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Your Ref.

Our Ref.  
GE/04/09

Date  
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Dear Sir or Madam

**Waldschlösschen Bridge in Dresden**  
*In reply to your inquiry of 29 April 2009*

The verdict of the Administrative Court of the City of Dresden of 30 October 2008 – File reference: 3 K 923/04– does not give rise to the assumption that stipulations of the European habitat protection laws would prevent the responsible body for the above mentioned building project from building a tunnel instead, if this body decided in favour of preserving the status of the “Dresden Elbe Valley” as a world heritage site to meet its traffic planning objectives by means of a tunnel.

With its above mentioned verdict, the Administrative Court of the City of Dresden dismissed the lawsuits of three nature conservation organisations which were filed against the approval of the plans for building a new Waldschlösschen Bridge, approved by the Regional Council of Dresden on 25 February 2004, as specified in the order of planning amendment of 09 June 2008 as well as the amending decision of 14 October 2008. The court’s decision is based on the assumption –which is not to be discussed here– that the plaintiffs can not demand a suspension of the approval of plans because, from the court’s point of view, it does not include any legal non-compliance which could be contested by a recognized nature conservation organisation. Naturally, the court did not decide about the legitimacy or illegitimacy of an alternative tunnel because this was not subject of the legal matter.

The judge’s remarks comparing alternatives, which was necessary because the approved building project is bringing about some considerable disturbances to the region of the “Elbe Valley between Schöna and Mühlberg” which, in turn, belongs to the European ecological network of “Natura 2000”, do not automatically lead to the conclusion that a tunnel, discussed in several sub-alternatives, would interfere with habitat protection laws. Although the Administrative Court did not pronounce that any of these tunnel alternatives would be preferable to the already approved building project of a bridge<sup>1</sup>, it did not state, however, that such an alternative tunnel would be

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<sup>1</sup> Administrative Court of the City of Dresden, Verdict of 30/10/2008 – 3 K 923/04 – p. 87.

inadmissible, but only expressed that the responsible body for the bridge project does not necessarily need to apply one of the suggested and discussed tunnel solutions for legal reasons. This assessment by the judge is essentially based on the assumption that the tunnel solutions would, compared to a newly built bridge, entail even more severe impairments for the protected biosphere types "Rivers with muddy banks with *Chenopodium rubri* pp and *Bidention* pp vegetation" (Natura 2000 habitat type code: 3270) and "Lowland hay meadows" (Natura 2000 habitat type code: 6510) in this Natura 2000-area, as well as the potential habitats of the Dusky Large Blue (*Maculinea nausithous*). Accuracy of this assessment can be neglected here with regard to the question under discussion. Even if it was true, this would not lead to insuperable legal hindrances for the feasibility of a tunnel.

According to Art.22b Par.3 No.2 SächsNatSchG (Nature Conservation Act of the Free State of Saxony), designed for the purpose of applying Art.6 Par.4 of the Council Directive 92/43/EEC<sup>2</sup>, a project entailing considerable impairments may only be approved if there is no reasonable alternative. If the responsible body had recognized its obligation to protect and conserve the "Dresden Elbe Valley"<sup>3</sup> according to the internationally valid Art.4, 5 of the World Heritage Convention<sup>4</sup> and considered that this site had been included in the "List of endangered World Heritage sites" (Art. 11 Par. 4 of the Convention on the Protection of the World Cultural and Natural Heritage, the so called „red list")<sup>5</sup>, and therefore decided in favour of a tunnel preventing from irreversible damage to the cultural landscape of the Elbe Valley, the need to find an alternative that takes care of biosphere types and habitats as much as possible, that arises from the habitat protection laws, would not have proved to be obstructive.

Reasonable according to Art.22b Par.3 No.2 SächsNatSchG (Nature Conservation Act of the Free State of Saxony) is a technologically feasible and legally admissible alternative only if it does not entail considerable impairments for other public issues, which can be assessed to be of higher priority than nature conservation.<sup>6</sup> Since preserving and permanently protecting the world heritage sites represents a special public interest as being expressed by the World Heritage Convention, a responsible body interested in realising a tunnel could not have been obliged to build a bridge, even if this would –as the Administrative Court of the City of Dresden assumes– reduce the extent of adverse effects on biosphere types and potential habitats. The responsible body and the plan approving authority can refrain from a preferable solution from the viewpoint of nature conservation due to reasons beyond nature

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<sup>2</sup> Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, Official Journal L 206, p. 7; Amended by Official Journal 2006 L 363, p. 368.

<sup>3</sup> Cf. Ulrich Fastenrath, Der Schutz des Weltkulturerbes in Deutschland – Zur innerstaatlichen Wirkung von völkerrechtlichen Verträgen ohne Vertragsgesetz (Verwaltungsabkommen i.S.d. Art. 59 Abs. 2 Satz 2 GG) – DÖV 2006, 1017 (1020 f. und 1027).

<sup>4</sup> Convention concerning the Protection of the World Cultural and Natural Heritage of 23/11/1972, BGBl. 1977 II p. 213.

<sup>5</sup> Decision of the World Heritage Committee of 11/07/2006.

<sup>6</sup> On the considerability of reasons beyond nature protection cf. BVerwG, Urt. v. 16.03.2006 – 4 A 1073.04 – NVwZ 2006, Beil. Heft 8, S. 55 Rn. 567; Urt. v. 12.03.2008 – 9 A 3.06 – NuR 2008, 633 Rn. 172; Urt. v. 09.07.2008 – 9 A 14.07 – NuR 2009, 112 Rn. 119.

conservation, if the related disadvantage is not in relation to a potential gain for nature and environment. Apart from the fact that, according to the judge's verdict, also a bridge will entail considerable adverse effects on protected habitats and species<sup>7</sup> and that its advantages for nature conservation compared to a tunnel can be regarded as of minor importance, bears the bridge project the risk of being deprived of the title of World Heritage and gives rise to the concern about a serious loss of reputation of the German Federal Republic. To accept such substantial disadvantages only for the sake of realising the minor advantages for nature conservation as assessed by the Administrative Court could not seriously be expected of a responsible body determined to build a tunnel.

Since the stipulations of the quoted habitat protection laws did not prohibit a tunnel it is self-evident that no opposed statements can be read in the Administrative Court's decision. The less so because the judging chamber of the Administrative Court of the City of Dresden was not to judge about the legitimacy of a tunnel but had to come to a decision whether the building project of a bridge as approved by the Regional Council of Dresden complies with legal requirements from nature conservation laws.

Yours faithfully,

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<sup>7</sup> Administrative Court of the City of Dresden, Verdict of 30/10/2008 – 3 K 923/04 – p. 67.