the environment. According to a newly presented draft law a Swedish association however, as part of implementation of the Aarhus-convention, in a case like this should have a right to apply for Judicial Review under the 1988 Act.

**5 ).** In applying for Judicial Review the applicant has to claim that the contested decision is in conflict with one or more legal rules that may be related to infringements of individual rights such as respect for his property according to the European Convention of Human Rights. If the planning decision concerns him, he may also claim that the decision is in conflict

with legal rules because of infringements of public interests or the unlawfulness of the planning decision in general.

**6** ). In proceedings brought under the 1988 Act, the Supreme Administrative Court examines whether the contested decision “conflicts with any legal rule” (article 1 of the 1988 Act). According to the preparatory work to the Act, as reproduced in Government Bill 1987/88:69 (pp. 23-24), its review of the merits of cases concerns essentially questions of law but may, in so far as relevant for the application of the law, extend also to factual issues; it must also consider whether there are any procedural errors which may have affected the outcome of the case. The judicial review is however restricted to conflicts with legal norms that have been questioned in the application for Judicial Review unless it is evident from the files that the decision conflicts with other legal norms.

**7 a** ). Due to the fact that in a case of building a motorway, as foreseen in this case, an environmental impact assessment as prescribed by Community law is a mandatory requirement in Swedish national law it is not likely that it has not been carried out in the planning process. If that anyhow would be the case and the Government upheld the planning decision the Supreme Administrative Court most certain would quash the Governments decision if there were an application for Judicial Review of the decision of the Government.

**7 b and c** ). The preamble of the Habitats Directive states that, in order to ensure the restoration or maintenance of natural habitats and species of Community interest at a favourable conservation status, it is necessary to designate special areas of conservation in order to create a coherent European ecological network according to a specified timetable.

According to Article 3(1) of the Directive, ‘a coherent European ecological network of special areas of conservation shall be set up under the title Natura 2000.

Article 4 states that on basis of the criteria set out in Annex III (Stage 1) and relevant scientific information, each Member State shall propose a list of sites indicating which natural habitat types in Annex I and which species in Annex II that is native to its

territory the sites host. – The list shall be transmitted to the Commission, within three years of the notification of this Directive, together with information on each site.

The Commission shall establish, in agreement with each Member State, a draft list of sites of Community importance drawn from the Member States' lists identifying those that host one or more priority natural habitat types or priority species.

The list of sites selected as sites of Community importance, identifying those which host one or more priority natural habitat types or priority species, shall according to article 4(5) be adopted by the Commission in accordance with the procedure laid down in Article 21.

Once a site of Community importance has been adopted in accordance with the procedure laid down in paragraph 21, the Member State concerned shall designate that site as a special area of conservation as soon as possible and within six years at most.

As soon as a site is placed on the draft list it shall be subject to Article 6(2), (3) and (4).'

Article 6 of the Directive states that Member States shall take appropriate steps to avoid, in the special areas of conservation, the deterioration of natural habitats and the habitats of species as well as disturbance of the species for which the areas have been designated, in so far as such disturbance could be significant in relation to the objectives of this Directive.

Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. In the light of the conclusions of the assessment of the implications for the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public.

If, in spite of a negative assessment of the implications for the site and in the absence of alternative solutions, a plan or project must nevertheless be carried out for imperative reasons of overriding public interest, including those of a social or economic nature, the Member State shall take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected.

The Directive has been transposed into Swedish law nowadays mainly by the Environment Code from 1998 and amendments to that act and decrees issued in accordance with the act. Because of the various decisions made by the Government between December 1995 and August 2004, Sweden contributes to Natura 2000 with 3,903 proposed Sites of Community Interest (pSCI sites) under the Habitat Directive with a combined area of just over 6,235,623 hectares. All these pSCIs are to be evaluated by the EU.

The Court of Justice has interpreted article 4(5) of the Habitats Directive so that the protective measures prescribed in Article 6 (2),(3) and (4) of the Directive are required only as regards sites which, in accordance with the

third subparagraph of Article 4(2) of the Directive, are on the list of sites selected as sites of Community importance adopted by the Commission in accordance with the procedure laid down in Article 21 of the Directive.

However, the Court has also expressly stated that this does not mean that the Member States are not to protect sites as soon as they are proposed, under Article 4 (1) of the Directive, as sites eligible for identification as sites of Community importance on the national list transmitted to the Commission. (see Case C-117/03, Società Italiana Dragaggi SpA and Others, ECR 2005 Page I-00167, Para 25 and 26)

It explicitly prescribes in the Swedish Road Act that the overall aim when planning a road is to see to that a road can be built with as a little encroachment as possible, without unreasonable costs and with consideration to the landscape, cultural values and material sceneries. To fulfil those aims the planning must comply with the statues implementing the Habitats directive. It follows from the foregoing that if an area has been identified as being eligible for designation as a special area of conservation and a notification of that has been transmitted to the Commission, but not yet placed on the list of the Commission, it should nevertheless been taken into consideration in an environmental impact assessment when working out plans or project. It should therefore also in fact influence the planning decision so that it will not be in conflict with the Directive. If not so – or if the consequences have not been analysed from all aspects and appropriate protective measures are not suggested to ensure that the building of the motorway will not be in conflict with the Habitats Directive's conservation objective of safeguarding the relevant ecological interest of sites eligible for designation as special area of conservation – the planning decision is likely to be quashed.

What has been said above should moreover be valid whether the list has been transmitted to the Commission and to a great extend even if a project is not to affect a special area for conservation but could affect species of Community interest in the sense of the Habitats Directive. That was also the situation in a case before The Swedish Supreme Administrative Court last

winter. The case concerned a project plan for a housing project and in the proceedings before the Supreme Administrative Court the appellant asserted unchallenged that there was a population of the great crested newts (*Triturus cristatus*) to be found in the project area. Even though the Commission had declared that Sweden for that kind of species had proposed a sufficient number of special areas for conservation the Supreme Administrative Court found that the presence of a species that are protected by the Habitat Directive also called for an analyse in the environmental impact assessment of the consequences of the exploitation for that species. Owing to the fact that this had not been done, the Supreme Administrative Court quashed the Government's decision in which the planning decision had been upheld (see the Supreme Administrative Courts judgement the 8<sup>th</sup> of February 2005, case 7964-03).

7 d ). The Swedish Government has decided to designate 509 Special Protection Areas (SPA) under the Birds Directive with a total area of approximately 2,864,780 hectares. Following the Government's decision, these are included automatically in Natura 2000. – What has been said above about the Habitats Directive goes also *mutatis mutandis* when a project affects a bird sanctuary in the sense of the EU-Birds Directive.

7 e ). Also the EU-“Ambient Air Directive” has been implemented into Swedish law nowadays mainly by the 1998 Environmental Code and decrees enacted by virtue of that Code. – In chapter 16, section 5 of the Code it is clearly stated that in principle permission for a new project will not be granted if an environmental quality standard will be violated. Exceptions could be made e.g. if the environmental standard as a whole will be improved in the area affected by the project. So if a new motorway project is likely to exceed the limit valued of the EU-“Ambient Air Directive” a decision to carry on with the project is most likely to be quashed if it is not shown that proper measures are taken to make the project comply with relevant environmental quality standards.

**8 a ).** There is as such in the Swedish legal order, relating to the building of a new motorway, no procedural and/or substantive deficiencies that are explicitly said to render a planning decision completely void. If however fundamental procedural obligations laid down by law, such as the obligation to have consultation with the public concerned or carry out an environmental impact assessment, has been neglected a planning decision according to the Supreme Administrative Court's established practice is most likely to be quashed. The same goes for a planning decision that is shown to be based on wrongful assessments e.g. concerning environmental quality standards.

**8 b ).** If the Supreme Administrative Court finds that the impugned decision is unlawful – and that it is not obvious that the mistake lacks significance for the decision – it must quash it and, where necessary, refer the case back to the relevant administrative authority. In other cases the ruling will be declared valid and permanent.

**8 c ).** The Government, if a planning decision is appealed, can make minor modifications of the planning decisions. If a person apply for Judicial Review of the decision the Supreme Administrative Court on the other hand, as mentioned above, only have the power either to quash the decision if it is in conflict with one or more legal rules or norms or – if that is not the case or if it is obvious that the violation is of no significance for the outcome of the decision – uphold it.

**8 d ).** As stated above it is probably only the inhabitant of the residential area and the farmer that will be accepted as applicants if they apply to the Supreme Administrative Court for Judicial Review while applications from the others are most likely to be dismissed. When a case is tried an application will only be successful if there has been a violation of one or more legal rules or norms.

**9 ).** Due to the fact that when a person applies for Judicial Review of a Government decision the Supreme Administrative Court will be the only law court that will hear the case it is in principle possible to refer to new evidence

and circumstances without any limitations as long as it is relevant to the case. However – since neither the Government nor the authority who first come to a decision, in this case SRA, can be a party in the proceedings before the court and since the court, as mentioned above, can set aside in fact a decision only if it is in conflict with one or more legal rules – the possibility for procedural or substantive deficiencies to be remedied during the judicial process are in anyway limited and it is also in fact not often possible without starting the whole planning process all over again owing to the fact that the public concerned, municipalities, counties etc. are entitled to be informed of all facts that a planning decision is based on.

However if the facts of the case are such that one outcome of the case might be that the reviewed decision is quashed there will be an opportunity for the government to give its opinion and if there is an oral hearing the authority that came to the first decision in the case as a rule is invited to the hearing. In those cases, and sometimes also in other cases, it could come out that deficiencies that the applicant referred to because of new facts presented during the court proceedings had no significant impact on the outcome of the challenged decision. If for instance it is argued that the Government had upheld a road planning decision without having taken into consideration that the road might have some impact on an area which is the habitat for some protected species it is possible that a new environmental impact assessment could be brought before the court showing that the planned road in fact would have no impact whatsoever on the living conditions for the species in question. So even if the decision from the Government, and SRA, originally was based on an imperfect analysis of facts and thus in conflict with legal environmental rules it could nevertheless in the end be apparent that the imperfection had no real significance and therefore the Government's decision could be upheld anyway ( see the Supreme Administrative Courts judgment 2<sup>nd</sup> of July 2004, case 670-02).