CO/4557/2014

Neutral Citation Number: [2015] EWHC 1471 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
THE ADMINISTRATIVE COURT

Royal Courts of Justice
Strand/
London WC2A 2LL

Monday, 13 April 2015

B e f o r e:

MR JUSTICE DOVE

Between:
LEE VALLEY REGIONAL PARK AUTHORITY

Claimant

v

EPPING FOREST DISTRICT COUNCIL

Defendant

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(Official Shorthand Writers to the Court)

Mr G Jones QC and **Mr D Graham** (instructed by Lee Valley Regional Park Authority) appeared on behalf of the **Claimant**
Ms M Thomas (instructed by Epping Forest District Council) appeared on behalf of the **Defendant**

Mr P Village QC and **Mr N Helme** (instructed by DHP Law LLP trading as Duffield Harrison) appeared on behalf of the Interested Party

J U D G M E N T
(Approved)
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1. MR JUSTICE DOVE: On 21 June 2011 the interested party applied for a substantial glass house development on their land which lies within the defendant's administrative area as well as within the Lee Valley Regional Park and the Green Belt. To the north of that application site lies existing glass houses which are operated by the interested party. On 6 November 2011 the defendants responded to an EIA screening request which had been submitted as part and parcel of the interested party's application. I shall set out the detail of the Town and Country Planning (Environmental Impact Assessment) Regulations 2011 a little later in this judgment. Having concluded that the development was not Schedule 1 development, the screening opinion which was adopted by the defendant as follows:

> "Schedule 2.1(b) includes water management projects for agriculture where the area of works exceed 1 hectare. The application includes provision and use of water storage ponds in excess of this area and therefore this aspect of the development falls within Schedule 2 and must be assessed under Schedule 3 of the regulations.
>
> Schedule 3 sets out the criteria that should be considered in assessing whether the development is likely to have significant environmental effects and therefore require an EIA.
>
> I have considered the development therefore in relation to Schedule 3 and noted that the site falls within a 'sensitive location', being within 2km of a Special Protection Area under the EC Birds Directive 79/409, Ramsar, and SSSI and Local Wildlife Sites within the Lee Valley Regional Park.
>
> I have therefore assessed whether the provision and use of the proposed storage ponds within the development would be likely to have significant environmental impacts, in relation to this sensitive location. The application included a phase 1 Habitat and Ecological Scoping Report and the information in this report has been taken into account in my assessment.
>
> The proposals include remodelling of an existing lake which although outside any protected area is within 1km of the Lee Valley SPA and Ramsar site. The lake provides habitat suitable for 3 SPA Citation species and has been noted to support 2 of them (Gadwall and Shoveler).
>
> Given that the proposals do not propose removal of the lake but rather include remodelling this lake and creating a new additional storage pond to the north such that there is potential for a net increase in habitat provision for the relevant species, I do not consider that the impact of the development is likely to be significant.
>
> Given the nature of the proposals, the previous and existing uses of the land and the position of the development within the landscape it is not considered that the proposals will have wider significant environmental impacts and therefore the Council considers that the proposed works in

totality are not EIA development and an EIA is not therefore required."

2. Part of the development proposed lay over a water body created relatively recently by mineral workings as is apparent from the quotation which I have just cited from the screening opinion. That water body is more often than not referred to as Langridge Scrape. The water body, as the screening opinion noted, provided habitat for wild foul, in particular for Gadwall and Shoveler ducks which form part of the nature conservation interest for which the nearby Lee Valley SPA had been designated. The designation description provides as follows:

> "The Lee Valley SPA is located to the north-east of London, where a series of wetlands and reservoirs occupy about 20km of the valley. The site comprises embanked water supply reservoirs, sewage treatment lagoons and former gravel pits that support a range of man-made semi-natural and valley bottom habitats. These wetland habitats support wintering wildfowl, in particular Gadwall *Anas strepera* and Shoveler *Anas clypeata*, which occur in numbers of European important. Areas of reedbed within the site also support significant numbers of wintering Bittern *Botaurus stellaris*...
>
> This site qualifies under Article 4.1 of the Directive (79/409/EEC) by supporting populations of European importance of the following species listed on Annex 1 of the Directive...
>
> Over winter:
>
> Gadwall *Anas strepera*, 515 individuals representing at least 1.7% of the wintering Northwestern Europe population (5 year peak mean 1991/2 - 1995/6)
>
> Shoveler *Anas clypeata* 748 individuals representing at least 1.9% of the wintering Northwestern/Central Europe population (5 year peak mean 1991/2 - 1995/6)"

3. The application was supported by ecological material but that did not include an up to date winter survey of the birds using the water body. The "Phase 1 Habitat and Ecological Scoping Survey" relied upon visits made in May to August 2011. Presence of Gadwall and Shoveler ducks on those visits were noted in the documentation as follows:

> "4.3 The Lee Valley SPA was classified in June 2000 for its wintering populations of three bird species: Bittern *Botaurus stellaris*, Gadwall and Shoveler. The small lake on site does provide habitat suitable for the three SPA citation species. During the course of the scoping survey the lake was noted as holding both Gadwall and Shoveler. Although this lake is not part of the SPA it is necessary to consider the importance of this lake in the context of supporting proportions of the SPA populations of both Gadwall and Shoveler and any potential impacts which may arise

through the proposed development. The 30 Gadwall recorded during the scoping survey represents 6.6% of the SPA citation population (as based on the 5 year peak mean 1993/4-1997/8 derived from WeBS core count data for the Lee Valley SPA). The 5 Shoveler recorded represents 1.2% of the SPA citation population (as based on the 5 year peak mean 1993/4-1997/8 derived from WeBS core count data for the Lee Valley SPA).

4. The defendants consulted Natural England on the application under Regulation 61 of the Conservation of Habitats and Species Regulations 2010 ("the 2010 Regulations") which are set out below.

5. Natural England responded to the consultation on 6 July 2011 as follows:

> "However the Ecological Survey carried out by RPS has identified that the small lake in the southern part of the proposal site (referred to as a 'splash' by the applicant) is used by birds including Gadwall and Shoveler which are among the interest features for which the Lee Valley SPA is classified and the Lee Valley Ramsar site is listed.
>
> Their survey on 17 March 2011 recorded the presence of 30 Gadwall: which equates to 6.6% of the population of the Lee Valley SPA and Ramsar site at the time of its designation as an SPA and Ramsar site; or 10% of the minimum number required to qualify a site for selection as an SPA. The proposal site is, therefore, undoubtedly of considerable importance as supporting habitat which is used by the SPA bird interest. (This survey also recorded the presence of 5 Shoveler; although this number is not considered to of particular significance in terms of the population of the SPA and Ramsar site).
>
> Therefore, in the opinion of Natural England, and in the absence of mitigation, the proposal is 'likely to have a significant effect on the European site'. Furthermore, Natural England is also of the opinion that, in the absence of mitigation, the proposal does have the potential to 'adversely affect the integrity of the European site'...
>
> Natural England also notes mitigation measures which have been proposed as part of the application, and considers that these measures should be capable of providing an adequate and extent of supporting habitat, in order to ensure that there would not be a detrimental impact upon those bird species which are designated interest features of the Lee Valley SPA and Ramsar site.
>
> Therefore, provided that these mitigation measures are fully implemented and adequately maintained, Natural England considers that they would be sufficient to prevent the proposal having a significant effect upon the European and international site.

Based on the information provided, Natural England has no objection to the proposed development subject to the inclusion of our recommended conditions and the proposal being carried out in strict accordance with the details of the application. The reason for this view is that subject to the inclusion of our recommended conditions, the proposed development, either alone or in combination with other plans or projects, would not be likely to have a significant effect on the Lee Valley SPA and Ramsar site.

The conditions we recommend are:

• No excavation, infilling or noisy construction works (ie those involving heavy machinery, or particularly noise equipment such as angle-grinders, or hammering) are to take place within the southern half of the proposal site during the period from 1 October to 31 March inclusive in any year.

Reason: To avoid disturbance of the SPA bird interest during the winter period.

• The infilling of the northern part of the existing lake or 'splash' shall not commence until after the completion of the excavation works to extend this lake to the east.

Reason: To ensure continuity of extent of supporting habitat for the SPA bird interest.

• The lake and its margins shall be managed in such a way as to maintain the balance of habitats and features as detailed on drawing NK016844_SK035 Revision B.

Reason: To ensure the long-term availability of sufficient suitable supporting habitat for the SPA bird interest.

Informative: This requirement would probably be most appropriately and effectively addressed through a S.106 Agreement."

6. The RSPB objected and sent those objections to Natural England as well as the defendant. The Natural England officer commented on them in an email to RSPB which was copied to the defendant. In that email the Natural England officer observed as follows:

"Natural England acknowledges that the bird survey data supplied in support of this application fell considerably short of the standard which we would normally expect from any application affecting an SPA or other statutory designated site.

However, in this particular instance, we chose to weigh this concern against the fact that the lake in question did not appear to have been previously identified as being of significant nature conservation importance (it had not, for example, been designated as a Local Wildlife

> Site). Consequently, we took the view that the information provided by the applicant represented a significant advance over the previous stated knowledge and felt that, subject to appropriate conditions to ensure their delivery, the proposed mitigation measures were both appropriate and proportionate.
>
> In reaching this view, we also took into account the likelihood that the gadwall were probably exploiting the high level of weed growth within a relatively newly created lake and that, in the absence of appropriate habitat management, the current level of bird interest was unlikely to be sustained in the longer term. A S106 agreement in order to secure such management was one of the conditions which we recommended."

7. On 9 August 20011 Natural England provided futher correspondence in response to the defendant in relation to issues raised by the defendant about the proposed conditions which I have quoted above. In their letter of 19 August 2011 Natural England observed as follows:

> "As explained in our letter of 6 July 2011, Natural England is of the opinion that the proposal is 'likely to have a significant effect on the European site'. Furthermore, Natural England is also of the opinion that, in the absence of mitigation, the proposal does have the potential to 'adversely affect the integrity of the European site'.
>
> In responding to this planning application, Natural England considered the potential impacts of the proposed development and, in particular, the effects upon the bird interest of the Lee Valley SPA and Ramsar site. We also took into account the mitigation measures which the applicant had proposed. We concluded that, subject to the attachment of our recommended conditions, the development would not adversely affect the integrity of the SPA and Ramsar site.
>
> From this it is implicit that, in the absence of these conditions, an adverse effect on the integrity of the site cannot necessarily be ruled out (based on the currently available data). Therefore, Natural England would be very reluctant to allow significant increased flexibility with regard to the timings contained within the recommended conditions.
>
> If the applicant is not willing to accept these conditions, then we respectfully suggest that your council should not grant permission and should, instead, request that the applicant provide further more detailed bird survey data (as has been suggested by the RSPB in their objection dated 11 August 2011), in order to provide sufficient information to enable your council to carry out a full formal Appropriate Assessment."

8. A further email was sent by Natural England to the defendant following a meeting with the interested party's consultants at which some readjustment of the timetable in the conditions which they proposed in relation to the works was agreed. In the event,

notwithstanding the officer's recommendation for approval, this application was refused by the defendant on 24 August 2011. The interested party pursued an appeal against that refusal and also, on 15 December 2011, submitted a second application for what was essentially similar development. Natural England responded in similar terms to those that they had provided in response to the first application (in their letter of 6 July 2011) in a further letter in response to this second application of 2 January 2012. That second application was refused by the defendants on 15 February 2012.

9. The appeal against the refusal in relation to the first application was determined by means of the written representations process on 6 June 2012. Within her decision letter dismissing the appeal and therefore refusing planning permission, the inspector observed as follows:

> "Issue (i) whether the proposal would be 'inappropriate development' for the purposes of the NPPF and development plan policy.
>
> 11. 87,119 sq m of glass house would be for agriculture, one of the very limited exceptions to the construction of new buildings referred to in paragraph 89 of the NPPF. In addition, of course, there would be the associated warehouse area, office space, welfare facilities, large hard-surfaced areas for parking for HGVs and the irrigation tanks. It seems to me that, with the scale of agricultural production envisaged within the glasshouses, these uses, although large floor spaces in their own right, would be essential to the functioning of the agricultural use, and might be regarded as ancillary to the main use. I conclude the proposals would not be inappropriate development for the purposes of national and local planning policy.
>
> Issue (ii) the effect of the development upon the openness of the Green Belt and the purposes of including land within it.
>
> 12. While not inappropriate development, the effect of the development on the openness of the Green Belt is still a material consideration and a potential harm factor to be weighed in the balance. The fact that a development is not inappropriate does not set aside the fundamental Green Belt aim of 'keeping land permanently open'.
>
> 13. The appellant argues that through the implementation of the habitat enhancement and landscaping, supported by the findings of the Landscape and Visual Impact Assessment, the proposals are demonstrated not to have an excessive adverse impact upon the openness, rural character or visual amenities of the Green Belt.
>
> 14. But this cannot be correct; the scheme would involve the construction of 8.7ha - huge on any scale - of new building that is not there at present. Regardless of whether the building would have some landscaping associated with it and/or enhanced habitat creation, the area where the glasshouse would be located would not, any longer, be open; the ground

would not be free of solid, tangible development; it would not be being kept 'permanently open'. Such huge additional volume and bulk must diminish the openness of the Green Belt and the purpose of including land within it such as safeguarding the countryside from encroachment. 'Openness' is referred to in the new NPPF; where it is noted that one of the essential characteristics of Green Belts is their openness; I repeat that a policy objective is keeping land permanently open'. The proposal must conflict with national policy as expressed in the NPPF and LP policy; I accord this harm significant weight."

10. When the inspector turned to other matters she concluded as follows:

> "27. While the existing lake on the site is not part of the Lee Valley Special Protection Area (SPA) and Ramsar site, the ecological report states that during the course of the scoping survey there were 30 gadwall and 5 shoveler noted. The RSPB is of the opinion that the lake is functionally linked to the SPA since species for which the SPA has been designated are dependent on this habitat. It is therefore necessary to consider the ecological importance of the lake habitat in supporting a proportion of these species.
>
> 28. I understand that this lake has only been created in very recent times following the termination of gravel extraction and is part of the restoration work. It is interesting therefore that these species have take so readily to the lake and indicates that, all other circumstances being similar, they might take readily to the re-modelled lake. However, the proposals aim to bring greater numbers of people right up to the water edge and over it on timber walkways. The public footpath would be rerouted immediate (sic) adjacent to it, the picnic area and glasshouses would be within a few metres. The re-modelled lake would not be the relatively secluded and distant body of water it is at present and the species associated with the SPA may not use it to the same extent. While I note that Natural England raise no objection I am not satisfied, on the basis of the evidence I have, that the scheme would not adversely affect the integrity of the European site."

11. In summer 2013 the interested parties took stock of their position. They obtained favourable advice from leading counsel. They chose to submit a third application, which is the subject of these proceedings, on 27 November 2013. It was, in all respects which are material to these proceedings, similar, if not identical, to the earlier applications. Upon receipt of this application by the defendant it was the subject of a validation process. The officer who undertook this, coincidentally the same officer who had conducted the 2011 screening opinion, considered whether EIA was required by the proposal. In completing a 'validation/consultation' pro forma she noted that the development was Schedule 2 development but that no EIA was required. No reasons were required by the pro forma and none were supplied.

12. Natural England were again consulted in relation to this third application. They replied on 3 December 2013 in the following terms:

> "Statutory nature conservation sites - no objection.
>
> Based upon the information provided, Natural England advises the Council that the proposal is unlikely to affect any statutorily protected sites or landscapes but also refers you to our previous response, you ref EDF/2547/11, issued 06 January 2012."

13. It will be recalled from what I have set out above that that letter was in similar terms to the previous letter written on 6 July 2011 in respect of the first application. The "information provided" was the subject of some debate at the hearing of this matter. Firstly, there was dispute in relation to the inspector's conclusions. Natural England were advised by virtue of the consultation letter of the availability of the application documents supporting the proposal which were, in the normal way, placed on the Council's website. Within the planning statement which was contained with that material reference was made to the inspector's decision and indeed the full text of that decision letter was produced at Appendix 3 of the planning statement. The planning statement also made reference to further wetland bird surveys which had taken place between May 2011 and March 2012. These were undertaken because the earlier surveys from May to August 2011 were undertaken at an inappropriate time of year. Winter time counts were required in order to form a view in relation to the abundance of the over-wintering birds using Langridge Scrape. The full results of all of the wetland bird surveys were set out in a report but that document, it seems, was never provided to the defendant, or, if it was, it was never placed on the Council's website. Natural England, therefore, did not have access to the wetland birds survey report. The wetland bird survey's conclusions were however summarised in the planning statement as follows:

> "Wetland Bird surveys were carried out on a variety of dates between May 2011 and March 2012. The results indicate that the water bird counts in the gravel pit pond (application area) are considerably lower than counts made on Holyfield Lake. There is a notable size difference between the two water bodies and the gravel pit pond is therefore of lower habitat value. The reformation of the gravel pit pond will present a low impact on water bird populations provided that recommendations are implemented and the works are carried out during a period outside the breeding season and at a time which will be the least invasive. In all TWIG, the Consultancy who undertook the survey work, is satisfied that the application demonstrates a low impact on optimal habitat for listed species provided that works take place outside the breeding season and the operations do not disturb bird populations utilising key areas of the site."

14. The claimant draw attention to the fact that other wetland bird survey data was available for the site and the surrounding area. They produced a report entitled "The Wetland Resource of the Lee Valley: an Assessment of its Importance to Nature

Conversation with Special Reference to Water Birds". This report was produced by Messrs White and Harris. It contained further bird counts by species and also by water body, the relevant water body being Holyfield Marsh, the equivalent of Holyfield Lake in the quotation set out above, which is a wider area, which included as part of it the water body affected by the development, known as Langridge Scrape.

15. Further, the claimants have provided wetland bird counts from the British Trust for Ornithology for both Holyfield Lake and also for the Langridge Scrape. The counts are disaggregated between those two areas. They are counts which were taken before the application under challenge was submitted. What the matrix of bird counts discloses is that on two occasions there were noted to be more than 30 Gadwall on Langridge Scrape, (namely 53 and 62). And on two occasions there were noted to be more than 5 Shoveler ducks on Langridge Scrape, (namely 14 and 23). No one provided this information to either the defendant or Natural England during the course of their consideration of the application.

16. The claimants in their turn were consulted and they considered the application and resolved to object to it. They had previously objected to the first and second applications. In relation to the third application, they raised concerns about the impact on the regional park and on the Green Belt and on landscape impact. Each of these objections was framed and underpinned by relevant national and development plan policies. They also expressed concern about what they considered to be insufficient data on biodiversity and the impact on the habitat of the Langridge Scrape. They objected on the grounds of traffic impact. These objections, along with all of the other observations on the application were reported to members in a committee report which was prepared for the purposes of a meeting on 20 March 2014. In that report the officers analysed the issues thematically. It is necessary for the purposes of this judgment to refer to their conclusions on the questions of Green Belt, local policies relevant to the glasshouse industry, landscape impact, impact on the regional park, and wildlife and conversation. These were addressed in the officer's report as follows. Firstly, in relation to the Green Belt, the following advice was provided to members:

> "Green Belt
>
> 16. The proposed development is required for the purposes of horticulture and is therefore 'appropriate' in the Green Belt in terms of national guidance and Policy GB2A of the adopted Local Plan and Alterations. The applicant does not therefore need to demonstrate very special circumstances in order to justify the development. The visual impact, and impact on amenity, the environment and on highway safety do however also need to be addressed in accordance with GB7a and GB11 of the Plan and these matters are considered below.
>
> 17. In considering the previous appeal, the Inspector concluded that the development would be harmful to openness of the Green Belt and the purposes of including land within it. The NPPF however, whilst generally setting retention of openness at the heart of its Green Belt Policy, is strangely worded with regard to agricultural buildings. Para 89

states:

'A Local Planning Authority should regard the construction of new buildings as inappropriate in the Green Belt. Exceptions to this are:

• Buildings for agriculture and forestry

• Provision of appropriate facilities for outdoor recreation and for cemeteries, as long as it preserves the openness of the Green Belt and does not conflict with the purposes of including land within it:

• The extension or alteration of a building provided it does not result in disproportionate additions over and above the size of the original building...'

18. This wording clearly implies that unlike other forms of appropriate development, buildings for agriculture and forestry do not have to preserve openness and can conflict with the purposes of including land within it. This is actually quite logical as many agricultural buildings are by their very nature large and intrusive and will have a significantly adverse impact on openness.

19. The applicants have submitted with their application Counsel advice with regard to the Inspector's suggestion that despite being appropriate development this does not set aside the fundamental requirement of keeping land permanently open. The Legal Opinion of Peter Village QC is that this is 'fundamentally wrong and legally erroneous'.

20. This is of course only an opinion and Planning case law is full of examples of opinions and legal precedents which provide conflicting views, on almost any issue but it is in officer's (sic) view a logical interpretation of the wording in the NPPF and despite the fact that the previous appeal inspector placed weight on the openness of the Green Belt, it is not considered that his would be grounds to refuse the application. The Council's Policy GB11 relating to agricultural buildings (and is considered to be in accord with the NPPF) does not require that such buildings maintain openness."

17. In relation to the containment of the glasshouse industry, the report noted the extant local plans policy of consolidation. Having set out in full the text of policy of E13A, the report observed as follows:

22. The existing nursery is within an identified E13A Glasshouse Area but the proposed site is not. The development cannot in any way be described as a modest extension and the proposal will have an adverse impact on the open character of the countryside in this location due to its sheer scale. It is therefore clearly at odds with this policy, although it is open to dispute whether the that the (sic) requirement not to have an adverse impact on the 'open' character is in actually (sic) in compliance

with the NPPF for the reasons set out in the Green Belt section above.

> 23. However, it is acknowledged that the Council's Glasshouse policy is based on a study carried out in 2003 and is therefore not addressing the current needs of the industry; at the time of the previous decision the Council's Study on the Future of the Lee Valley Glasshouse Industry had been commissioned but was at an early stage. This report has since, however, been completed and was adopted in July 2012 as part of the Evidence Base for the New Local Plan."

18. The report then goes on to record the recommendations of that report which were, in effect, that there was a need to expand the E13 glasshouse areas in order to support the glasshouse industry in the longer term. The report continues as follows:

> "25. As before the applicants have satisfactorily demonstrated that there are no suitable sites available for this development within the currently adopted E13 areas. If the Council wishes to continue its support for the glasshouse industry, there has to be a greater understanding of how it is changing with increased pressure for economies of scale, new technology etc, and growing competition from Europe, North Africa and significant sites elsewhere in the UK (notably Thanet Earth). The application reflects these trends and if the decision is to refuse on policy grounds, the consequences may be that the growers will seek to find suitable sites outside the District, leaving the potential problem of a large derelict site, and the loss of employment of 40 full time posts (now) and the potential loss of an additional 40 full time posts. These are important concerns and any decision here has the potential for significantly adverse consequences.
>
> 26. In the light that there is no site within the existing identified glasshouse areas that could meet the needs of the developer it is not considered that this site can be dismissed simply because it is outside the scope of policy E13A. The particular merits of the development in this location therefore need to be looked at in detail."

19. In relation to the question of what the report places under the heading of "Sustainability" having noted that the NPPF, hereafter the framework, identifies sustainability as the golden thread running through both plan making and decision taking. The report advised as follows:

> "28. As such, it is important to establish whether the proposed development is 'sustainable'. The Sustainability Statement accompanying the application outlines the use of CHP that 'will provide significant electricity back to the national grid' and with filtered CO2 exhaust gases being re-circulated within the glasshouses to supplement photosynthesis. Previous years' crops have successfully been pesticide free and where intervention is needed it is specific and targeted. Production under lights at the site will produce no additional carbon to that of conventional

nurseries operating without CHP. Production without lights will be virtually carbon neutral; the development will include sustainable principles in its design, construction and end use. Significant attention is being paid to water use and storage. The site is not isolated, it is relatively close to major transport links and it is considered that the scheme generally meets the sustainability policies of the Local Plan.

29. The previous application was not refused on sustainability grounds, and it is considered that the development is sustainable."

20. In relation to landscape impact and the impact on the Lee Valley Regional Park, the report concluded that the development would have an adverse impact on the character and amenity of the immediate area but would not compromise the key landscape character of the area. Turning specifically to the effect on the regional park, the report observed as follows:

"32. The site is within the Lee Valley Regional Park and pays heed to para (1) of policy RST24, which requires new development in the Park to have regard to the importance of the park for leisure, recreation and nature conservation and make provision, where appropriate, for improved public access and landscaping. The developers have from the outset included habitat provision within the reconfigured lake area and seek to provide access and education at the site through the provision of picnic site (sic), interpretation boards and an outdoor classroom. With the intention of protecting and enhancing wildlife provision while enabling visitors not only to view the wildlife from but also to find out about the Lee Valley Glasshouse industry and showcase the modern development. The intention is to forge links with schools and work with the Council's Countrycare team and the Lee Valley Park to provide facilities appropriate to the location.

33. It has to be acknowledged, however, that the proposal is contrary to (ii) and (iii) of the policy - i.e. safeguarding the amenity and conserving the landscaping of the Park. The application site is included in a 'Landscape Enhancement Area' in the Park Plan of 2000. The area immediately south of the application site is described thus, 'The positive and attractive landscape character to the south of Langridge Farm to be retained and protected. This strong identity of woodland, wetland and open parkland to be extended north to Nazeing Road... The primary focus is to continue the restoration of degraded land and bring it into use for informal recreation.' Whether this is practical or achievable in the current economic climate is open to question, but this remains the most detailed approach of the Authority to this area of the Park. The action presumably take since this plan was published was to restore the application site to arable use, rather than for informal recreation...

35. The Park Authority have raised clear objection to the proposal as was set out above and it is clear that the Authority consider that this

development would be significantly harmful to the aims of the Park and the development may set a dangerous precedent if approved for other such development within the park boundaries. The 2012 Glasshouse Study referred to above acknowledges that expansion of E13 area within the Park Boundary will be resisted by the Park Authority and the previous appeal decision placed significant weight on the harm to the character and appearance of the Park. Should members determine to Grant Planning Permission the Park Authority will require that the application be referred to the Secretary of State."

21. In respect of wildlife and conservation, the following was set out in particular in relation to the position of Natural England and the effects on the SPA:

"48. Natural England were consulted and based on the information provided consider that the proposal is unlikely to affect any statutorily protected sites or landscapes and referred us to their provisions advice with regard to the previous applications.

49. The Lee Valley SPA that lies about a km from the site is classified for its wintering bird interest. Natural England has advised that they do not consider that the proposed development is directly connected with or necessary to the management of the site for nature conservation and would not directly impact on the European or Ramsar Site. They are also satisfied that any issues relating to increased surface water run off resulting from the large glasshouse should be capable of being addressed by the provision of the proposed balancing pond. However the small lake at the site has been identified as being used by birds including Gadwall and Shoveler for which the Lee Valley SPA is classified and the Ramsar site is listed. Without mitigation the development would potentially have a significant effect on the European Site and could adversely affect the integrity of the European Site. However the development proposes mitigation as part of the application and Natural England have concluded that these measures should be capable of providing an adequate extent and continuity of habitat in order to ensure that there would not be a detrimental impact. As a result Natural England has raised no objection to the proposed development subject to the imposition of conditions and the development being carried out in strict accordance with the details of the application...

51. As explained above the development includes significant mitigation in the form of habitat creation and is therefore considered acceptable in terms of its impact on wildlife.

52. In considering the previous appeal the Inspector felt that by bringing the public into the site with walkways and picnic areas, the lake would no longer be a distant and secluded feature and that the species associated with the SPA may not use it to the same extent, she noted the lack of objection from Natural England but concluded 'I am not satisfied, on the

basis of the evidence I have, that the scheme would not adversely affect the integrity of the European Site.'

53. This leaves us in a difficult position. Natural England is the Statutory Consultee with regard to impact on Statutory Nature Conservation sites and they have concluded from the information provided that there is unlikely to be an adverse impact. The thrust of recent government guidance for dealing with planning applications is to avoid delay in the determination of applications and not to request excessive supporting information. On balance it is considered that despite the concerns raised by the Planning Inspector and the LVRPA with regard to potential impact on wildlife, adequate information has been provided and any likely impact will be suitably mitigated and not so great as to warrant refusal.

54. It should be noted that the previous applications were not refused on grounds of harm to wildlife or habitats."

22. The officers' report provides a section entitled "Conclusion" in which the officers draw the threads together on the key points on which the decision on the application turned. Bearing in mind the debate which occurred during the course of the hearing, it is necessary to set out this section on conclusions in full, as follows:

"Conclusion

62. Once again in reaching a recommendation on this development we need to balance a number of competing issues and make a judgement as to which should carry most weight. The previous appeal decision which upheld members' decision to refuse the 2011 application is a material consideration that must be taken into account. Countering this, the applicant has submitted a strong argument that the weight the Inspector placed on maintaining the openness of the Green Belt was erroneous.

63. The development is clearly contrary to policy E13A which seeks to contain the glasshouse area, but this policy is outdated and the Council will not have a new policy until a new local plan is adopted, which is still some time away. Whilst the study on the future of the glasshouse industry has provided an evidence base it has not, nor was it intended to set out a way forward, this will need to be part of the local plan process.

64. The argument was previously made and supported on appeal, that to approve the development contrary to the adopted policy could have a significant impact on land use policy and set a dangerous precedent making glasshouses more difficult to resist elsewhere, and changing policy by default rather than through the proper plan process. The Inspector in May 2012 stated, 'In the interests of ensuring that decisions are made locally where possible, it is important that the Council concludes this speedily and resolves the difficult local balance.'.

65. Now nearly 2 years further on unfortunately despite best efforts, we are still in the same position. This leaves the applicants in a state of complete impasse, with no certainty about how to best ensure the continuation and expansion of their business. Government policy seeks to prevent delay and to push forward suitable sustainable development and the policies of the NPPF are supportive of economic development and the rural economy, it is considered that with the passage of time the ability to resist development on the basis of Policy E13 has been undermined.

66. On the basis therefore that the openness argument and the E13 argument are not as strong as they were in 2012 we need to weigh up whether the harm from the development is such as to outweigh the presumption in favour of sustainable economic development.

67. The main harm argued previously was the harm to the Lee Valley Regional Park and the Park Authority are clearly maintaining their objection, however their concern regarding traffic generation was not previously upheld on appeal and the impact on the ecology of the area was not a previous reason for refusal nor is it backed by Natural England. This leaves essentially two related issues; the scale of the development being incompatible with the function of the park and that the glasshouse would adversely affect the landscape setting of the site to the detriment of visitor amenity.

68. The question is really whether this impact is such that that the use of this area of the park for recreation is undermined. This is open to debate while some may consider that the glasshouse and it's almost industrial nature will significantly impair enjoyment, there is an argument that to be able to see a modern large scale glasshouse development of this kind in the Lea Valley, (which is historically known for its glasshouse industry) will add interest. The provision of suitable educational and information boards not only about the wildlife but also about the glasshouse industry could add to the attraction of the area for some. The Inspector at appeal stated that the experience of walkers would 'simply be a different experience, neither better nor worse'. However the Inspector did place significant weight on the impact of the development when viewed from the LVRP Viewpoint at Holyfield Hall Farm over a km to the south of the site. She states; 'This has been created and promoted as a public viewpoint and looking north-west the new glasshouse would be a significant element in the landscape... There would be significant harm to the character and appearance of the LVRP.' She therefore concluded that the development was contrary to policy RST24.

69. It is accepted that the development does not enhance the park and that there is harm to the landscape. This is inescapable for a development of this size; however this is just one of the competing factors that need to be balanced.

70. Officers are of the view that even taking into account the previous appeal decision and that there are policies that could be used to refuse this application, the potential benefits of the development in terms of economic development, and sustainability outweigh the limited harm to the character and amenity of the area and to the LVRP that would result. It is unlikely that a more suitable location, with less visual impact and impact on wildlife, landscape and residential amenity could be found within the District. If the District is to continue to enable the growth of the Glasshouse industry that has been such an important part of its heritage and not push growers to find sites further afield then development of this nature which provides suitable landscaping, ecological mitigation and transport plans and can not be located within E13 areas should be considered favourably. It is acknowledged that this could set a precedent for other large horticultural development in the District but such applications would also need to be considered on their individual merits.

71. Therefore, particularly in the light of the emphasis in the NPPF that 'significant weight should be placed on the need to support economic growth through the planning system' officers again consider that the balance is in favour of the development. The revised application is therefore recommended for approval subject to the raft of conditions set out in Appendix 1 and subject to the prior completion of a legal agreement covering factors a), b) and c) set out in Para 5 above.

72. However Members must be aware that the recommendation is contrary to the adopted Policies of the Local Plan and is contrary to the views of the Lee Valley Regional Park Authority. As a departure from the plan, should Members be minded to grant permission for the development, the matter would need to be referred to the Secretary of State. Referral is also required under Section 14(8) of the Lee Valley Regional Park Act. This means that the matter is referred to the Secretary of State to consider whether the application should be called in to be determined by the Secretary of State following a Public Inquiry.

73. Should Members however maintain their objection to the scheme, it is considered that the revised proposal could still be refused as it is contrary to current adopted policies and does not overcome the previous reasons for refusal 1, 3 and 4 as set out in Para 9 above. We could however face criticism at appeal on the basis that the current plan is not up to date and we have as yet no clear strategy to meet the future needs of the Glasshouse Industry."

23. The officer's recommendation that planning permission should be granted was accepted and, as a result of the claimant's objections and the matters set out in paragraph 2 of the Committee Report, the application was referred to the Secretary of State to see whether he wished to call it in. On 2 May 2014 he declined to do so. A section 106 obligation was entered into in relation, in particular, securing the ecological mitigation works and

executed on 21 August 2014. On the same date the planning permission which is the subject of this challenge was issued.

Policies

24. Relevant national policy is contained within the Framework. The presumption in favour of sustainable development operational in relation to decision taking is set out in paragraph 14 as follows:

> "For decision-taking this means:
>
> • approving development proposals that accord with the development plan without delay; and
>
> • where the development plan is absent, silent or relevant policies are out-of-date, granting permission unless:
>
> -- any adverse impacts of doing so would significantly and demonstrably outweigh the benefits, when assessed against the policies in this Framework taken as a whole; or
>
> -- specific policies in this Framework indicate development should be restricted."

25. Paragraph 17 of the Framework sets out a number of core land use planning principles but these are not prioritised. One element of them, which officers clearly thought relevant to the proposals, was that related to economic development. The Framework provides as follows:

> "17. Within the overarching roles that the planning system ought to play, a set of core land-use planning principles should underpin both plan-making and decision-taking. These 12 principles are that planning should...
>
> • proactively drive and support sustainable economic development to deliver the homes, business and industrial units, infrastructure and thriving local places that the country needs."

26. The Green Belt is also referred to in these core principles but the detail of national policy in relation to the Green Belt appears later on in the document. Bearing in mind the arguments in this case it is necessary to set the Green Belt policy out in some detail.

> "79. The Government attaches great importance to Green Belts. The fundamental aim of Green Belt policy is to prevent urban sprawl by keeping land permanently open; the essential characteristics of Green Belts are their openness and their permanence...
>
> 87. As with previous Green Belt policy, inappropriate development is, by definition, harmful to the Green Belt and should not be approved except

in very special circumstances.

88. When considering any planning application, local planning authorities should ensure that substantial weight is given to any harm to the Green Belt. 'Very special circumstances' will not exist unless the potential harm to the Green Belt by reason of inappropriateness, and any other harm, is clearly outweighed by other considerations.

89. A local planning authority should regard the construction of new buildings as inappropriate in Green Belt. Exceptions to this are:

• buildings for agriculture and forestry;

• provision of appropriate facilities for outdoor sport, outdoor recreation and for cemeteries, as long as it preserves the openness of the Green Belt and does not conflict with the purposes of including land within it;

• the extension or alteration of a building provided that it does not result in disproportionate additions over and above the size of the original building;

• the replacement of a building, provided the new building is in the same use and not materially larger than the one it replaces;

• limited infilling in villages, and limited affordable housing for local community needs under policies set out in the Local Plan; or

• limited infilling or the partial or complete redevelopment of previously developed sites (brownfield land), whether redundant or in continuing use (excluding temporary buildings), which would not have a greater impact on the openness of the Green Belt and the purpose of including land within it than the existing development.

90. Certain other forms of development are also not inappropriate in Green Belt provided they preserve the openness of the Green Belt and do not conflict with the purposes of including land in Green Belt. These are:

• mineral extraction;

• engineering operations;

• local transport infrastructure which can demonstrate a requirement for a Green Belt location;

• the re-use of buildings provided that the buildings are of permanent and substantial construction; and.

• development brought forward under a Community Right to Build Order."

27. Local planning policies were also relevant to the decision in this case and the key policies which are relied upon by the claimant are as follows. Firstly reliance is placed on policy E13 which is set out in two parts, as follows:

"Policy E13A - New and Replacement Glasshouses

> Planning permission will be granted for new and replacement horticultural glasshouses within areas identified for this purpose on the Alterations Proposals Map. Glasshouses will not be permitted outside the areas subject to this policy unless the proposed development is either:
>
> (i) a replacement of, or a small-scale extension to, a glasshouse or nursery outside the areas identified on the Alterations Proposals Map; or
>
> (ii) necessary for the modest expansion of a glasshouse or existing horticultural undertaking on a site at the edge of an area identified on the Alterations Proposals Map which is unable to expand because all the available land in that designated area is occupied by viable glasshouse undertakings, and where there is no suitable land (including redundant glasshouse land) in this or the other glasshouse areas identified on the Alterations Proposals Map;
>
> and in all cases the proposal will not have an adverse effect on the open character or appearance of the countryside.

Policy E13B - Protection of Glasshouse Areas.

28. The Council will refuse any application that it considers is likely to:

> (i) undermine its policy approach of concentrating glasshouses in clusters to minimise damage to visual amenity and loss of the openness of the Green Belt; and/or
>
> (ii) harm the future vitality and/or viability of the Lea Valley glasshouse industry."

29. The local plan also contained policies in relation to the Green Belt. Firstly, policy GB7A provided as follows:

> "Policy GB7A - Conspicuous Development.
>
> The Council will refuse planning permission for development conspicuous from within or beyond the Green Belt which would have an excessive adverse impact upon the openness, rural character or visual amenities of the Green Belt."

30. Policies GB10 and GB11 were also referred to the course of argument, and they provide as follows:

"Policy GB10 – Development in the Lee Valley Regional Park

Within the area of Green Belt which lies in the Lee Valley Regional Park, uses which are necessary to enhance the function and enjoyment of the Park for its users will be granted planning permission provided that:

(i) the developer shows, to the satisfaction of the Council, that the proposed site is the most appropriate one for that activity;

(ii) any built development associated with the provision of recreation or nature conservation

facilities will be kept to the minimum necessary.

Policy GB11 – Agricultural Buildings

Planning permission will be granted for agricultural buildings provided that the proposals:

(i) are demonstrably necessary for the purposes of agriculture within that unit;

(ii) would not be detrimental to the character or appearance of the locality or to the amenities

of nearby residents;

(iii) would not have an unacceptable adverse effect on highway safety or, with regard to water quality and supply, any watercourse in the vicinity of the site."

31. The local plan also contained a policy relevant to the Lee Valley Regional Park, RST24, which provides:

"Policy RST24

All developments within or adjacent to the Lee Valley Regional Park should:-

(i) have regard to the importance of the Park for leisure, recreation and nature conservation and make provision, where appropriate, for improved public access and landscaping;

(ii) safeguard the amenity and future development of the Park; and.

(iii) conserve and, where possible, enhance the landscape of the Park or its setting. Developments which are likely to result in a significant adverse impact upon the character or function of the Park will not be permitted."

The grounds.

32. In summary, the grounds of challenge advanced by Mr Gregory Jones QC assisted by Mr David Graham of counsel are as follows:

33. In ground 1 it is contended by the claimant that the officers failed to correctly interpret the Framework and, in particular, policy in relation to the Green Belt and openness. This is put in the context of the importantness of openness, both as set out in the Framework, and also in terms of the local plan. It is contended that the approach of the officers adopted my the members was inconsistent with that of the appeal inspector. It is said that they wrongly applied the presumption in favour of sustainable development in this case and, in effect, re-interpreted it illegitimately in the conclusions of the committee report.

34. By ground 2 the claimant contends that the process followed in relation to environmental impact assessment screening in relation to the application was unlawful. No screening opinion was published and the claimant was prejudiced as there were, judging by the reasons given in 2011, mattera which the claimant would have wished to observe by way of representations to a screening opinion.

35. In ground 3 the defendant's assessment of the issues in relation to nature conservation and, in particular, the legal tests set out in the Habitats Directive, to which I shall make reference below were, it is submitted, defective. The consideration of these matters was flawed both in relation to the available information to underpin the decision and also the test which was applied, which led to the conclusion that appropriate assessment was not required and the interests of the SPA would be preserved.

The Law

36. The claimant is a creature of the Lee Valley Regional Park Act 1966 under which it has a duty under section 12 to develop, improve, preserve and manage the regional park. Under section 14(8) it can, as it did in this case, require a local planning authority to refer an application to the Secretary of State for him to consider calling it in. Whilst, therefore, they are not a planning authority, they are obviously intimately concerned with, and have powers in relation to, the development control process.

37. The power to grant planning permission is given to a local planning authority in section 70 of the Town and Country Planning Act 1990.

38. In granting planning permission or refusing it, pursuant to section 38(6) of the Planning and Compulsory Purchase Act 2004, it is necessary for the local planning authority's determination to "be made in accordance with the plan unless material considerations indicate otherwise". The interpretation of the policies of the development plan and national policies in the Framework is a question of law (See Tesco Stores Ltd v Dundee City Council (Scotland) [2012] UKSC 13). These policies are to be interpreted objectively on the basis of the language used and in the context that they are policies, not statutes or contracts, and are designed to be used in the practical exercise of development control. Earlier cases have considered the interpretation of the

Framework's Green Belt policies (see, for example, Redhill Aerodrome Ltd v Secretary of State [2014] EWCA 1386; R (Timmins) v Gedling Borough Council [2015] EWCA Civ 10). These authorities have not, however, considered the particular point raised in this case.

39. Of some similarity to the points which are raised before me was the case of Europa Oil and Gas Ltd v SSCLG [2013] EWHC 2643 (Admin). That case concerned a challenge to an appeal decision in which the inspector had refused consent for an exploratory drilling rig. The question which was raised was whether the inspector had wrongly concluded that development was not appropriate to the Green Belt as mineral extraction development. It will be recalled that paragraph 90 of the Framework provides that mineral extraction is not inappropriate development provided that it preserves the openness of the Green Belt and does not conflict with the purposes of including land in the Green Belt.

40. Ouseley J concluded in relation to the decision in that case and the application of the Framework, as follows:

> "64. First, the premise of paragraph 17 [of the Inspector's decision] incorrectly, is that mineral extraction including hydrocarbon exploration cannot be appropriate in the Green Belt. However, any correct analysis of the proviso to NPPF 90, which is not what paragraph 17 purports to provide at all, has to start from the different premise that such exploration or extraction can be appropriate. The premise therefore for a proper analysis is that there is nothing inherent in the works necessary, generally or commonly found for extraction, which would inevitably take it outside the scope of appropriate development in the Green Belt.
>
> 65. As Mr Banner accepted, some level of operational development for mineral extraction, sufficiently significant as operational development to require planning permission has to be appropriate and necessarily in the Green Belt without compromising the two objectives. Were it otherwise, the proviso would always negate the appropriateness of any mineral extraction in the Green Belt and simply make the policy pointless. Extraction is generally not devoid of structures, engineering works and associated buildings. The policy was not designed to cater for fanciful situations but for those generally encountered in mineral extraction.
>
> 66. Secondly, as Green Belt policies NPPF 89 and 90 demonstrate, considerations of appropriateness, preservation of openness and conflict with Green Belt purposes are not exclusively dependent on the size of building or structures but include their purpose. The same building, as I have said, or two materially similar buildings; one a house and one a sports pavilion, are treated differently in terms of actual or potential appropriateness. The Green Belt may not be harmed necessarily by one but is harmed necessarily by another. The one it is harmed by because of its effect on openness, and the other it is not harmed by because of its effect on openness. These concepts are to be applied, in the light of the

nature of a particular type of development.

67. One factor which affects appropriateness, the preservation of openness and conflict with Green Belt purposes, is the duration of development and the reversibility of its effects. Those are of particular importance to the thinking which makes mineral extraction potentially appropriate in the Green Belt. Another is the fact that extraction, including exploration, can only take place where those operations achieve what is required in relation to the minerals. Minerals can only be extracted where they are found. Both those reasons are reflected in the supporting text to MC3, in paragraph 3.45, itself drawing on PPG2, paragraph 3.11.

68. Green Belt is not harmed by such a development because the fact that the use has to take place there, and its duration and reversibility are relevant to its appropriateness and to the effect on the Green Belt. Whether development, capable of being appropriate for the purposes of the proviso to NPPF 90, is in fact inappropriate, is a more complex question than the consideration of the effect on the Green Belt, where development has already been concluded to be inappropriate. Those considerations are necessarily absent from paragraph 17. It does not address the effect on the Green Belt for the purposes of appropriateness in the proper policy context."

41. The correct approach to analysing committee reports in the context of a challenge of this kind was aptly summarised by Hickinbotton J in R (Zurich Assurance Ltd t/a Threadneedle Property Investments) v North Lincolnshire Council [2012] EWHC 3708 (Admin). He distilled the propositions from the relevant authorities in paragraph 15 of his judgment, as follows:

"Each local planning authority delegates its planning functions to a planning committee, which acts on the basis of information provided by case officers in the form of a report. Such a report usually also includes a recommendation as to how the application should be dealt with. With regard to such reports:

i) In the absence of contrary evidence, it is a reasonable inference that members of the planning committee follow the reasoning of the report, particularly where a recommendation is adopted.

ii) When challenged, such reports are not to be subjected to the same exegesis that might be appropriate for the interpretation of a statute: what is required is a fair reading of the report as a whole. Consequently:

'[A]n application for judicial review based on criticisms of the planning officer's report will not normally begin to merit consideration unless the overall effect of the report significantly misleads the committee about material matters which thereafter are left uncorrected at the meeting of the

planning committee before the relevant decision is taken' (Oxton Farms, Samuel Smiths Old Brewery (Tadcaster) v Selby District Council (18 April 1997) 1997 WL 1106106, per Judge LJ as he then was).

iii)In construing reports, it has to be borne in mind that they are addressed to a 'knowledgeable readership', including council members 'who, by virtue of that membership, may be expected to have a substantial local and background knowledge' (R v Mendip District Council ex parte Fabre (2000) 80 P & CR 500, per Sullivan J as he then was). That background knowledge includes 'a working knowledge of the statutory test' for determination of a planning application (Oxton Farms, per Pill LJ)."

42. EU law in relation to the requirement for Environmental Impact Assessment ("EIA") is transposed into domestic law by the Town and Country Planning (Environmental Impact Assessment) Regulations 2011. It is accepted that this development falls into Schedule 2 of the 2011 Regulations. Regulation 7 of the Regulations provides as follows:

"Applications which appear to require screening opinion

7. Where it appears to the relevant planning authority that—

(a) an application which is before them for determination is a Schedule 1 application or a Schedule 2 application; and

(b) the development in question has not been the subject of a screening opinion or screening direction; and

(c) the application is not accompanied by a statement referred to by the applicant as an environmental statement for the purposes of these Regulations,

paragraphs (4) and (5) of regulation 5 shall apply as if the receipt or lodging of the application were a request made under regulation 5(1)."

43. The reference to regulation 5 is a reference to the regulation dealing with requests by people minded to carry out development. These requests will be made to the Council to determine whether or not EIA is required. Regulations 5(4) and 5(5) provide as follows:

"5(4) An authority receiving a request for a screening opinion shall, if they consider that they have not been provided with sufficient information to adopt an opinion, notify in writing the person making the request of the points on which they require additional information.

(5) An authority shall adopt a screening opinion within 3 weeks beginning with the date of receipt of a request made pursuant to paragraph (1) or such longer period as may be agreed in writing with the person making the request."

44. The screening opinion is defined by regulation 2

as a:

"written statement of the opinion of the relevant planning authority as to whether the development is EIA development."

45. Regulation 4 makes general provisions relating to screening of development for EIA purposes. In particular, regulation 4(7) provides:

(7) Where a local planning authority adopts a screening opinion under regulation 5(5), or the Secretary of State makes a screening direction under paragraph (3)—

(a)that opinion or direction shall be accompanied by a written statement giving clearly and precisely the full reasons for that conclusion; and.

(b)the authority or the Secretary of State, as the case may be, shall send a copy of the opinion or direction and a copy of the written statement required by sub-paragraph (a) to the person who proposes to carry out, or who has carried out, the development in question."

46. In relation to subsequent applications where environmental information has not previously been provided, regulation 9 of the 2009 Regulations provides:

"Subsequent applications where environmental information not previously provided.

9. Where it appears to the relevant planning authority that—

(a)an application which is before them for determination—

(i)is a subsequent application in relation to Schedule 1 or Schedule 2 development;

(ii)has not itself been the subject of a screening opinion or screening direction; and

(iii)is not accompanied by a statement referred to by the applicant as an environmental statement for the purposes of these regulations; and

(b)the original application was not accompanied by a statement referred to by the applicant as an environmental statement for the purposes of these Regulations,

paragraphs (4) and (5) of regulation 5 shall apply as if the receipt or lodging of the application were a request made under regulation 5(1)."

47. Thus the effects of these regulations when read together make clear that when an application for a subsequent application is made which appears to be Schedule 2

development, that triggers a requirement for screening to occur and for the provisions of regulation 5(4) and 5(5) to be complied with.

48. Finally, regulation 23 of the 2011 regulations requires that screening opinions are placed on the planning register along with the relevant application.

49. This court, in the case on R(CBRE Lionbrook (General Partners Ltd)) v Rugby Borough Council [2014] EWHC 646 (Admin) considered the question of subsequent applications or amendments to applications in compliance with the 2011 Regulations. In that case the Council decided that they did not need to issue a further screening opinion in relation to a revised proposal where they had issued already a negative screening opinion for the original proposal. Lindblom J was satisfied that that approach was one which was lawful. He concluded in relation to this issue:

> "46. Mr Kimblin and Mr Elvin were in my view right to submit that there was no breach of any relevant provision of the 2011 EIA regulations, and, in particular, no breach of regulation 7. They focused on the opening clause of regulation 7 - 'where it appears to the relevant authority that...' They submitted, and I agree, that implicit in those words there is more than merely a question of fact. Parliament has deliberately provided an element of discretionary judgment for an authority deciding whether a screening process is required. The discretion relates to all three of the matters referred to in paragraph 7(a), (b) and (c), including the question raised in paragraph 7(b) - whether 'the development in question has not been the subject of a screening opinion...' It follows, submitted Mr Kimblin and Mr Elvin, that the Council could properly conclude, as it did, that the development had been the subject of a screening opinion. I agree.
>
> 47. The thrust of this submission, which I accept, is that the concept of a development having been the subject of a screening opinion is broad enough to include previous screening process for an earlier version of the proposal, so long as the nature and extent of any subsequent changes to the proposal do not give rise to a realistic prospect of a different outcome if another formal screening process were to be gone through. This is classically a matter of judgment for 'the relevant planning authority'. It will always turn on the facts of the particular case.
>
> 48. The essential point is that regulation 7 allows the authority to judge whether any changes to a proposal are such as to cast doubt on the continuing validity of the screening opinion for the proposal in its previous form. In principle, and subject to review by the court on Wednesbury grounds, it is open to an authority to conclude that in the screening process it has already conducted the essential characteristics of the site and proposal bearing on the crucial question - whether the development is likely to have significant effects on the environment - have been taken into account and the relevant screening thresholds and criteria applied.

> 49. If the result of that process was a screening opinion determining that the project was not EIA development, and if the result of a further screening process for the revised proposal would inevitably be the same, the authority will be able to conclude that its screening opinion is competent for the proposed development in its modified form. The judgment embodied in that screening opinion will be no less valid and effective for the proposal as revised than it was for the proposal as originally conceived. The potential effects of the development will already have been dealt with in a formal screening process. The development will have been 'the subject of a screening opinion' - the concept in regulation in 7(b). The provisions of paragraphs (4) and (5) of regulation 5 will not be engaged. The screening process will not have to be repeated. If it were repeated it would be of no benefit to the authority, no benefit likely to be affected by the outcome, and no benefit to the public interest in the EIA regime being operated with the rigour required."

50. Lindblom J went on to conclude in paragraphs 53 and 54 of his judgment that even were he wrong about that conclusion he would in any event have exercised his discretion against the claimant in the light of the decision of the Supreme Court in Walton v Scottish Ministers [2013] Env LR 16 and would have declined to quash the Council's decision.

51. In relation to the requirements under regulation 4(7) of the 2011 Regulations and regulation 23 of the 2011 Regulations it is important to note that the obligation set out in particular in regulation 4(7) is more extensive than the requirements of the European Directive 85/337 on which the 2011 regulations are based. That is established by the decision of the European Court of Justice in the case of Mellor v Secretary of State for Communities and Local Government C75/08 [2010] PTSR 880 in which the court observed that the effect of the Directive was as follows:

> "61. In the light of the foregoing, the answer to the first question is that Article 4 of Directive 85/337 must be interpreted as not requiring that a determination, that it is unnecessary to subject a project falling within Annex II to that directive to an EIA, should itself contain the reasons for the competent authority's decision that the latter was unnecessary. However, if an interested party so requests, the competent administrative authority is obliged to communicate to him the reasons for the determination or the relevant information and documents in response to the request made."

Thus the positive requirement to provide reasons in regulation 4(7) of the 2011 Regulations is a requirement of domestic law. The EU law requirement is more narrow and is to provide reasons if so requested.

52. As set out above, the application site was nearby a site protected by EU law in relation to habitats and birds. In particular, it was close to the SPA which I have referred to above and supported bird species for which the site has been designated. Articles 6(2) and (3) of the Habitats Directive, Council Directive 92/43/EEC provide:

"2. 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.

3. 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 site and subject to the provisions of paragraph 4, 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."

53. The question of the approach to screening a plan or project in relation to the first sentence of Article 6(3) of the Habitat Directive was considered in Landelijke Vereniging to Behoud van de Waddenzee v Staatsecretaris van Landbouw, Natuurbeheer en Visserij [2005] 2 CMLR 31. It suffices for present purposes to cite the following elements of the court's judgment:

"43. It follows that the first sentence of Art.6(3) of the Habitats Directive subordinates the requirement for an appropriate assessment of the implications of a plan or project to the condition that there be a probability or a risk that the latter will have significant effects on the site concerned.

44. In the light, in particular, of the precautionary principle, which is one of the foundations of the high level of protection pursued by Community policy on the environment, in accordance with the first subparagraph of Art.174(2) EC, and by reference to which the Habitats Directive must be interpreted, such a risk exists if it cannot be excluded on the basis of objective information that the plan or project will have significant effects on the site concerned (see, by analogy, inter alia Case C-180/96 United Kingdom v Commission [1998] E.C.R. I-2265, paras 50, 105 and 107). Such an interpretation of the condition to which the assessment of the implications of a plan or project for a specific site is subject, which implies that in case of doubt as to the absence of significant effects such an assessment must be carried out, makes it possible to ensure effectively that plans or projects which adversely affect the integrity of the site concerned are not authorised, and thereby contributes to achieving, in accordance with the third recital in the preamble to the Habitats Directive and Art.2(1) thereof, its main aim, namely, ensuring Page 35 biodiversity through the conservation of natural habitats and of wild fauna and flora.

45. In the light of the foregoing, the answer to Question 3(a) must be that

the first sentence of Art.6(3) of the Habitats Directive must be interpreted as meaning that any plan or project not directly connected with or necessary to the management of the site is to be subject to an appropriate assessment of its implications for the site in view of the site's conservation objectives if it cannot be excluded, on the basis of objective information, that it will have a significant effect on that site, either individually or in combination with other plans or projects.

Question 3(b)

46. As is clear from the first sentence of Art.6(3) of the Habitats Directive in conjunction with the 10th recital in its preamble, the significant nature of the effect on a site of a plan or project not directly connected with or necessary to the management of the site is linked to the site's conservation objectives.

47. So, where such a plan or project has an effect on that site but is not likely to undermine its conservation objectives, it cannot be considered likely to have a significant effect on the site concerned.

48. Conversely, where such a plan or project is likely to undermine the conservation objectives of the site concerned, it must necessarily be considered likely to have a significant effect on the site. As the Commission in essence maintains, in assessing the potential effects of a plan or project their significance must be established in the light, inter alia, of the characteristics and specific environmental conditions of the site concerned by that plan or project.

49. The answer to Question 3(b) must therefore be that, pursuant to the first sentence of Art.6(3) of the Habitats Directive, where a plan or project not directly connected with or necessary to the management of a site is likely to undermine the site's conservation objectives, it must be considered likely to have a significant effect on that site. The assessment of that risk must be made in the light inter alia of the characteristics and specific environmental conditions of the site concerned by such a plan or project...

52. As regards the concept of 'appropriate assessment' within the meaning of Art.6(3) of the Habitats Directive, it must be pointed out that the provision does not define any particular method for carrying out such an assessment.

53. None the less, according to the wording of that provision, an appropriate assessment of the implications for the site concerned of the plan or project must precede its approval and take into account the cumulative effects which result from the combination of that plan or project with other plans or projects in view of the site's conservation objectives.

> 54. Such an assessment therefore implies that all the aspects of the plan or project which can either individually or in combination with other plans or projects, affect those objectives must be identified in the light of the best scientific knowledge in the field...
>
> 56. It is therefore apparent that the plan or project in question may be granted authorisation only on the condition that the competent national authorities are convinced that it will not adversely affect the integrity of the site concerned.
>
> 57. So, where doubt remains as to the absence of adverse effects on the integrity of the site linked to the plan or project being considered, the competent authority will have to refuse authorisation.
>
> 58. In this respect, it is clear that the authorisation criterion laid down in the second sentence of Art.6(3) of the Habitats Directive integrates the precautionary principle (see Case C-157/96 National Farmers' Union [1998] E.C.R. I-2211, [63]) and makes it possible effectively to prevent adverse effects on the integrity of protected sites as the result of the plans or projects being considered. A less stringent authorisation criterion than that in question could not as effectively ensure the fulfilment of the objective of site protection intended under that provision.
>
> 59. Therefore, pursuant to Art.6(3) of the Habitats Directive, the competent national authorities taking account of the conclusions of the appropriate assessment of the implications of mechanical cockle fishing for the site concerned, in the light of the site's conservation objectives are to authorise such activity only if they have made certain that it will not adversely affect the integrity of that site. That is the case where no reasonable scientific doubt remains as to the absence of such effects."

54. This approach was further explained by the European Court of Justice in the case of Sweetman v An Bord Pleanála [2014] PTSR 1092. Again, the judgment, so far as relevant, was:

> "28. Article 6(3) of the Habitats Directive establishes an assessment procedure intended to ensure, by means of a prior examination, that a plan or project not directly connected with or necessary to the management of the site concerned but likely to have a significant effect on it is authorised only to the extent that it will not adversely affect the integrity of that site (*Waddenvereniging and Vogelbeschermingsvereniging*, paragraph 34, and Case C-182/10 *Solvay and Others* [2012] ECR, paragraph 66).
>
> 29. That provision thus prescribes two stages. The first, envisaged in the provision's first sentence, requires the Member States to carry out an appropriate assessment of the implications for a protected site of a plan or project when there is a likelihood that the plan or project will have a significant effect on that site (see, to this effect, *Waddenvereniging and*

Vogelbeschermingsvereniging, paragraphs 41 and 43).

30. Where a plan or project not directly connected with or necessary to the management of a site is likely to undermine the site's conservation objectives, it must be considered likely to have a significant effect on that site. The assessment of that risk must be made in the light of, in particular, the characteristics and specific environmental conditions of the site concerned by such a plan or project (see, to this effect, *Waddenvereniging and Vogelbeschermingsvereniging*, paragraph 49).

31. The second stage, which is envisaged in the second sentence of Article 6(3) of the Habitats Directive and occurs following the aforesaid appropriate assessment, allows such a plan or project to be authorised on condition that it will not adversely affect the integrity of the site concerned, subject to the provisions of Article 6(4)...

36. It follows that Article 6(2) to (4) of the Habitats Directive impose upon the Member States a series of specific obligations and procedures designed, as is clear from Article 2(2) of the directive, to maintain, or as the case may be restore, at a favourable conservation status natural habitats and, in particular, special areas of conservation.

37. In this regard, according to Article 1(e) of the Habitats Directive, the conservation status of a natural habitat is taken as 'favourable' when, in particular, its natural range and areas it covers within that range are stable or increasing and the specific structure and functions which are necessary for its long-term maintenance exist and are likely to continue to exist for the foreseeable future.

38. In this context, the Court has already held that the Habitats Directive has the aim that the Member States take appropriate protective measures to preserve the ecological characteristics of sites which host natural habitat types (see Case C-308/08 *Commission v Spain* [2010] ECR I-4281, paragraph 21, and Case C-404/09 *Commission v Spain*, paragraph 163).

39. Consequently, it should be inferred that in order for the integrity of a site as a natural habitat not to be adversely affected for the purposes of the second sentence of Article 6(3) of the Habitats Directive the site needs to be preserved at a favourable conservation status; this entails, as the Advocate General has observed in points 54 to 56 of her Opinion, the lasting preservation of the constitutive characteristics of the site concerned that are connected to the presence of a natural habitat type whose preservation was the objective justifying the designation of that site in the list of SCIs, in accordance with the directive.

40. Authorisation for a plan or project, as referred to in Article 6(3) of the Habitats Directive, may therefore be given only on condition that the

competent authorities – once all aspects of the plan or project have been identified which can, by themselves or in combination with other plans or projects, affect the conservation objectives of the site concerned, and in the light of the best scientific knowledge in the field – are certain that the plan or project will not have lasting adverse effects on the integrity of that site. That is so where no reasonable scientific doubt remains as to the absence of such effects (see, to this effect, Case C-404/09 *Commission v Spain*, paragraph 99, and Solvay and Others, paragraph 67).

41. It is to be noted that, since the authority must refuse to authorise the plan or project being considered where uncertainty remains as to the absence of adverse effects on the integrity of the site, the authorisation criterion laid down in the second sentence of Article 6(3) of the Habitats Directive integrates the precautionary principle and makes it possible to prevent in an effective manner adverse effects on the integrity of protected sites as a result of the plans or projects being considered. A less stringent authorisation criterion than that in question could not ensure as effectively the fulfilment of the objective of site protection intended under that provision (*Waddenvereniging and Vogelbeschermingsvereniging*, paragraphs 57 and 58)."

55. The question of the availability of data for undertaking the duties under the Habitats Directive was considered by the European Court of Justice in the case of Nomarchiaki Aftodioikisi Aitoloakarnanias & Ors case, C-43/10 [2013] Env LR 21. The following appears in the court's judgment:

"111. With regard to the concept of 'appropriate assessment' within the meaning of Article 6(3) of Directive 92/43, it should be noted that the directive does not define any particular method for the carrying out of such an assessment (*Commission v Italy*, paragraph 57).

112. The Court has, however, held that that assessment must be organised in such a manner that the competent national authorities can be certain that a plan or project will not have adverse effects on the integrity of the site concerned, given that, where doubt remains as to the absence of such effects, the competent authority will have to refuse development consent (see *Commission v Italy*, paragraph 58).

113. With regard to the factors on the basis of which the competent authorities may gain the necessary level of certainty, the Court has stated that it must be ensured that no reasonable scientific doubt remains, and those authorities must rely on the best scientific knowledge in the field (see *Waddenvereniging and Vogelbeschermingsvereniging*, paragraphs 59 and 61, and *Commission v Italy*, paragraph 59).

114. Furthermore, knowledge of the effects of a plan or a project in the light of the conservation objectives relating to a given site is an essential prerequisite for the application of Article 6(4) of Directive 92/43, since, in

> the absence thereof, no condition for application of that derogating provision can be assessed. The assessment of any imperative reasons of overriding public interest and that of the existence of less harmful alternatives require a weighing up against the damage caused to the site by the plan or project under consideration. In addition, in order to determine the nature of any compensatory measures, the damage to the site must be precisely identified (see, to that effect, *Commission v Italy*, paragraph 83, and *Solvay and Others*, paragraph 74).
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> 115. In the light of the foregoing, it cannot be held that an assessment is appropriate where information and reliable and updated data concerning the birds in that SPA are lacking.
>
> 116. That said, where the development consent given to a project is annulled or revoked because that assessment was not appropriate, it cannot be ruled out that the competent national authorities may gather a posteriori reliable and updated data on the birds in the SPA concerned and that they may appraise, on the basis of that data and an assessment thereby supplemented, whether the project for the diversion of water adversely affects the integrity of that SPA and, where necessary, what compensatory measures must be taken to ensure that the execution of the project will not jeopardise protection of the overall coherence of Natura 2000.
>
> 117. Consequently, the answer to the eleventh question is that Directive 92/43, and in particular Article 6(3) and (4) thereof, must be interpreted as precluding development consent being given to a project for the diversion of water which is not directly connected with or necessary to the conservation of a SPA, but likely to have a significant effect on that SPA, in the absence of information or of reliable and updated data concerning the birds in that area."

56. Issues are raised in the submissions made before me as to whether or not the measures contained within this application to address nature conservation issues are properly to be understood legally as mitigation or as compensation. The case of Briels v Minister van Infrastructuur en Milieu [2014] PTSR 1120 concerned the widening of a motorway, causing an impact on a protected natural habitat, namely Molinia Meadows, caused by nitrogen deposition arising from the road proposals. The project included the creation of larger and higher quality Molinia Meadows as part of its proposals. The question which was posed to the European Court of Justice and its answer to it were as follows:

> "18. By its questions, which it is appropriate to consider together, the referring court asks, in essence, whether Article 6(3) of the Habitats Directive must be interpreted as meaning that a plan or project not directly connected with or necessary to the management of an SCI, which has negative implications for a type of natural habitat present thereon and which provides for the creation of an area of equal or greater size of the same natural habitat type within the same site, has an effect on the

integrity of that site and, if so, whether such measures may be categorised as 'compensatory measures' within the meaning of Article 6(4) thereof...

The assessment carried out under Article 6(3) of the Habitats Directive cannot have lacunae and must contain complete, precise and definitive findings and conclusions capable of removing all reasonable scientific doubt as to the effects of the works proposed on the protected site concerned (see, to that effect, *Sweetman and Others* EU:C:2013:220, paragraph 44 and the case-law cited).

28. Consequently, the application of the precautionary principle in the context of the implementation of Article 6(3) of the Habitats Directive requires the competent national authority to assess the implications of the project for the Natura 2000 site concerned in view of the site's conservation objectives and taking into account the protective measures forming part of that project aimed at avoiding or reducing any direct adverse effects for the site, in order to ensure that it does not adversely affect the integrity of the site.

29. However, protective measures provided for in a project which are aimed at compensating for the negative effects of the project on a Natura 2000 site cannot be taken into account in the assessment of the implications of the project provided for in Article 6(3).

30. This is the case of the measures at issue in the main proceedings which, in a situation where the competent national authority has in fact found that the A2 motorway project is liable to have – potentially permanent – adverse effects on the protected habitat type on the Natura 2000 site concerned, provide for the future creation of an area of equal or greater size of that habitat type in another part of the site which will not be directly affected by the project.

31. It is clear that these measures are not aimed either at avoiding or reducing the significant adverse effects for that habitat type caused by the A2 motorway project; rather, they tend to compensate after the fact for those effects. They do not guarantee that the project will not adversely affect the integrity of the site within the meaning of Article 6(3) of the Habitats Directive.

32. It should further be noted that, as a rule, any positive effects of a future creation of a new habitat which is aimed at compensating for the loss of area and quality of that same habitat type on a protected site, even where the new area will be bigger and of higher quality, are highly difficult to forecast with any degree of certainty and, in any event, will be visible only several years into the future, a point made in paragraph 87 of the order for reference. Consequently, they cannot be taken into account at the procedural stage provided for in Article 6(3) of the Habitats Directive.

> 33. Secondly, as rightly pointed out by the Commission in its written observations, the effectiveness of the protective measures provided for in Article 6 of the Habitats Directive is intended to avoid a situation where competent national authorities allow so-called 'mitigating' measures – which are in reality compensatory measures – in order to circumvent the specific procedures provided for in Article 6(3) and authorise projects which adversely affect the integrity of the site concerned.
>
> 34. It is only if, in spite of a negative assessment carried out in accordance with the first sentence of Article 6(3) of the Habitats Directive, a plan or project must nevertheless be carried out for imperative reasons of overriding public interest, including those of a social or economic nature, and there are no alternative solutions, that Article 6(4) of the Habitats Directive provides that the Member State is to take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected."

57. The question of the distinction to be drawn between mitigation measures and compensation measure was also recently considered by the Court of Appeal in the case of Smyth v Secretary of State [2015] EWCA Civ 174. In the leading judgment of the court given by Sales LJ he observed the following on this topic:

> "66. There is sometimes reference in cases and guidance to a distinction between mitigation measures and compensation measures: see e.g. the European Commission's Guidance Document on Article 6(4) of the Habitats Directive (2007/2012), referred to in the Opinion of AG Sharpston in Case C-521/12, *Briels v Minister van Infrastructuur en Milieu* [2014] PTSR 1120, at paras. 8-10. One needs to be careful here, because although the concept of "compensatory measures" is used in Article 6(4), no definition is given; and, further, the concept of mitigation is not used in the Habitats Directive itself, and the idea of mitigation is not always a precise one. However, I think that the basic distinction which is relevant for purposes of the application of the Habitats Directive is clear enough. If a preventive safeguarding measure of the kind I have described is under consideration, which eliminates or reduces the harmful effects which a plan or project would have upon the protected site in question so that those harmful effects either never arise or never arise to a significant degree, then it is directly relevant to the question which arises at the Article 6(3) stage and may properly be taken into account at that stage. This view is supported by para. 108 of AG Kokott's Opinion in the *Waddenzee* case, where, in relation to what may be brought into account as part of an 'appropriate assessment' under the second limb of Article 6(3), she says in terms: 'Measures to minimise and avoid harm can also be of relevance.' The part of the judgment of the Court which corresponds with this part of her Opinion indicates no dissent from her approach. Rather, the wide language used by the Court to indicate what should be brought into account for the purposes of an 'appropriate assessment' under Article 6(3) supports it: an appropriate assessment requires 'all aspects of

the plan or project which can, either individually or in combination with other plans or projects, *affect [the objectives of the Directive]*' to be taken in to account (emphasis supplied), and preventive safeguarding measures which would prevent harm from occurring meet this description...

75. The CJEU has emphasised that Article 6 is to be read as a coherent whole in the light of the conservation objectives pursued by the Habitats Directive (see *Sweetman*, judgment, para. 32; *Briels*, judgment, para. 19). The first, screening opinion limb of Article 6(3) is intended to operate as a preliminary check whether there is a possibility of significant adverse effects on a protected site, in which case an 'appropriate assessment' is required under the second limb of Article 6(3) to consider in detail whether and what adverse effects might arise. Both limbs are directed to the same conservation objectives under the Directive, which explains why the threshold under the first limb has been interpreted as being so low (see para. 49 of AG Sharpston's Opinion in *Sweetman*). Since it is clear from the relevant case-law that preventive safeguarding measures are relevant matters to be taken into account under an 'appropriate assessment' under the second limb (see the discussion above), there is in my view a compelling logic to say that they are relevant and may properly be taken into account in an appropriate case under the first limb of Article 6(3) as well. In accordance with this logic, on a straightforward reading of para. 108 in AG Kokott's Opinion in the *Waddenzee* case, set out above, she treats preventive safeguarding measures as relevant to both limbs of Article 6(3).

76. If the competent authority can be sure from the information available at the preliminary screening stage (including information about preventive safeguarding measures) that there will be no significant harmful effects on the relevant protected site, there would be no point in proceeding to carry out an 'appropriate assessment' to check the same thing. It would be disproportionate and unduly burdensome in such a case to require the national competent authority and the proposer of a project to undergo the delay, effort and expense of going through an entirely unnecessary additional stage (and see in that regard paras. 72-73 of AG Kokott's Opinion in *Waddenzee*, where she explains that 'it would be disproportionate to regard any conceivable adverse effect as grounds for carrying out an appropriate assessment')."

58. The requirements of EU law are incorporated into domestic law through the provisions of The Conservation of Habitat and Species Regulations 2010. These secure compliance with the Habitats Directive. Under regulation 61(3) the local planning authority are obliged to consult with Natural England and take their views into account in reaching a decision in cases of this sort. They are an important consultee in the process as has been recognised, for instance in the case of R (Morge) v Hampshire County Council [2011] UKSC 2 at paragraphs 30 and 45; R (Akester) v Department for the Environment, Food and Rural Affairs [2010] Env LR 33 at paragraph 112; and R

(on the application of Prideaux) v Buckinghamshire County Council [2013] EWHC 1054 (Admin) paragraph 116.

Ground 1

59. The essential contention of the claimant is that even if an agricultural building is not inappropriate or, in simpler language appropriate, in the Green Belt, its impact on openness still has to be assessed because firstly, of the fundamental importance of openness, as set out in paragraph 79 of the Framework, and, secondly, as a result of the reference in paragraph 88 of the Framework to the requirement on a local planning authority, when considering "any" application to give substantial weight to any harm to the Green Belt. Thus the designation of an agricultural building as appropriate means, in the submissions of the claimant, that it does not have to be justified by very special circumstances under paragraph 87 but that an agricultural building could properly be refused permission because of its impact on openness. This was, in effect, the approach adopted by the appeal inspector, which I have set out above, and indeed my attention has been drawn to another appeal decision in which a different inspector adopted a similar approach.

60. As set out above, the officers' report and the committee rejected this analysis and, it is submitted, they were wrong in law to do so. I am satisfied that the claimant's reading of the policy is not correct. I have reached that conclusion for the following reasons. Firstly, it is important to note that in setting out the categories of exceptions to buildings being inappropriate development in paragraph 89, some are qualified by only being such an exception if they preserve the openness of the Green Belt or if they would not, as a redevelopment proposal, have a greater impact on the openness of the Green Belt. Similarly, in paragraph 90, other forms of development are not regarded as inappropriate if they pass a test of preserving the openness of the Green Belt.

61. Two consequential points arise from this observation. Firstly, it is to be noted that agricultural buildings are not the subject of any such qualification. Secondly, if an assessment of openness is a gateway in some cases to identification of appropriateness, it is strongly suggestive, in my view, that once appropriate, the question of the impact of the building on openness is no longer an issue.

62. The question is obviously related to the question of what the implications are of a development in Green Belt not being appropriate or, in simpler language, being appropriate. The question is: what is the development appropriate to? The answer must be: appropriate to the Green Belt. It follows that appropriate development is deemed not harmful to the Green Belt and its principle characteristic of openness in particular; it is appropriate to it. This is the conundrum which is being described by Ouseley J in the Europa Oil and Gas case at paragraph 66 which I have quoted above. The same building, in terms of its dimensions, may or may not be harmful to the Green Belt depending on its use and whether that use falls within the exceptions in paragraph 89 or 90. All new buildings in the Green Belt will in truth have some impact on openness but if they are appropriate in terms of the exceptions in paragraph 89, then they are not harmful to the Green Belt. This approach and understanding of the policy

answers the points which are made by the claimant in relation to paragraphs 79 and 88 of the Framework.

63. In relation to paragraph 79, this sets out the fundamental or overarching aim of Green Belt policy, in particular in relation to openness to which, for example, in paragraph 89, there are exceptions. Paragraph 88 requires substantial weight to be given to any harm to the Green Belt but if the development is appropriate, if it is a building which falls within one of the exceptions to a new building being deemed inappropriate under paragraph 89, then harm to openness does not fall to be part of the assessment, applying paragraph 88. There will not be any harm to openness of the Green Belt.

64. Little is added in substance to the claimant's arguments by the references to development plan policy. There was a section of the officers' report expressly devoted to the E13 policies and a conclusion was reached, as set out above, that the proposal was contrary to the E13 policies, and to policy E13A in particular. However, the officers noted that as a matter of planning judgment that had to be balanced with other issues in considering the application, including the needs of the glasshouse industry. This was a legitimate planning judgment within the overall planning evaluation of the merits of the application.

65. Whilst reference was made to policy GB10, and the officers' report listed it, it was, in my view, far from central to the concerns in this case since it relates to development "necessary to enhance the function and enjoyment of the Regional Park" which plainly this was not. GB11 and GB7A were far more obviously important and, as the officers' report makes clear at paragraph 16, were part of the discussion in relation to Green Belt policy which I have set out above. They were, therefore, taken into account and analysed as part of the overall assessment of Green Belt policy in considering the application. A further section of the officers' report was devoted expressly to the Regional Park. It formed clear conclusions in relation to policy RST24. Those conclusions were that the development was contrary to elements of that policy. That conclusion again fed into the overall planning conclusions and does not, in my view, give rise to any form of legal error in the consideration of the application.

66. This leaves two related residual complaints under ground 1. Firstly, that in paragraph 68 of the officers' report there is confusion about the presumption in favour of sustainable development from the Framework which, it is submitted, appears to have morphed into a "presumption in favour of sustainable economic development". This submission is related to a finding that paragraphs 28 and 29 of the officers' report concluded that the development was sustainable and corroborates the suggestion that the overall conclusions and the reference to "a presumption in favour of sustainable economic development" was a misconceived misapplication of the presumption contained in paragraph 14 of the Framework.

67. Furthermore, it is suggested that there is muddle in that it seems that a Framework presumption in favour of sustainable development has been applied when there was not warrant to do so by virtue of, for instance, any finding that the development plan policies which were relevant were silent, absent or out of date. It appears, the claimant

contends, that the officers have misconstrued the Framework as providing for a presumption in favour when economic development was engaged in the application.

68. In my view these arguments arise from what is essentially an impermissible over-reading of the contents of the officers' report. Standing back from the report and reading it as a whole, it is clear to me that paragraphs 28 and 29 are relating the question of sustainability at this point in the planning analysis to issues of resource conservation, accessibility and the like, and not to an overall assessment of whether granting permission would, in terms of the Framework taken as a whole, foster sustainable development.

69. The reference to a presumption in paragraph 66 is not, in my view, a re-invention of the presumption contained in paragraph 14 of the Framework, but rather a recognition of the strong support in the Framework for "proactively" supporting sustainable economic development. In my view, the balance required by section 38(6) of the 2004 Act which needed to be resolved in this situation, where there was conflict with development plan policies but material considerations in favour, is fully played out in paragraphs 66 to 72 of the officers' report. I am unable to conclude that there is anything in the officers' report which suggests a legal error in either their overall approach to decision making or in their interpretation of planning policy.

Ground 2.

70. The starting point in relation to the complaints about the EIA process in this case must be that, as is clear from the facts I have set out above, the defendant did in fact screen the development. That is evidenced by the validation sheet. The requirements of regulations 5, 7 and 9, even setting to one side the potential applicability of the approach taken by Lindblom J in the CBRE Lionbrook case were actually met. This is not a case where the question of whether this Schedule 2 development will be likely to have significant environmental effects has not been considered at all or has been considered incompetently. In any event, any challenge to the rationality of the conclusion that the development was unlikely to have significant environmental effects would face an uphill battle, being in mind that a very similar if not identical development would have been screened as part and parcel of the appeal process, and no environmental impact assessment was sought by the planning inspectorate as part of that process.

71. In truth, if there is a failure at all here, it is within a very narrow compass. It amounts to a failure to provide the accompanying reasons for the decision under regulation 4(7) and their publication under regulation 23. The purpose of providing reasons is to enable the participant to understand why a conclusion at the screening stage excluding the need for EIA has been reached. The need to understand the conclusion may be required so that representations might be made, but perhaps more importantly so that a challenge to the substance to the decision can be made if appropriate. It is important to bear in mind that no request was made as to the reasons as to why EIA had not been required in this case. And, therefore, the requirements of the Directive, as interpreted through the case of Mellor were not in fact breached. The breach which arises in this case is one related to the domestic law requirements.

72. Whilst extensive submissions were made as to the possible exercise of discretion, even if there had been a breach of EU law. following on from the case of Walton, in particular the claimant and the interested parties, in my view they do not arise in terms of any error of EU law that can be identified in this case. The legal error in relation to Regulations 4(7) and (23) does not, in my view, warrant the quashing of the decision. The circumstances which are pertinent to that exercise of discretion are, firstly, that the reasons for the screening opinion were in the public domain in any event in the form of the reasons which had previously been given in the screening opinion of 2001. Secondly, a similar application had already been independently screened in the context of the appeal process. Thirdly, there were no representations made by the claimant in the course of the application that EIA was required, not were any reasons for the absence of that requirement sought by the claimant.

73. I am, therefore, wholly unpersuaded that the breaches of Regulations 4(7) and 23 should, in the context of this case, lead to the decision being quashed. The complaint is, in my view, aridly technical has caused no material prejudice to the claimant and is not grounded in the substance of the decision which is under challenge.

Ground 3

74. It is clear that in reaching their conclusions as to whether the legal requirements in respect of the SPA had been satisfied, the Council adopted and relied upon the conclusions of Natural England. There is nothing necessarily wrong with taking that approach but it does beg two questions: firstly, whether Natural England applied the correct legal approach and, secondly, how were the adverse conclusions reached by the inspector addressed?

75. The Natural England response in this case, of 3 December 2013, cross referred to the response of 6 January 2012 which was in turn in similar terms to the response quoted above from 6 July 2011. It is clear from the face of the documentation which I have set out above that Natural England did reach conclusions applying the correct legal tests. They first considered whether in the light of the presence of the 30 Gadwall there would, as a result of the proposal, be likely significant effects, and concluded that without mitigation there would. They then took account of the measures shown on the "Habitat Enhancement and Landscaping Plan" and the other accompanying information about ecological mitigation in terms of replacement water bodies and the provision of other habitat, together with provisions as to the timing of the works in order to minimise disturbance, and reached the conclusion that with those measures in place they could be satisfied that no likely significant effects would arise.

76. Subject to three issues raised by the claimant, this is in and of itself unimpeachable. The first issue that the claimant raises is whether this opinion was, as required, based on up to date appropriate data. Superficially, there is some force in the complainant's complaint. The surveys on which the original ecological work was based were undertaken at the wrong time of the year. Those from the correct time of the year were not, it seems, either with the application or, for certain, packaged with the application in a form which was available to Natural England.

77. However, the question which arises as to whether or not the other data, with which I have been provided, on the abundance of Gadwall and Shoveler ducks suggests that the count of 30 Gadwall on which Natural England relied was an unsuitable or unreliable basis for decision making. In my view that allegation has simply not been made out. As I have set out above, the British Trust for Ornithology data shows some occasions when the Gadwall and Shoveler counts were higher but also occasions when they were lower. This is unsurprising given the transitory character of the nature conservation interest concerned and the fact that counts will therefore vary from time to time. But, in my view, that data does not come close to rendering the factual basis for Natural England's conclusions unsound. The 2012 Waterfowl Report, if it had been available, did not undermine and in fact supported the earlier data on which Natural England had relied.

78. It needs to be borne in mind that the question which was before Natural England here was not related to whether or not there was a sufficient abundance of the species concerned to give rise to the potential for a likely significant effect, but rather (they having concluded that such a likely significant effect could arise), the adequacy of the mitigation measures. The claimant, in my view, has not shown that in reality there is any basis on which the judgment as to that issue was not exercised on the basis of data which could provide a sound grounding for the decision which was reached.

79. The second question is whether the ecological works were in reality mitigation or, by contrast, compensation. Were the replacement elements of water body and habitat enlargements and enhancements aimed at avoiding or reducing the significant effects? That question must, in my view, be answered by starting with the protected nature conservation interest concerned and an understanding of the source of the effect.

80. In this case, the SPA interest concerned was the Gadwall and Shoveler ducks. It was not a particular protected habitat type but, rather, the species which were the basis of the designation. The works (and the conditions related to timing) were designed to reduce and avoid harm to the interests of those birds. This was to be achieved by undertaking works when, as a result of the birds' migration, they were far less abundant, and implementing a scheme "providing an adequate extent and continuity of supporting habitat" to eliminate, avoid or reduce the likely significant effects. This was, in my view, clearly mitigation, not compensation.

81. Once one starts with an understanding of the protected nature conservation interest and the source of the anticipated potential effect, the distinction between the present case and that of, of instance, the case of Briels is clear. In Briels the protected interest was a type of habitat which would be adversely affected, and the proposal was to create new areas of that habitat type. In that case, the new areas of habitat were not mitigation but were compensation for the impact on the habitat type, which was the nature conservation interest concerned. It was not, like the present case, a measure designed to eliminate, avoid or reduce the impact on the protected nature conservation interest in the first place.

82. The third point raised by the claimant is the question of the inspector's conclusions in the appeal decision. The claimant says that there is no evidence Natural England had

regard to the views of the appeal inspector which dismissed the view of Natural England upon which they relied in the present case, dated 6 January 2012, in the course of her decision. The response to this is that clearly Natural England had access to the inspector's report which was part of the application material, and the conclusion which must be drawn is that they were simply not impressed by her views. It is submitted they did not have to give reasons for rejecting the inspector's views beyond the re-iteration, unchanged, of their own view.

83. With some hesitation, I have come to the view that those later submissions are correct. It is unfortunate that Natural England did not provide reasons for rejecting the inspector's conclusions, which would have dealt with this point conclusively. Whilst in this case, I am satisfied that it is adequate to say that they had the inspector's view and they were undeterred by it, it may be that in other cases where, in effect, a local planning authority delegates their decision on such an issue to Natural England, upon whose views, on the recent authorities, they are entitled to rely, it may well be that in another case the court would require essential assistance from an understanding of the considerations underpinning their consultation response or Natural England's submissions as to the propriety of the approach which they adopted, either as part of a planning authority's defence to a challenge, or by them taking the role of an interested party. However, on the facts of the present case, I am satisfied that Natural England had access to the appeal decision and that it clearly did not in any way impact upon their conclusion that the approach they had taken in respect of the earlier two applications was one which remained legally valid. I am therefore satisfied in relation to this ground that there is no element of illegality in the Council's decision.

Conclusion

84. For all of these reasons, the claimant's case on each of the three grounds advanced must be dismissed.

85. MS THOMAS: My Lord, may I first of all say I do apologise for coming late; I am afraid we got no notification that you were sitting this morning, so therefore I had arrived in chambers and was told to hot foot it over here. So I have come, I am afraid, without specific instructions and no instructing solicitor, although my general instructions are to apply for costs.

86. MR JUSTICE DOVE: Well, I don't think you would need a crystal ball to work that out, but I did say at the last hearing that I would permit a timescale for the making of written observations on the various ancillary matters. Mr Graham indicated before your arrival, at the outset, that he had come to resist any application for permission to appeal or apply for permission to appeal orally, depending on what the outcome of the decision was. I am happy, in the circumstances, to hear that application now, and I would hope that any consequential matters could then be dealt with by consent. But I will provide until Friday 4.00 pm for either a consent order to be lodged or, alternatively, written submissions on anything you fall out about to be provided.

87. MS THOMAS: I am grateful.

88. MR GRAHAM: My Lord, I do apply for permission to appeal on all three grounds. I will be brief as to the basis for that application. On ground 1, in my submission, this is a point which is not clear from the wording of the Framework because, in particular, there is a question which is not the subject of previous authority as to whether the fundamental aim in paragraph 79 and the objectives in paragraph 80 are to be read down in the light of the exceptions further on at paragraphs 89 and 90 or, conversely, whether or not, as the claimant submitted, the exceptions are to be read down in the light of those objectives.

89. In my submission, that is a point which is not clear; it is a point on which the claimant would have a real prospect of success on appeal; it wouldn't be a fanciful prospect of success. My Lord, in relation to that as well, there is a compelling reason for the Court of Appeal to address these. The Green Belt comprises about thirty something (Inaudible) per cent of all the land in England. There is a clear public interest both in those interests in favour of conservation of the Green Belt, the statutory purpose of the Park and my client, and also in those affected farmers, growers and livestock farmers in particular, who will be affected by your Lordship's ruling on this question as to what the position is. Certainly my client is facing and will face other applications that will come forward within the Park which will be for large scale agricultural buildings. It is clear that the planning officer in this case has accepted that this would set a precedent. And this is a matter that my client cannot leave as it is and would be likely to raise this issue in subsequent cases. And, my Lord, the submission is that there is a real risk that there would end up being conflicting, first instance decisions on this, and this is a point that would benefit from having some certainty at an appellate level at this stage. My Lord, clearly development decisions will need to be made on the basis of what the law is and, in addition, if necessary, one group of interest or another will wish to lobby the Government as to potentially change the wording of the policy.

90. My Lord, in relation to the point about how the local plan was dealt with, my submission is simply this: that again the wording of the officers' report itself says expressly that a presumption in favour of sustainable economic development was applied. Again, in my submission, there must be a real prospect that the Court of Appeal would come to the view that that was the approach taken.

91. My Lord, turning to grounds 2 and 3, in relation to EIA, the claimant's point is simply this. The procedure was not followed in terms of reasons. Your Lordship's reasons for not quashing the decision relied, in particular, on the previous 2011 application having been in the public domain, and on the similar 2011 application being screened on the appeal by the planning inspectorate.

92. In respect of those two points, there is no evidence that the 2011 opinion was in any way linked back to the validation or the application in this case. The validation itself was not published on the website so there is no way that a member of the public or my client going to the website would know either at all that the application has been screened, let alone to then ask for the reasons as to what that was. Nor would they have any idea to guess that the reasons might be contained in another document from 2011 or indeed in some other document produced by PINS(?) which was not on the register either. So, my Lord, those are the submissions on that.

93. In terms of whether representations were made by my client about whether EIA was required, which was the other ground that your Lordship gave for refusing to quash the decision, it was not incumbent on my client, in my submission, to ask for EIA to be carried out. What my client did do was raise all the substantive environmental effects and submit that those were significant effects that justified refusal of permission. So my submission is simply that the authority ought to have considered, as in fact this was not on the planning register, whether or not screening was required. So it is not for my client to raise any more than it did because it made a representation.

94. Addressing ground 3, your Lordship's judgment acknowledged that in this case the local authority had effectively delegated its responsibility as competent authority to Natural England. And your Lordship used that word "delegated". My Lord, first of all, the authority did not delegate to Natural England; it possibly could have done that under the Local Government Act. It might have arranged for another body to carry out its function, but it did not do that. What it has done is it has deferred to Natural England; it has allowed itself to be dictated to by Natural England. In my submission, that, on fundamental administrative law principles, is not a permissible thing for a competent authority to do. It cannot be dictated to by Natural England; it has to consider the matter for itself. And my Lord, the question is not, in my submission, whether Natural England gave reasons for disagreeing with the planning inspector, which they did not, and your Lordship has inferred from their potential access to that opinion that they disagreed with the inspector and they did consider it, in my submission that does not get around the issue, which is that no reasons were given for why they disagree. But the issue us not that; it is about he competent authority, and whether the competent authority had a good reason, any reason, for disagreeing with the planning inspector.

95. Certainly the local authority could not have known whatever Natural England's unstated reasons were for it disagreeing, assuming that it had consciously considered it and disagreed, because Natural England did not give reasons. So that begs the question of how the local authority, having regard -- as we know it is a mandatory relevant consideration to have regard to a previous planning inspector's decision -- how they could have justified giving a reason for departing from that decision. It is no good just to say, well, Natural England disagree; they have got to explain why, what the rational basis is for that disagreement. So, my Lord, that is my submission on ground 3. I do submit that that is again is a ground that has a real prospect of success and, similarly, in terms of the underpinning data. Your Lordship found that there was no basis contesting the reliability of the survey that found 30 Gadwall or Shoveler. My Lord, there was, and simply because on one day there were 30 and on two other days there were significantly higher numbers, I think nearly double numbers of birds, that in itself is grounds for suggesting that the reliability of that first day cannot be relied upon because that was only one day's data. The problem is unless one does a whole lot of dates of data, one does not know. There are a number of things to do with whether the timing and so on as to what might affect the numbers of birds but, in my submission, the number of birds was something that was critical because it is not just that Natural England found that there was a threshold that once the project harms let us say 20 birds, that that means it is likely to have a significant effect, and then we ignore how grave that effect is on the number of birds affected. It is not that and then you just jump to

look at the mitigation. It must be relevant to what mitigation is needed as to how many additional birds the new habitat has to accommodate before one can conclude logically that any project as a whole, taking into account the mitigation, is going to avoid the significant effect on the population.

96. Now if, in fact, there were a maximum of say 60 birds living at the site, that is clearly double. Even if it is 50, it is a large additional increment. So if Natural England, as they did, assumed that the impact was limited to 30 birds when in fact that they are looking at double, my Lord, that is my submission: that it must be material and we are dealing, of course, with data that even if that data had been sufficient at the time to be reliable, back in 2011, by the time the decision is made, 2014, we are already three years out of date. So, my Lord, again, in my submission, it must be reasonably arguable that that was outdated for the purpose of the Nomarchiaki test.

97. My Lord, those are my submissions.

98. MR JUSTICE DOVE: Thank you very much. Mr Graham, I am not going to grant permission to appeal. If you want to take this further, you should take it somewhere else.

99. So far as ground 1 is concerned, I am clear that the appropriate interpretation of the paragraphs is as I have explained in the judgment. You raised the questions of your clients and others being concerned as to the implications of that interpretation. That is a matter which can be raised, as you pointed out yourself in your submissions, elsewhere if the policy needs changing. But the policy is as I have explained it, and I am not in any doubt about that.

100. So far as ground 2 is concerned, for the reasons which I have set out, this is not a case where the technical breach of regulation 4(7) and 23 would justify a quashing of the decision, and I do not consider that there is any arguable prospect of you persuading the Court of Appeal to a different point of view.

101. So far as ground 3 is concerned, as I set out in the judgment, and what you have not addressed in your submissions, is fundamentally the approach taken by Natural England, subject to the three points which I deal with in the judgment, was unimpeachable. And, for the reasons which I have given in the judgment pertaining to the quality of the bird data, the availability of the inspector's report, and the distinction between mitigation and compensation, there is not any reasonable prospect of succeeding in relation to this element of the case on an appeal.

102. So, for those reasons, I am not going to accede to your application.

103. There will be other matters that will need to be addressed.

104. Mr Graham, you obviously were aware of today's read out.

105. MR GRAHAM: Yes, my Lord. We received an email from your clerk. It was a copy-in to an email to the listing office which was that your Lordship would like the

hearing to be listed for 10.30 am in court 37. What we did not get was a response or something confirming.

106. MR JUSTICE DOVE: You didn't get anything from the listing office.

107. MR GRAHAM: But we did look on the website on Friday, and it came up there.

108. MR JUSTICE DOVE: I will take it up with the listing office via my clerk because obviously the purpose of that email was to get them, the listing office, to tell everybody that it was on.

109. MS THOMAS: Just to clarify, the email went to the one clerk who was away but it had a message on saying: if this is urgent, resend the email to the other clerk. So I am not saying that one did not come through, but it was in those sort of terms that Mr Graham described.

110. MR JUSTICE DOVE: It is all to do with the vacation, I am sure. Thank you both for coming. If you cannot agree about any other matters, please representations by 4.00 pm Friday. Thank you very much.