Neutral Citation Number: [2019] EWHC 1211 (Admin)

Case No: CO/3625/2018
AND
CO/3900/2018

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14/05/2019

Before :

MR JUSTICE DOVE

- -

FOR CO/3625/2018
Between :

CANTERBURY CITY COUNCIL	**Claimant**
- and -	
SECRETARY OF STATE FOR HOUSING, COMMUNITIES AND LOCAL GOVERNMENT	**Defendant**
-and-	**Interested**
HOLLAMBY ESTATES (2005) LIMITED	**Party**

James Pereira QC and Isabella Tafur (Instructed by **Peter Kee of Canterbury City Council**) for the **Claimant**
David Elvin QC and Zack Simons (Instructed by the **Government Legal Department**) for the **Defendant**
Mark Lowe QC and Robin Green (instructed by **DMH Stallard LLP**) for the **Interested Party**

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FOR CO/3900/2018

CRONDALL PARISH COUNCIL	**Claimant**
-and-	
SECRETARY OF STATE FOR HOUSING, COMMUNITIES AND LOCAL GOVERMENT	**1st Defendant**
-and-	**2nd Defendant**
CRONDALL DEVELOPMENTS LIMITED	
-and-	
HART DISTRICT COUNCIL	**Interested Party**

Robert McCracken QC and Horatio Waller (instructed by **Emma Montlake of the Environmental Law Foundation**) for the **Claimant**

David Elvin QC and Zack Simons (instructed by **Government Legal Department**) for the 1st **Defendant**
Ruben Taylor QC (instructed by **Andrew Piatt) for the 2nd Defendant**
No representation for the Interested Party

Hearing dates: 6-8th March 2019

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Approved Judgment

Mr Justice Dove :

Introduction

1. This judgment addresses the claims in two cases. They have in common a similar error of law in the decision taking process, related to the question of whether or not an Appropriate Assessment of the effects of the developments proposed in each case was required pursuant to regulation 63 of the Conservation of Habitats and Species Regulations 2017 ("the Habitats Regulations") which transposes into domestic law the requirements of Article 6 of Directive 92/43/EEC ("the Habitats Directive"). The details of the error of law are identified below, but it suffices to observe at this stage that the error is conceded by the Secretary of State for Housing, Communities and Local Government, hereafter referred to in each case as the Defendant. In both cases there are additional grounds upon which it is contended that the Defendant erred in law and which are set out below.

2. The structure of this judgment is as follows. Firstly, the factual context of each of the claims is set out together with a brief rehearsal of the grounds upon which the claim is brought. Thereafter, the judgment examines the error of law which is in common in each of these cases, and the legal principles relevant to whether or not in the light of that error the decision should be quashed. The judgment then examines the relevant law applicable to the other grounds upon which each claim is brought, before proceeding to an examination of the merits of each claim.

3. I would wish to place on record my gratitude to all of the lawyers for their contributions towards the preparation and presentation of these cases. The collation of the relevant papers, along with the careful and focused written and oral submissions on all sides enabled a very efficient hearing and have assisted greatly in my task in preparing this judgment.

The first claim (the "Canterbury case")

4. On the 16th June 2015 the Interested Party submitted a hybrid application for the following form of development

> "Full: Demolition of existing Dwelling house in Conservation Area and two other dwellings, change of use of lagoon to allotments, ecological habitat and footpath link and improvements along Bullockstone Road.
>
> Outline: Development of a new mixed use neighbourhood with up to 800 dwellings, commercial and community development within a local centre, spine road, estate roads, other means of access, pedestrian and cycle links, improvements to existing footpath, sustainable urban design drainage measures, landscaped noise bund/ earthworks and boundary treatments, public open space, highway related and utilities infrastructure. Approval is sought for means of access from Canterbury Road and Bullockstone Road."

5. The Claimant, Canterbury City Council ("CCC") failed to determine the planning application within the prescribed period, and the Interested Party appealed to the Defendant. Amongst the seven reasons why, after the submission of the appeal, CCC resolved that planning permission should be refused were the likelihood of a severe adverse impact on the highway network, including inadequate and unsafe works to Bullockstone Road, together with a conflict with the Habitats Regulations. On the 27th June 2016 the Defendant recovered the decision for his own determination. During the run up to the public inquiry into the appeal matters moved on in relation to the highway proposals incorporated as part of the appeal, and, akin to the Inspector's report, this judgment focuses on the proposals as they stood at the time of the public inquiry rather than examining the evolution of those proposals prior to that. The application was accompanied by an Environmental Impact Assessment ("the EIA") prepared pursuant to the Town and Country Planning (Environmental Impact Assessment) Regulations 2011.

6. The EIA covered a considerable amount of environmental information. Of particular interest so far as the present case is concerned was Chapter 10, which covered Ecology and Nature Conservation. The EIA, and in particular Chapter 10, were presented to the public alongside a Habitats Regulations Assessment Screening Statement. The contents of both of these documents mirrored each other in so far as they provided information about potential impacts upon European sites. The documentation noted that there were a number of European sites within 10 kilometres of the development proposal. Each of those sites was examined in detail in relation to both its particular nature conservation interest, the reason for its designation, and the potential for the development to have an impact upon it both during the construction phase of the development as well as in its operational phase after the proposed dwellings were in residential use.

7. Within the Habitats Regulations Assessment Screening Statement three potential types of environmental impact were examined. Firstly, the impact on water quality at two European sites with hydrological links to the development site, namely the Thanet Coast and Sandwich Bay SPA/Ramsar and The Swale SPA/Ramsar. The Habitats Regulation Assessment Screening Statement concluded that given the effective implementation of a Construction Environmental Management Plan, which would regulate the surface water drainage strategy and appropriate treatment of waste water, "no significant effects to the Thanet Coast and Sandwich Bay SPA/Ramsar are considered likely". The Swale SPA/Ramsar, being a greater distance from the proposed development was also not considered to have any likely significant effects.

8. The second type of potential environmental impact examined was that of recreational pressure arising from an estimated 1,920 new residents in the approximately 800 new residential dwellings proposed. It is unnecessary to rehearse the conclusions reached in relation to European sites others than the Thanet Coast and Sandwich Bay SPA/Ramsar, save to say that in respect of all other European sites no significant effects were anticipated by the Habitats Regulation Assessment Screening Statement.

9. In relation to the Thanet Coast and Sandwich Bay SPA/Ramsar the document recorded as follows:

> "Thanet Coast and Sandwich Bay SPA/Ramsar

5.1.31 Should an increase in visitor numbers to Thanet Coast and Sandwich Bay SPA/Ramsar arise as a result if the Lower Herne Village development, this would have the potential to disturb the bird populations which contribute to the special interest of this designated site.

5.1.32 Despite the generous provision of accessible greenspace as part of the proposed scheme, it is acknowledged that a proportion of the new residents are still likely, on occasion to visit the Thanet Coast and Sandwich Bay for the purpose of recreation, owing to the different type of recreational experience the coastline can offer.

5.1.33 As detailed in the HRA screening statement for the draft local plan (AMEC, 2013), it is anticipated that the presence of management plans for those European sites impacted by recreational activities, such as Thanet Coast and Sandwich Bay, will mitigate the potential adverse effect on increased numbers of recreational visitors associated with the Project. If necessary, this will involve restricting public access from sensitive areas of the sites or at sensitive times of the year through, for example, the provision of wardening, improved waymarked trials and signage.

5.1.34 In light of the above, it is understood that the draft local plan, once adopted, will be supported by the Strategic Access, Mitigation and Monitoring Plan for European designated sites in the Canterbury District. This Plan will be applied to new residential development within the zone of influence of those Natura 2000 sites designated for their bird populations and identified as being vulnerable to an increase in recreational pressure. This will ensure that no likely significant effects will result from development proposed under the local plan.

…

5.5.36 As there may be some minor use of the Thanet Coast and Sandwich Bay SPA by residents of the Lower Herne Village, despite the generous on-site provision of accessible greenspace, there remains the potential for disturbance upon the bird populations it supports.

5.1.37 The developers of the Project site are therefore committed to providing the necessary level of financial contribution (appropriate to the scale of development and its distance from the Thanet Coast and Sandwich Bay SPA/Ramsar) towards its on-going access management. This will be in accordance with the Strategic Access, Mitigation and Monitoring Plan for the Thanet Coast and Sandwich Bay SPA, as and when formally adopted. This approach has already been discussed and agreed in principle with CCC.

> 5.1.38 Taking into account the degree of onsite provision of accessible greenspace to be delivered as part of Lower Herne Village, and the commitment to providing financial contributions towards on-going access management for sensitive habitats, no likely significant effects upon the bird populations for which the Thanet Coast and Sandwich Bay SPA/Ramsar is designated are expected."

10. The third type of environmental impact examined by the Habitats Regulations Assessment Screening Statement was impact upon air quality. The document concluded that as a result of the distance of European sites from any roads affected by traffic increases there would be no significant air quality effects on any European sites. The document completed its assessment by examining the impact of the proposed development in combination with other proposals, plans and projects and reached the same conclusion namely that there were not likely to be any significant in-combination effects.

11. These conclusions were further reflected in the conclusions of Chapter 10 of the EIA in the following terms:

> "10.9.7 Statutory and non-statutory sites of nature conservation importance will not be subject to significant effects during construction. The implementation of a carefully designed SUDs strategy within the scheme design will also ensure impacts on designated areas as a result of changes to hydrology during operation of the proposed development, are avoided.
>
> 10.9.8 Minor adverse impacts associated with an increase in recreational use of the Thanet Coast and Sandwich Bay SPA/Ramsar during operation of the proposed development are possible. This is despite the generous provision of on-site accessible greenspace to be delivered as part of the proposed development, which will absorb much of the daily recreational needs of the new residents. The Applicant is therefore committed to providing a financial contribution towards the agreed visitor management measures. It is expected this will ensure significant effects on the Thanet Coast and Sandwich Bay SPA/Ramsar arising from recreational use are avoided."

12. Natural England were consulted by CCC as part of the development control process. On the 4th November 2015 Natural England responded to CCC and provided the following in relation to the assessment of European sites:

> "**Town and Country Planning (Development Management Procedure) (England) Order 2010**
>
> **The Conservation of Habitats and Species Regulations 2010 (as amended)**
>
> **The Wildlife and Countryside Act 1981 (as amended)**

The application site is in close proximity to European designated sites (also commonly referred to as Natura 2000 sites), and therefore has the potential to affect their interest features. European sites are afforded protection under the Conservation of Habitats and Species Regulations 2010, as amended (the 'Habitats Regulations'). The application site is located approximately:

- 960m north-east of West Blean and Thornden Woods Site of Special Scientific Interest (SSSI)

- 1.2km north-west of the Blean Complex Special Area of Conservation (SAC) and East Blean Woods SSSI

…

- 2.2km south of Thanet Coast & Sandwich Bay Special Protection Area (SPA) and Ramsar site and Thanet Coast SSSI

- 3.3km southeast of Tankerton Slopes and Swalecliffe SAC

Please see the subsequent sections of this letter for our advice relating to SSSI features.

In considering the European site interest, Natural England advises that you, as a competent authority under the provisions of the Habitats Regulations, should have regard for any potential impacts that a plan or project may have. The Conservation objectives for each European site explain how the site should be restored and/or maintained and may be helpful in assessing what, if any, potential impacts a plan or project may have.

We note the Habitats Regulations Assessment Screening Statement provided with the proposals.

In advising your authority on the requirements relating to the Habitats Regulations Assessment, and to assist you in screening for the likelihood of significant effects, based upon the information provided, Natural England offers the following advice:

- The proposal is not necessary for the management of the European sites

- Subject to the following…

- Appropriate financial contributions is made to the Thanet Coast and Sandwich Bay SPA Strategic Access

> Management and Monitoring (SAMM) Plan being developed in conjunction with Thanet District Council
>
> - This strategic mitigation will need to be in place before the dwellings are occupied
>
> - Best practice measures through the Construction Environmental Management Plan (CEMP) and Sustainable Drainage Scheme to prevent contaminated surface run-off during construction and operation entering hydrological links to the Thanet Coast and The Swale SPAs/ Ramsar sites
>
> - Confirmation from Southern Water that the Herne Bay Wastewater Treatment Works can accommodate sewerage discharge from the Strode Farm development
>
> Natural England is satisfied the proposals are not likely to have a significant effect on the Blean Complex and Tankerton Slopes and Swalecliffe SACs."
>
> "i) SPA mitigation
>
> 4.3 As identified in chapter 10 of the ES the worst case assessment of impacts on Statutory Designated Areas of Nature Conservation Importance was of a minor adverse effect to the Thanet Coast and Sandwich Bay SPA which can be mitigated by financial contributions towards the management of the SPA. Accordingly, the appellant has agreed to secure the full requested obligation on a pro-rata basis towards the delivery, in perpetuity, of the Thanet Coast and Sandwich Bay SPA SAMM Plan in their S.106 Agreement to mitigate the impact of the development. The LPA has no objection to the proposal in this regard on the basis of this obligation being secured in full. This figure will be apportioned on a pro rata basis in the S106 Agreement depending on the final number and mix of dwellings to be approved at Reserved Matters stage."

This response was reiterated in substance in an email to CCC from Natural England on the 11th February 2016.

13. For the purposes of the public inquiry in relation to the appeal a Statement of Common Ground was prepared registering the matters which were not in dispute between CCC and the Interested Party. The Statement of Common Ground recorded the following in relation to European sites:

> "i) SPA mitigation
>
> 4.3 As identified in chapter 10 of the ES the worst case assessment of impacts on Statutory Designated Areas of Nature Conservation Importance was of a minor adverse effect to the

> Thanet Coast and Sandwich Bay SPA which can be mitigated by financial contributions towards the management of the SPA. Accordingly, the appellant has agreed to secure the full requested obligation on a pro-rata basis towards the delivery, in perpetuity, of the Thanet Coast and Sandwich Bay SPA SAMM Plan in their S.106 Agreement to mitigate the impact of the development. The LPA has no objection to the proposal in this regard on the basis of this obligation being secured in full. This figure will be apportioned on a pro rata basis in the S106 Agreement depending on the final number and mix of dwellings to be approved at Reserved Matters stage."

14. The public inquiry in relation to the appeal took place between the 10th January 2017 and the 31st July 2017. The Inspector's report to the Defendant was dated the 25th September 2017. In relation to the site and its surroundings the Inspector noted the following relative to European sites and other sites of natural conservation interest:

> "2.9 There are no designated areas of nature conservation interest within the Strode Farm site. However within a radius of 5km are West Blean and Thornden Woods Site of Special Scientific Interest (SSSI), the Blean Complex Special Area of Conservation (SAC) and the East Blean Woods SSSI. Along the coast are located Thanet Coast and Sandwich Bay Special Protection Area (SPA) and Ramsar site and Thanet Coast SSSI, together with Tankerton Slopes and Swalecliffe SAC. As set out in its statutory consultation response, Natural England was satisfied that, subject to mitigation, the proposals would be unlikely to have a significant effect on these sites."

15. Having noted the development plan policy support for the protection of European sites, and the existence of the Strategic Access Management Monitoring Plan 2014 (a strategy to mitigate the potential in-combination impact of new housing development and the recreational pressure associated with it), the Inspector went on to note the observations in the Statement of Common Ground which have been set out above. She then went on in her conclusions to record the following in respect of potential impacts on the natural environment:

> "Natural environment
>
> 11.109 The residential development would be likely to increase recreational activity within the internationally important Thanet Coast and Sandwich Bay SPA and Ramsar site. The potentially harmful impact is able to be adequately mitigated by a planning obligation, which secures a financial contribution towards the implementation of the SAMM before the commencement of each phase. As a consequence the development would be unlikely to have a significant effect on the important interest features of the SPA, whether alone or in combination with other plans and projects. The obligation is directly related to the development and is necessary to make the scheme acceptable in planning terms through compliance with

> the CDLP Policies SP6, LB5 and LB6 on SSSI's. The sum is linked to the proposed number of dwellings and hence the obligation is fairly and reasonable related in scale and kind to the development. An appropriate assessment of the implications of the proposals for the SPA is not necessary. [2.9, 3.8, 3.22, 5.4, 10.23-10.25]
>
> 11.110 Reliance on the use of best practice measures through a CEMP and a sustainable drainage scheme would be appropriate to prevent contaminated surface run-off during construction entering hydrological links to the Thanet Coast SPA and Ramsar sites. [2.9, 10.5, 10.6]
>
> 11.111 On the basis of the advice of Natural England, the development is unlikely to have a significant effect on the Blean Complex and Tankerton Slopes and Swalecliffe SACs. [2.9]"

16. As set out above, an issue which remained in dispute in the appeal related to highway infrastructure. The background to this issue is provided by the Canterbury District Local Plan (the "Local Plan") in which the site of the proposed development was identified under policy SP3 as "Site 5, Strode Farm, Herne Bay". Policy SP3 identified as part of the infrastructure requirements for the site the provision of a new highway or spine road through the site linking Thanet Way to Bullockstone Road, and improvements to Bullockstone Road, all of which were indicated on the Local Plan's Proposals Map. Another site was identified for residential development known as Hillborough which the Local Plan also contemplated would deliver highway infrastructure works through policy SP3 which "may include improvements to Bullockstone Road which forms part of the Herne Relief Road".

17. CCC's case to the inquiry was that against this development plan background, and in the light of the evidence presented at the inquiry, there was an overwhelming case for the early delivery of the road infrastructure improvements comprising the new highway through the site and the improvements to the Bullockstone Road. This approach was justified by the need to comply with policy SP3, the requirement to avoid severe residual capacity problems on the A291 through Herne (with associated safety issues) and the need to ensure that all residents lived within 400m of a bus stop so as to maximise the use of public transport. CCC's concerns included that the planning obligation offered by the Interested Party only included a contribution towards the Herne Relief Road, leaving the delivery of the Herne Relief Road to depend upon an acceptable scheme for the Hillborough site coming forward and the Hillborough developers being willing to contribute the balance of the monies required to deliver the scheme.

18. By contrast, the case advanced at the inquiry by the Interested Party related both to the timing of the completion of the spine road which was necessary, and also the extent of funding necessary to address the impact of the development through the provision of offsite highway improvements. Whereas CCC contended that the spine road and the Bullockstone Road improvement scheme (the "Kent BRIS") should be completed and open for use prior to the completion of the 410th dwelling, or by the end of 2023 whichever was the sooner, the Interested Party contended that the

payment of its contribution was not required prior to the completion of the 500th dwelling, and that the overall completion of the Herne Relief Road would not be necessary without the Hillborough development. There were, therefore, issues in relation both to the timing of the provision of the spine road and also the amount and timing of any apportioned costs towards the Kent BRIS.

19. The Inspector dealt with these issues in relation to timing and funding separately. She noted the provisions of policy SP3 of the Local Plan requiring the provision of the spine road and the improvements to Bullockstone road as a primary objective. She rejected the arguments raised by the Interest Party in relation to the capacity of the A291 through Herne, concluding that the provision of the Herne Relief Road would be necessary in advance of the timescales they proposed. So far as road safety was concerned she noted that the provision of the Herne Relief Road would improve highway safety on the A291 through Herne, whereas delay in providing the Herne Relief Road would have a small negative effect. She accepted CCC's position in relation to the need for the completion of the spine road by the 410th dwelling or 2023, in order to reduce the length of time and number of households without good access to a bus service. Air quality was, she concluded, a further reason to support early delivery of the Herne Relief Road.

20. Her conclusions, therefore, in relation to timing were as follows:

> "Conclusion on timing
>
> 11.84 The completion of the spine road by the 410th dwelling is required to avoid the development having a severe impact on the capacity of the A291 and reducing highway safety for a significant period of time during construction. To delay the ability for residents to have good access to public transport and more particularly a bus service would be contrary to policy objectives to give people a real choice about how they travel and to reduce social exclusion. In the centre of the village increases in traffic would make the pedestrian environment inhospitable and delay securing improvements in air quality. Amenity would deteriorate. Overall there would be a severe impact on the community.
>
> 11.85 The phasing of the development has not been satisfactorily addressed, contrary to a requirement of Policy SP3. Insufficient account has been taken of principles of the Transport Strategy in Policy T1 namely (a) controlling the level and environmental impact of vehicular traffic including air quality, and (b) providing alternative modes of transport to the car by extending provision for pedestrians, cyclists and the use of public transport. A failure to deliver the HRR at an appropriate point in the development programme would delay the provision of an integral part of the development, undermining the intent of Policy T13."

21. The Inspector went on to consider the issues arising in relation to funding. She noted that the funding dispute related only to the Kent BRIS. She also noted the requirement

from policy SP3 of the Local Plan for the proposed development to provide both the spine road and the improvements to Bullockstone Road, and the fact that this requirement was expressed differently to the other proposed residential sites under policy SP3, where the text of the policy noted that contributions "may be sought", a conditional approach not reflected in the text for the Local Plan in relation to the proposed development site.

22. Against the background of this policy strategy in relation to highway improvements she noted the following:

> "Proposed contribution
>
> 11.92 The outstanding total sum of £4,581,883, as stated in the SCG – HRR, was calculated on a delivery date of 2020 and was based on an estimated cost. The appellant's contribution of £2,331,000 towards the KCC BRIS would be in accordance with the apportionment set out in the SCG – HRR. The planning obligation allows for the contribution to be increased in line with the All Construction Tender Price Index (or equivalent). There is no provision to reflect any change to the base cost of the scheme as a result of a detailed cost plan or alterations to the scheme that were made prior to the grant of planning permission. The omission is significant and could result in a shortfall in the necessary contribution, even without taking account of the considerations raised by the Council.
>
> 11.93 The contribution is timed to be made prior to the occupation of the 500th dwelling to tie in with the appellant's proposal to complete the spine road in the final phase of development. I have concluded that delivery of the HRR earlier in the development programme is justified in order to achieve policy objectives. Consequently the contribution should be paid on first occupation of the 250th dwelling in accordance with the Council's requirement.
>
> 11.94 For these reasons alone the planning obligation fails to ensure the necessary infrastructure is provided in an acceptable timescale and that a proportionate contribution is secured. Consequently there is a failure to comply with Policies SP3 and T13.
>
> 11.95 The Council is requiring the appellant not only to pay its share of the cost of the Kent BRIS but also the sum apportioned to Hillborough, for an interim period at least until that side comes forward for development. It is the case that the wording of the Policy SP3 is less definitive for Hillborough (site 3) when compared to Strode Farm in respect of the Bullockstone Road infrastructure. However, when the traffic and environmental impacts are taken into account there is strong justification for Hillborough to contribute to the Kent BRIS.

> Policy T13 is reasonably interpreted in such a way. The SCG – HRR also strongly supports such an approach.
>
> 11.96 An essential test is whether the obligation would be fairly and reasonably related in scale and kind to the development to be permitted. Viability and flexibility on other related infrastructure provision are not determining factors. It would be disproportionate to require the appellant to commit to pay all the outstanding balance now with no enforceable mechanism in place to ensure the Hillborough share is secured.
>
> 11.97 The planning position has moved on with the adoption of the CDLP. There is the prospect of the Hillborough sites coming forward within a short timescale that could offer a way forward and avoid a serious delay to housing delivery on sites that are allocated in the development plan. The matter at issue now is primarily one of timing and coordinating development with the essential infrastructure to serve it. The onus is on all interested parties to come forward with a solution that avoids KCC forward funding the project and not recovering the costs of doing so."

23. She went on to form the following conclusions in relation to the highway infrastructure proposals:

> "Conclusions on highway infrastructure
>
> 11.99 There are no outstanding issues regarding the design standard of the proposed highway infrastructure at this outline stage.
>
> 11.100 The proposal would not deliver the HRR at an acceptable stage in the development by reason of the phasing programme and the timing of the contribution to the Kent BRIS. There is a shortfall in funding the Kent BRIS.
>
> 11.101 The proposal would not deliver the highway infrastructure required to enable the Strode Farm development to proceed in a timely and coordinated manner. Safe and suitable access to the site would not be achieved for all and the residual cumulative impact of the development would be severe through the construction phase."

24. The Defendant responded to the Inspector's report with a "minded to" letter dated 23rd March 2018. He agreed with the Inspector's reasoning and conclusions in relation to impact on the natural environment set out in paragraphs 11.109-11.111 above. In respect of highway infrastructure the Defendant observed as follows:

> "Highway Infrastructure

55. The Secretary of State has given careful consideration to the Inspector's analysis at IR11.40-11.77. He notes at IR11.42 that the principle matters in dispute between the main parties are timing and funding for the Herne Relief Road (HRR).

56. With regard to capacity, for the reasons given at IR11.45-11.60, the Secretary of State agrees with the Inspector at IR11.61 that there would be a capacity objection even without the Hillborough development and that completion of the HRR would be necessary in advance of proposed timescale.

57. With regard to highway safety, for the reasons given at 11.62-11.68, the Secretary of State agrees with the Inspector that the HRR would improve highway safety on the A291 through Herne (amounting to a moderate benefit), while the delay in providing the HRR would have a small negative effect.

58. The Secretary of State has given careful consideration to the Inspector's analysis on public transport at IR11.69-11.77. Like the Inspector at IR11.70, the Secretary of State considers that on current evidence the spine road and the Kent BRIS both need to be in place to ensure a bus service operates through the site. He notes that the phasing programme put forward by the appellant would not deliver completion of the spine road until the final phase of the development, which could be some 8 years or more from commencement of development (IR11.74).

59. Overall, like the Inspector at IR11.84, the Secretary of State concludes that the completion of the spine road by the 410th dwelling is required to avoid the development having a severe impact on the capacity of the A291 and reducing highway safety for a significant period of time during construction. He agrees with the Inspector that to delay the ability for residents to have good access to public transport and more particularly a bus service that would be contrary to policy objectives to give people a real choice about how they travel and to reduce social exclusion. For the reasons given by the Inspector at IR1.78-11.83, the Secretary of State agrees with the Inspector at IR11.84 that in the centre of the village increases in traffic would make the pedestrian environment inhospitable and delay securing improvements in air quality, amenity would deteriorate, and overall there would be a severe impact on the community.

60. For the reasons given at IR11.84-85, the Secretary of State agrees with the Inspector that the phasing of the development has not been satisfactorily addressed contrary to a requirement of SP3; that insufficient account has been taken of the principle of the Transport Secretary in Policy T1; and that the intent of T13 would be undermined.

> 61. The Secretary of State has given careful consideration to the Inspector's analysis on funding for highway infrastructure at IR11.86-11.97. For the reasons given at IR11.92-11.94 he agrees with the Inspector that the planning obligation fails to ensure the necessary infrastructure is provided in an acceptable timescale and that the proportionate contribution is secured. Consequently there is a failure to comply with Policies SP3 and T13. He also agrees with the Inspector that there is a strong justification for Hillborough to contribute to Kent BRIS (IR11.95) and that it would be disproportionate to require the appellant to commit to pay all the outstanding balance now with no enforceable mechanism in place to ensure the Hillborough share is secured (IR11.96).
>
> 62. Overall, like the Inspector at IR11.100-11.101, the Secretary of State considers that the proposal would not deliver the HRR at an acceptable stage in the development by reason of the phasing programme and the timing of the contribution to Kent BRIS. He agrees that safe and suitable access to the site would not be achieved for all and the residual cumulative impact of the development would be severe through the construction phase."

25. The Defendant expressed his position in relation to the overall planning balance in respect of the development in the following terms, coupled with opportunity for the Interested Party to address his concerns prior to a final decision on the appeal being reached:

> "75. Weighing in favour for the proposal is the fact that the site is allocated in the development plan and would make a significant contribution to the district's housing land supply. The Secretary of State gives this significant weight. He also gives significant weight to the scheme's potential contribution to housing (including affordable), as well as the benefit of accommodating the route of the HRR, a priority road scheme.
>
> 76. Weighing against the proposal, the Secretary of State gives significant weight to the delay in completing the spine road and the delay in the financial contributions towards the HRR. He gives moderate weight to the under-provision of employment land and limited weight to the loss of BMV land. The Secretary of State considers that the proposal would cause less than substantial harm to the Herne Conservation Area. He gives this harm considerable importance and weight against the proposal. In accordance with paragraph 134 of the Framework, the harm to heritage assets must be weighed against the public benefits set out above clearly outweighs the less than substantial harm to the significance of heritage assets. The Secretary of State also considers that there is harm to the setting of a listed building and affords this harm significant weight.

> 77. In paragraphs 15, 16, 22, 25, 35 and 39 above, the Secretary of State has set out a number of concerns relating to the affordable housing tenure split; the robustness of the planning obligation in securing 30% affordable housing; the provision of the necessary infrastructure to an acceptable timescale; and the provision of a proportionate contribution. On the basis of the material before him, he considers that these matters carry very significant weight against the appeal proposals.
>
> 78. However, before making his final decision, he wishes to give the appellant the opportunity to address these concerns via submission of a revised and agreed planning obligation. Subjected to being satisfied that these concerns can be satisfactorily addressed he is minded to allow the appeal and grant planning permission."

26. On the 6th August 2018 the Defendant issued a final decision letter in relation to the appeal. Further events had transpired following the "minded to" letter of the 23rd March 2018. The final decision letter built upon the conclusions which had been reached in that earlier letter. Those events transpiring between the letters, and the Defendant's conclusion in relation to them, was set out in the final decision letter in the following terms:

> "Highways Infrastructure
>
> 14. The Secretary of State concluded in paragraph 22 that the completion of the spine road by the 410th dwelling was required to avoid the development having a severe impact on the capacity of the A291 and reducing highway safety for a significant period of time during construction. The Secretary of State has noted that the appellant agrees that a suitably worded condition (drafted as proposed condition 35, but numbered 34 in Annex C to this letter) could be imposed to require the spine road to be completed by the 410th dwelling.
>
> 15. In paragraph 25 the Secretary of State considered that the proposal would not deliver the Herne Relief Road (HRR) at an acceptable stage in the development by reason of the phasing programme and the timing of the contribution to the Kent BRIS.
>
> 16. In the letter from Vic Hester on 17th May 2018, the Unilateral Undertaking of the same date to Kent County Council is stated to secure a developer financial contribution of £2,311,000 (being proportionate contribution as agreed in the Statement of Common Ground between the local authorities and the Herne Bay strategic site developers) towards the Kent BRIS by the first occupation of the 250th dwelling. It is also stated to reflect the potential for changes in the base cost of the Kent BRIS scheme by the Strode Farm owner covenanting to cover 51% of any increase in base cost above the current Strode

> Farm proportionate contribution upon notification of any increase by Kent County Council.
>
> 17. The Secretary of State has, however, noted that this Unilateral Undertaking is not acceptable to Kent County Council and the County Council's position is supported by Canterbury City Council. In a letter of 2 May 2018 Kent County Council set out their position that the total cost of the KCC (Kent) BRIS is £7.692m. £3.1112m has already been secured from the Herne Bay Golf Course site through a section 106 agreement. The proposed contribution from the Strode Farm development is not the full outstanding balance which stands at £4.581m. The letter also states that without a legal agreement there is no guarantee that the KCC BRIS would be built leaving the County Council with a funding shortfall and that it has been made clear to developers that the HRR should be built at no additional cost to the County Council. Furthermore that the Secretary of State stated that the HRR was required even without the Hillborough development coming forward. The County Council stated they were prepared to sign up to an obligation to pass on any contributions towards the KCC (Kent) BRIS secured from the Hillborough development through their respective Section 106 agreements back to the appellant.
>
> 18. In his letter of 23 March 2018, the Secretary of State also agreed with the Inspector that there was strong justification for Hillborough to contribute to the Kent BRIS and that it would be disproportionate to require the appellant to commit to pay all the outstanding balance now with no enforceable mechanism in place to ensure the Hillborough share is secured. The Secretary of State has considered the response from Kent County Council and Canterbury City Council to the Unilateral Undertaking, but does not consider that there is enforceable mechanism in place to ensure that the Hillborough share is secured. He concludes that this is a factor that weighs against allowing the appeal."

27. Having noted at paragraph 27 of the letter of the 6th August 2018 that Kent County Council were prepared to sign an obligation to pass any contributions towards the Kent BRIS secured through the Hillborough development back to the Appellant, the Defendant concluded that such an obligation might not be consistent with the tests set out in paragraph 56 of the Framework. The Defendant then went on to set out his final conclusions as to the appropriate striking of the planning balance in this case in the following terms:

> "Overall conclusion
>
> 29. For the reasons given above, the Secretary of State considers that the appeal scheme is not in accordance with the Policies SP3, HE4 and T13 of the development plan, and is not in accordance with the development plan overall. He has gone

> on to consider whether there are material considerations which indicate that the proposal should be determined other than in accordance with the development plan.
>
> 30. Weighing in favour of the proposal is the fact that the site is allocated in the development plan and would make a significant contribution to the district's housing land supply. The Secretary of State gives this significant weight. He also gives significant weight to the scheme's contribution to delivery of affordable housing, as well as the benefit of accommodating the route of the HRR, a priority road scheme. Furthermore the Secretary of State gives significant weight in favour to the earlier completion of the spine road and the earlier financial contributions towards the HRR than were originally proposed.
>
> 31. Weighing against the proposal, there is no enforceable mechanism in place to ensure that the Hillborough share of the Kent BRIS is secured to which the Secretary of State gives significant weight. He gives moderate weight to the under-provision of employment land and limited weight to the loss of BMV land. The Secretary of State considers that the proposal would cause less than substantial harm to the Herne Conservation Area. He gives this harm considerable importance and weight against the proposal. In accordance with paragraph 134 of the Framework, the harm to heritage assets must be weighed against the public benefits of the development. The Secretary of State considers that the combination of public benefits set out above clearly outweighs the less than substantial harm to the significant of heritage assets. The Secretary of State also considers that there is harm to the setting of a listed building and affords this harm significant weight.
>
> 32. For the reasons gives above the Secretary of State now considers that the balance weighs in favour of the scheme. He also notes that an application for development on the Hillborough site was validated by Canterbury City Council on 16th August 2017 and considers there is a reasonable prospect of this coming forward. The Secretary of State, therefore, considers that there are material considerations which indicate that the proposal should be determined other than in accordance with the development plan and he therefore concludes that planning permission should be granted subject to the conditions set out in Annex C."

28. CCC challenges the grant of planning permission on two grounds. The first ground, which is conceded by the Defendant, is that it was an error of law, in the light of recent authority in the Court of Justice for the European Union ("the CJEU") for the Defendant to have failed to carry out an Appropriate Assessment of the effects of the proposed development on the integrity of European Sites prior to the granting of planning permission. Whilst accepting that that error of law infects the Defendant's

decision, the Defendant contends that the court can conclude with confidence that the decision would have been the same even if an Appropriate Assessment had been carried out. In response to that contention CCC submits that such a conclusion cannot be arrived at, firstly, on the basis that Appropriate Assessment includes a requirement for public consultation which was not undertaken; secondly that the screening decision which was reached on the question of Appropriate Assessment cannot be taken as an adequate proxy for Appropriate Assessment itself; thirdly there is a danger in rescuing the Defendant's unlawful decision through the exercise of discretion that developers and decision takers will gain the impression that the requirements of the Habitats Regulations can be ignored with impunity.

29. The second ground of the CCC's case is that it was irrational for the Secretary of State to grant planning permission without a mechanism in place to secure the delivery of the Kent BRIS. It was accepted by him that the Kent BRIS was an essential prerequisite for the appeal proposal without which it would amount to unacceptable development. No explanation was provided as to where the Defendant thought that the balance of the funding would come from and it was irrational to conclude that there was a reasonable prospect of the Hillborough site coming forward when in fact only one third of that site was the subject of the validated planning application referred to in paragraph 32 of the decision. Further detail in relation to the competing submissions are set out in the context of the conclusions in respect of this case below.

The second case: the "Crondall case"

30. The second case addressed in this judgment relates to development proposals at a site known as Broden Stables on the edge of the village of Crondall. The development proposed in an application dated 6th September 2016 was described as follows:

> "The development proposed is for the demolition of the existing stable building, arena, flood lights and hard standing, and the erection of 30 residential dwellings, with associated access, landscaping and car parking arrangements."

On the same date as the application was made, namely the 6th September 2016, the Second Defendant wrote to the Interested Party, the local planning authority, recording that the Second Defendant had paid £296,914 for the following purpose:

> "The Council has identified that the Development will conflict with the Habitats Regulations due to its adverse effect on the SPA as identified in the Avoidance Strategy for the Thames Basin Heaths Special Protection Area (the Strategy) and will cause adverse effects of the SPA. The Council is desirous of resolving that issue to enable a formal planning application to be submitted to the Council to enable it to be considered on its planning merits without the constraints of the Habitats Regulations requiring the application to be refused.
>
> The Council has identified several Suitable Alternative Natural Greenspace (SANG's) with which to mitigate the effects of the relevant development upon the SPA by utilising the space capacity of the SANG's and the Applicant wishes to reserve

> that space by the payment of the contribution of £275,678 (the Contribution) upon completion hereof and upon the terms and conditions below as is identified in the Strategy. The Applicant also wishes to make a contribution of £21,236 (the SAMM Contribution) towards the Strategic Access Management and Monitoring Project Tariff Guidance (Natural England 2010)."

31. In particular, within the Planning Heritage Statement provided with the application in relation to the development it was noted that the proposed development site was within the catchment area of the Hitches Lane SANG and that there was sufficient capacity at that SANG to accommodate the impact of the proposed development. An Ecological Appraisal was provided to accompany the application. That noted the fact that the site was within the zone of influence of the Thames Basin Heaths SPA, but that any impact had been addressed by the payment towards the SANGs and SAMM strategies.

32. On the 3rd October 2016, the Claimant, Crondall Parish Council ("CPC"), submitted objections to the planning application. These were wide ranging, but for the purposes of this case the following are important aspects of CPC's objections. Firstly, CPC contended that the application was flawed as it was outside the Hitches Lane SANG catchment area for larger developments. Further, a number of specific policy objections were identified including in particular the fact that the site was outside the existing village boundary as set out in the Hart District Local Plan (Replacement) 1996-2006 ("the Local Plan"), and therefore contrary to policy RUR2 which provides as follows:

> "RUR 2 Development in the open countryside - general
>
> RUR 2 DEVELOPMENT IN THE OPEN COUNTRYSIDE, OUTSIDE THE DEFINED SETTLEMENT BOUNDARIES, WILL NOT BE PERMITTED UNLESS THE LOCAL PLANNING AUTHORITY IS SATISFIED THAT IT IS SPECIFICALLY PROVIDED FOR BY OTHER POLICIES IN THE LOCAL PLAN, AND THAT IT DOES NOT HAVE A SIGNIFICANT DETRIMENTAL EFFECT ON THE CHARACTER AND SETTING OF THE COUNTRYSIDE BY VIRTUE OF ITS SITING, SIZE AND PROMINENCE IN THE LANDSCAPE.
>
> The local plan proposals map distinguishes the built up areas of towns and villages from the surrounding open countryside by means of settlement policy boundaries. The whole of the area outside these boundaries is classified as countryside.
>
> In addition to the areas designated for their landscape or ecological value, much of the countryside of the District is of a small scale and intimate, enclosed character: this should be respected by any new development. This countryside is of strategic significance in controlling the sprawl and separating the built up areas of the Blackwater Valley Towns, Reading

> and Basingstoke. It is also a valuable informal recreation resource for the residents of these urban areas.
>
> The Council's aim is to protect this countryside for its own sake by minimising the impact of new development on agricultural and forestry land, mineral resources, and areas of historic, landscape or nature conservation interest. Pressures for development are in conflict with the protection of the countryside resource, and policies of restraint are required to protect its character. Central Government guidance in Planning Policy Guidance Note 7: The Countryside and Rural Economy, emphasises that building in the open countryside, away from existing settlements or allocated areas, should be strictly controlled and that priority should be given to restraint in designated areas.
>
> The countryside can normally accommodate some small-scale economic development without detriment, provided that it is sensitively related in design and location to the existing settlement pattern and landscape. Some diversification from strictly agricultural uses within complexes of farm buildings, for example small-scale industrial units, will be considered as part of the rural economy. Such uses will still be judged according to their impact on landscape, ecology, general amenity of the countryside and the objectives of sustainability."

33. Subsequently on the 13th October 2016 CPC wrote again to correct their earlier observations about the Hitches Lane SANG. That observation together with their revised comments were set out as follows:

> "It has come to our attention that the comment about SANG access (page 6 of the CPCs Broden Stables Objection letter, against section 8.17 of the applicants Planning & Heritage Statement) is not correct. It appears on the inspection of the Hart map that the site is actually just inside the "general" SANG area- by about 100m.
>
> However, Hart issued some new SANG guidance in July- in section 9 on page 2 it states an order of priority, which would exclude this site as it is outside their current policy (i.e. beyond the development boundary- RUR2).
>
> In the light of this Crondall Parish Council wishes to add an additional Comment as shown below:-
>
> CPC notes that on more detailed inspection that the Broden Stables site is within the general SANG catchment area; hence it withdraws bullet point 5 and the comments against section 8.17 of the applicants Planning & Heritage Statement (see Annex B2 page 6) of its Letter of OBJECTION dated 03 October 2016.

> However, it is noted that the site is outside the existing development boundary and therefore contrary to RUR2. In this respect the site should not have been allocated SANG land as it is outside the current policy: "SANGs allocation and delivery-procedure and advice for the Applicants, June 2016" page 2, section 9 which states: "No priority for the allocation of Council administered or managed SANG will be given to any development that does not meet these criteria. In all instances the development must be policy compliant in that it must be in accordance with the adopted policy of the Council"."

34. Further observations were provided by CPC on the 23rd March 2017, prior to the Interested Party determining the application. These did not bear upon either the nature conservation issue or the issue associated with the application of planning policy. On the 13th April 2017 the application was refused by the Interested Party. That decision followed the preparation of a report to committee recommending refusal. In their conclusions on the application officers recorded the making of the contribution towards SANG mitigation and the SAMM project, and on that basis concluded that the proposal would not have a negative impact on the Thames Basin Heaths SPA.

35. In relation to planning policy the officers examined whether or not the development plan was absent, silent or out-of-date for the purposes of considering whether or not the tilted-balance in paragraph 14 of the National Planning Policy Framework (March 2012) ("the 2012 Framework") applied to the application. They noted that at a recent appeal in relation to land at Moulsham Lane an Inspector had concluded that policy RUR2 was not up-to-date, but the officers considered that the Inspector's assessment in that appeal decision had "oversimplified the stance taken by the NPPF to development in the countryside". They concluded as follows in advising members as to the correct approach to this issue:

> "Whilst the Council do not share the view that policy RUR2 is out of date when it is applied to housing development in the countryside, it is recognised that all developments must be considered having regard to the policies in the Framework taken as a whole, including the need to boost significantly the supply of housing. In other words, this does not mean that what could otherwise be considered as sustainable development, which is outside of settlement boundaries, should necessarily be refused.
>
> …
>
> The weight to be applied to policy RUR2 should therefore be proportionate. The fact that the development of the application site conflicts with the housing policies of the development plan is a point for consideration with the next step to weigh up other material considerations and assess any harm against the benefits that would be derived from the development, taking account of the three stands of sustainable development as set out in the paragraph 7 of the NPPF."

36. The officers went on to raise criticisms of the design of the proposal and its impact on the local area and the nearby Conservation Area. They summarised their advice on the merits of the application to the committee in the following terms:

> "*Whether having regard to the suggested benefits and disbenefits of the proposal, and the Council's five-year supply of deliverable housing sites, it would represent a sustainable form of development*
>
> The fact that the development of this site conflicts with the policies of the development plan is a start point for consideration but one then has to weigh up the material considerations and assess any harm against the benefits that would be derived from the development, taking account of the three stands of sustainable development as set out in paragraph 7 of the NPPF.
>
> In terms of the benefits, the scheme would deliver additional housing, both market and affordable in line with the NPPF's aim of significantly boosting the supply of such, this benefit must be given substantial weight. The site also brings forward areas of new open space and play areas which are benefits which should also be given some weight. The Government has made clear its view that house building plays an important role in promoting economic growth. In economic terms, the schemes would provide construction jobs and some local investment during its build out. These jobs and investment would be transitory, and in this regard moderate weight should be afforded.
>
> The scheme however would result in unacceptable harm to the character of the local area, including the nearby Conservation Area. The scheme would potentially result in harm to visually prominent tress and would potentially result in the loss of a substantial amount of hedging with no mitigation proposed to offset this harm. Furthermore the lack of a planning obligation means that there is no mechanism to secure the affordable housing, off-site highways improvements or open space mitigation.
>
> Placing all factors and all of the relevant material considerations in the balance, the assessment is that the adverse impacts of the proposed development significantly outweigh the benefits and it is therefore unacceptable.
>
> CONCLUSION
>
> The proposed development would conflict with relevant development plan policies in a number of respects. The proposal would be likely to cause harm to the character of the area and setting of the Crondall Conservation Area. The

> proposal would be out of a poor design, taking no account of the character of the local area. The scheme would potentially result in harm to visually prominent trees and would potentially result in the loss of a substantial amount of hedging with no mitigation proposed to offset this harm. Furthermore the lack of planning obligation means that there is no mechanism to secure the affordable housing, off-side highways improvements or open space mitigation.
>
> As such, the proposal is considered to be unacceptable. Refusal is, therefore, recommended."

37. The Second Defendant appealed the refusal of planning permission and in preparation for the appeal sought to agree common ground with the Interested Party. On the 27th June 2017 there was an exchange of emails between the Second Defendant's planning consultants and the Development Management Team Leader of the Interested Party. Through that email exchange it was established that three of the reasons for refusal were matters which were capable of being overcome through the provision of a finalised section 106 obligation. The fourth reason related to trees, and does not form the subject matter of the present case. The Second Defendant's Planning Consultants email, which was accepted as an accurate reflection of their agreement by the Interested Party's Development Management Team Leader, contained the following of relevance to the present case:

> "Design
>
> Reasons 1 and 2 relate to concerns with design issues (character, scale, layout, design and landscaping) and the effect that these have on the following:
>
> - The rural character of the local area and setting of the countryside and;
>
> - The setting of Crondall Conservation Area
>
> There is a reference to Policy RUR2 in Reason 2. We understand that there are two parts to compliance with Policy RUR2. The first relates to the principle of development outside the settlement boundaries, and in the second relates to ensuring that development is accepted outside of these boundaries is acceptable in terms of the effect on the character and setting of the countryside. The proposed development at Broden Stables was not refused on the basis of the first part of the policy, and the Council is not opposed in principle of a residential redevelopment and the effect that it would have on the character and setting of the countryside.
>
> Common Ground
>
> On the basis of the contents of the Committee Report, the reasons for refusal, and discussions with officers during the

> course of the application, we understand that the following points are not in contention:
>
> …
>
> - The application was not refused because it was outside of the settlement boundary, but because of the concerns relating to impact on the settling of the countryside (ref p.31 of the com report and Reason 2);
>
> - There is no objection to the principle of residential development on the site (ref. p43 of the com report and Reason 2);
>
> …
>
> - The applicant has secured SANG mitigation and made a SAMM payment and would therefore not be unacceptable in terms of impact on the Thames Basin Heaths Special Protection Area (ref p. 41 of the com report)."

38. In September 2017 the Second Defendant submitted its full Statement of Case in relation to the appeal. The document appended and relied upon the email setting out common ground with the Interested Party. The Statement of Case on behalf of the Interested Party followed in February 2018. The Interested Party observed as follows in respect of the weight to be attached to policy RUR2:

> "3.34 This appeal must be determined in accordance with the policies of the development plan unless any material planning considerations indicate otherwise and it is therefore necessary to consider if there are any overriding public benefits that would result from the development that would outweigh the identified harm. The age of the respective policies is not relevant but rather it is their consistence with the NPPF that should be considered. The Appellants are not advancing any suggestion that the relevant policies are not consistent with the NPPF. A recent High Court decision (Wynn-Williams v SSCLG [2014] EWHC 3374 (Admin) has held that policy RUR2, a countryside protection policy, is in terms of objective and approach, consistent with the Framework and can only be considered out of date if it serves to constrain the meeting of a more recently identified need. In this case the Council can demonstrate in excess of a 5 yr HLS (something that the appellants do not contest) and consequently paragraph 49 of the Framework is not engaged. It is acknowledged that an Inspector concluded that the Council has in reaching its housing supply position breached Policies RUR1 and RUR2 by granting planning permissions that offended those policies (Netherhouse Copse Appeal). In the Netherhouse Copse decision, the Inspector concluded that those policies were as a result out of date. However the Inspector also recognised that those policies

> still served a proper planning purpose, to protect the countryside from unwanted and unjustified development, so consequently afforded them moderate weight. When the Council took the decision on this application, it was before the decision on the Netherhouse Copse application and at the time the Council applied reduced weight to these policies as a result of the Moulsham Lane appeal that was referenced in the Officer report. The Council therefore still considers it appropriate to apply at least moderate weight to policies RUR1 and RUR2 in the determination of this appeal."

39. The Interested Party went on to note that they had a 5 year housing land supply which measured in excess of 8 years, and to contend that the "overly-urbanising and poorly designed development" did such material harm to the character and setting of Crondall and its Conservation Area that permission should be refused.

40. On 2nd February 2018 CPC submitted their written representations to the appeal. Again, as at the application stage, they raised a range of concerns in relation to the development. In particular, in so far as the present case is concerned, they contended that the development did not comply with either policy RUR2 of the Local Plan, or an emerging policy of the Hart Local Plan Strategy and Sites 2016-2032 ("the emerging Local Plan") to similar effect, namely policy NBE1 of the emerging local plan, which provides as follows:

> "Policy NBE1 Development in the Countryside
>
> Development proposals within the countryside (defined as the area outside settlement policy boundaries) will only be supported where they are:
>
> a) meeting the proven essential need of a rural worker to live permanently at or near their place of work; or
>
> b) providing business floorspace to support rural enterprises (Policy ED3); or
>
> c) providing reasonable levels of operational development at institutional and other facilities or;
>
> d) providing community facilities close to an existing settlement which is accessible by sustainable transport modes; or
>
> e) providing affordable housing on rural exception sites (Policy H3); or
>
> f) providing specialist housing (Policy H4); or
>
> g) providing a replacement dwelling or an extension to an existing dwelling; or

> h) converting previously used permanent buildings or redundant agricultural buildings for appropriate uses; or
>
> i) are for a replacement building that is not temporary in nature, or for an extension to an existing building, provided that the proposal does not require substantial rebuilding, extensions or alternation; or
>
> j) located on suitable previously developed land appropriate for the proposed use; or
>
> k) proposals for small scale informal recreation facilities such as interpretation centres and car parks which enable people to enjoy the countryside."

41. In the light of an appeal decision in July 2015 CPC contended that policy RUR2 should be considered to be relevant and valid so far as the appeal proposals were concerned. In relation to policy NBE1 they observed that given the absence of objection to it or its application to Crondall through the stages of the emerging plan it was reasonable to conclude that the presently configured text of policy NBE1 would be the subject of final consultation.

42. On the 26th June 2016 CPC submitted further observations to the Planning Inspectorate in relation to the appeal. Whilst initially their letter was rejected on the basis that it was outwith the scope of the relevant written representations procedure, following persistence on behalf of CPC the case officer accepted it would be appropriate for the material to be passed to the Inspector. Two topics were covered by the letter of the 26th June 2018: firstly, the submission of the emerging Local Plan for formal examination and secondly a development in relation to the Habitats Regulations. The text of the letter so far as pertinent reads as follows:

> "HDC submitted its Local Plan for Inspection on 18th June 2018, thus giving it elevated weight in planning terms as a whole set of policies. Within the submitted Local Plan one of the specific policies relevant to this site (NBE1- Development in a Countryside) remains unchanged after several rounds of consultation. On page 23 of HDC's "Summary of Responses received to the Regulation 18 consultation with the Council's Response" (designated CD6b in the Local Plan Examination Library 2018) issued in June 2018, it considers NBE1 (listed as MG5 and renamed in that report) and has made no changes to the text of NBE1.
>
> We have been advised by HDC that following the "Sweetman" judgement (C-323/17) additional Habitat Regulation Assessment (HRA) will be required on many extant planning applications. It is understood that this requirement also applies at this site, which currently lacks an HRA.
>
> The Crondall Neighbourhood Plan is progressing very well, but the unexpected need for HRA and Strategic Environmental

> Assessments means that Reg 14 consultation is now likely to take place in August 2018."

43. In July 2018 the Defendant published the revised version of the National Planning Policy Framework ("the 2018 Framework"). In response to that development, and bearing in mind that the appeal was still current and undetermined, the Planning Inspectorate wrote to the Second Defendant and the Interested Party seeking their observations as to whether the changes in the 2018 Framework had any bearing on the issues in the appeal. On the 6th August 2018 the Interested Party responded to this request in an email making the following observations:

> "As the Inspector is aware the new Framework has immediate affect in relation to Development Management. Under the previous Framework the footnote to paragraph 14 made reference to exceptions to the presumption in favour of sustainable development applying, these exceptions have been further clarified and included within the test of paragraph 11. The relevant policy within the framework is paragraph 117 (replaces paragraph 119) which relates to the presumption not applying where development requires appropriate assessment. In this instance the wording of the Framework remains largely similar, the Inspector will need to be mindful of the recent European Court Judgement *People over wind and Sweetman v Coillte Teoranta*.
>
> …
>
> By way of other updates that the Inspector should be made aware of, the Council has submitted its Emerging Plan for examination with the examination being scheduled for November/ December 2018. Following the Regulation 19 consultation, which ran between 9 February to 26 March 2018, the Hart Local Plan Strategy and Sites 2016-2032 Proposed Submission Version was submitted on 18 June 2018 to the Planning Inspector for examination. The Council is currently awaiting a date for the Local Plan Examination."

44. By the time this exchange of correspondence occurred the Inspector had undertaken his site visit on the 16th July 2018. On the 23rd August 2018 the decision letter in relation to the appeal was issued and the appeal was allowed. In paragraph 3 of the decision letter the Inspector noted that a financial contribution towards SANGs and SAMM had been made. He then went on to consider the question of planning policy. He made the following observations in relation to the weight to be attached to policy RUR2 and his assessment of the emerging local plan:

> "10. Despite representations from third parties, particularly as the Council can demonstrate a five years' supply of deliverable housing sites, it is necessary at the outset of this appeal to consider the relevance of development plan policies, particularly those that have the effect of restricting the supply of housing. The Council draws my attention to the recent High

> Court decision where it was held that a countryside protection policy (in this case LP Policy RUR2) can only be considered out of date if it serves to constrain the meeting of a more recently identified need. However in this case, there is general consensus between the principle parties that the application of settlement boundaries would be inconsistent with the National Planning Policy Framework (the Framework), irrespective of the five year land supply position. The Council acknowledges that housing supply policies can at most, only attract moderate weight.
>
> 11. There is agreement between the parties that the first limb of LP Policy RUR2 in relation to it seeking to control development outside settlement boundaries does not apply in the case of this appeal and that the Council's concern in relation to RUR 2 relates to whether the design of the development would have a deleterious effect on the character and setting of the countryside.
>
> …
>
> 13. Neither the Draft Hart Local Plan nor the Crondall Neighbourhood Plan are at a sufficiently advanced stage to influence the outcome of this appeal and as such can be given very limited weight in my consideration of this appeal."

45. The Inspector then went on to consider the effect on the character and setting of the countryside of the development. He noted the concerns expressed by the Interested Party in relation to the impact of the scheme by virtue of the proposed siting and scale of the development and its prominence in the landscape. His conclusions in relation to the impact of the development both in terms of its built form and also in terms of its effect on the wider countryside were set out as follows:

> "20. Thus turning to the Council's concerns, the focus is on the alleged overdevelopment of the site manifested by dwellings being too large for the plots, poor ratio between buildings and landscaping with hard surfacing dominating and reinforcing a feeling of being too urban, particularly given the transitional nature of the site. By contrast however, the appellant provides convincing evidence based on an analysis of plot ratios and edge of village analysis that demonstrates that the proposed scheme would not be out of kilter with other recent housing developments situated at similar edge of countryside locations in Crondall. By the same token, the reduction in the extent of hardstanding associated with a narrower combined pedestrian vehicular access road would provide a gentler design solution, which combined with the proposed landscaping, would give a more informal, softer and rural feel to the development. The dwellings have been designed to reflect local character and are attractive as a result.

21. The setting of this part of Crondall is mainly experienced by those using the public footpath to the north of Redlands Lane, from Redlands Lane itself, together with the public footpaths that run alongside the northern and eastern boundaries. There are, in addition, glimpsed views of the site from parts of Pankridge Street. However, for the most part, the appeal site is relatively self-contained and views from the ROW to the north also takes in the manicured landscape comprising the golf course, whilst from Redlands Lane itself, the views are dominated by the brownfield development of the arena and its floodlights together with the stabling and associated parking and other hard standing areas. The presence of thick mature hedgerow trees along either side and above Redlands Lane allows limited views in to the site for passing motorists. From these views I do not accept that the site performs as a transition from village to open countryside or when leaving the village from the west where in climbing away from the village, one is soon presented with the suburbanising effect created by the existing golf course, which was described in a negative and somewhat derogatory fashion in the Council's Landscape Character Assessment (1997).

22. During my site visit, I was able to walk the ROWs described in the appellant's Landscape Statement and Visual Study (Viewpoints 1-3, 4 and 8) and agree with these assessments although recognising the slight changes in the positioning and orientation of dwellings proposed in the appeal scheme. Moreover I would concur that the proposed development would have only localised visual effects, which would be further reduced through the landscape mitigation that is proposed. I would conclude that perceptions of the proposed development other than for a short section of the ROW to the north would be limited to a few rather glimpsed opportunities. The undulating nature of the landscape and the presence of large tracts of woodland would mean that from both medium to long views and to a degree also from closer vantage points, the appeal site itself would not be discerned in its entirety and that development would nestle in a relatively low lying area and as part of the wider village. Although taller than the new surgery complex to the west, I do not find that the scale of development would be unacceptable from the closer vantage points along Redlands Lane at this point.

23. I would therefore conclude that the development as proposed would not have a significant detrimental effect on the character and setting in the manner set out in LP Policy RUR 2 and its design in terms of scale, form, character, layout and landscaping would comply with LP Policies GEN 1, GEN 3 and GEN 4 which in combination seeks to ensure that

> development respects and responds to local landscape character and urban design qualities."

46. Moving from these concerns to the effect on the character and setting of the Conservation Area the Inspector concluded that the overall minor change to the setting of the Conservation Area would not be harmful to its significance and, further, that there were no identifiable harmful effects on nearby listed buildings. He therefore concluded that the development complied with Local Plan Policy in relation to the historic built environment. He was satisfied that the proposed development complied with Local Plan Policy in relation to any impact on trees and hedgerows. In respect of the Thames Basin Heath SPA the Inspector concluded as follows:

> "34. The Habitat Regulations 2010 require an assessment to be undertaken as to whether a proposal would be likely to have a significant effect on the interest features of a protected site. The Thames Basin Heaths Special Protection Area (SPA) is such a protected site. The assessment is required to ensure that development does not result in a likely significant effect upon designated sites. Taking account of the Habitat Regulations and Policies CON1 and CON2 of the LP it is necessary to demonstrate that all development either individually or in combination with other development which would increase the use of the Thames Basin Heath SPA for recreational and other purposes would not have a damaging impact on wildlife habitats or other natural features of importance. Policy NRM6 of the saved South East Plan requires adequate measures to avoid or mitigate any potential adverse effects on the SPA.
>
> 35. The Interim Avoidance Strategy sets out the Council's policy for mitigating the impact on the SPA and this includes seeking financial contributions towards providing compensatory measures (SANG) through the SANG Management Plan to offset that additional pressure. This site is located outside of the 400 metre exclusion zone but within the 5km zone of influence where the proposal has the potential to result in increased recreational disturbance and consequent potential adverse effects on bird species, which would require mitigation. The appellant has already made a financial contribution to the Council towards the Hitches Lane SANG and to support the Strategic Access Management and Monitoring (SAMM) project. Consequently, the Council does not object to the proposal. From the evidence, I am satisfied that such measures will suitably safeguard against adverse effects on the SPA both alone and in combination with other projects. Therefore, based on this evidence and including the SANG Management Plan, I find that the proposed mitigation would adequately address the impacts of development.
>
> 36. The proposal is therefore in accordance with the Council's Thames Basin Heath Avoidance Strategy, LP Policies CON1 and CON2 and Policy NRM6 of the South East Plan.

> Consequently I am of the view that the proposal would not have an adverse effect on the integrity of the SPA, either alone or in combination with other projects, and therefore would not be contrary to the Habitat Regulations."

47. The overall planning balance in respect of the case was set out by the Inspector as follows:

> "42. Section 38 (6) of the Planning and Compulsory Purchase Act 2004 requires applications for planning permission to be determined in accordance with the development plan unless other material planning considerations indicate otherwise. Being outside the settlement boundary, the proposals are not in accordance with the development plan taken as a whole.
>
> 43. However, although the appeal site falls outside the settlement boundary for Crondall, through the application of the assessment set out in paragraph 213 of the Framework negatively worded policies that seek to apply a considerably more restrictive approach by preventing development outside settlement boundaries can reasonably be considered out-of-date and I can only attach at best moderate weight to their application (in this case the first element of RUR2). I agree with the appellants that the first part of LP Policy RUR2 has ceased to serve a useful planning purpose for the determination of housing applications in the District, which is consistent with the findings of Inspector Gleeson in the Netherhouse Copse appeal. In any event, whilst the Council can demonstrate a 9 years supply of deliverable housing sites, paragraph 59 of the Framework maintains that it is the Government's stated objective to significantly boost the supply of housing.
>
> 44. That said, the second limb to LP Policy RUR2 is of relevance as is Policy CON13 and I afford significant weight to relevant aspects of these policies. However, I have found that the proposals would not have a significant detrimental effect on the character and setting of the countryside at this location or the setting of the Conservation Area. Paragraph 68 of the Framework clearly sets out that small and medium sized sites can make an important contribution to meeting the housing requirements of an area and that local planning authorities should support the development of windfall sites and give great weight to the benefits of using suitable sites within existing settlements. The Council, by its own admission, confirms that the appeal site is relatively sustainable. Whilst the proposed development is partly in conflict with LP Policy RUR2, it would supply 30 no. of dwellings at a site which is visually and functionally well located to the village and include 40% of much needed affordable housing in an area of high housing demand. Along with the provision of on-site open space and provision of a financial contribution towards off-site public

> open space facilities, I find that these comprise a substantial social benefit.
>
> 45. Balanced against the identified conflict with the development plan, these matters carry significant weight in the context of paragraph 59 of the Framework which states that to support the Government's objective of significantly boosting the supply of homes, it is important that a sufficient amount and variety of land can come forward where it is needed, that the needs of groups with specific housing requirements are addressed and land developed without unnecessary delay.
>
> 46. Furthermore I am satisfied that the development will fulfil the aims of the Framework by promoting a high quality design of new homes and places. In addition, where harm has been identified, in terms specifically to the SPA, this has been demonstrated to be fully mitigated. Together with the identified ecological mitigation and flood mitigation, I apportion moderate measures of weight in terms of the environment.
>
> 47. I have attached moderate weight in terms of the economic benefits that would ensue from the development, including the New Homes Bonus and a boost to the local economy both during the construction period and thereafter from the spending power from 30 no. new households within the local area.
>
> 48. Taking all of this into account, including all other material considerations, I find that the adverse impacts of granting planning permission would not significantly and demonstrably outweigh the benefits of the proposed development when assessed against the policies in the Framework as a whole and that the proposal represents sustainable development. On this basis a decision, other than in accordance with the development plan is justified and therefore the appeal should be allowed."

48. The claim brought by CPC proceeds on 8 grounds. Ground 1 is the failure to undertake an Appropriate Assessment prior to the grant of planning permission in circumstances where an Appropriate Assessment had been screened out by the taking into account of mitigating measures. It is conceded by the Defendant, as set out above, that this is an error of law infecting the decision which the Inspector reached. It is contended on behalf of the Defendant that there would have been no difference in the decision if an Appropriate Assessment had been undertaken. This is disputed by CPC for reasons which I shall turn to once I have set out the other grounds upon which the claim proceeds. Ground 2 is the contention that the Inspector misunderstood the position of the parties and took into account an irrelevant consideration when in paragraph 10 of his decision he stated that there was a general consensus between the principle parties that policy RUR2 was inconsistent with the 2018 Framework. The Interested Party had set out in their appeal statement that all local plan policies were "up to date" for the purposes of the 2012 Framework. Furthermore, there were recent decisions to which the Interested Party made reference

indicating support for policy RUR2 as a relevant and up to date policy. Moreover, the representations of CPC contended that policy RU2 was not out of date.

49. Grounds 3 and 4 seek to question the Inspector's conclusion, in particular in paragraph 43 of his decision, that the first part of policy RUR2 had ceased to serve a useful planning purpose, consistent with an earlier Inspector's decision in an appeal at Netherhouse Copse. Firstly, CPC contend that the reasoning of the Inspector appears to be based upon the restrictive approach taken by the policy, rather than the reasoning of the Inspector in the Netherhouse Copse appeal which was as follows:

> "63. In the current appeal the Council argued that it can provide five years supply of housing land. However, this is a reflection of the Council granting a number of permission for housing development right outside of settlement boundaries identified in the LP in breach of Policies RUR2 and RUR3 in order to meet market and affordable housing needs and maintain a rolling five year land supply. Consequently it is not meeting current housing needs on the basis of the settlement boundaries in the development plan. I therefore find that Policy RUR1 is out-of-date and carries only moderate weight.
>
> 64. Policy RUR2 is similarly dependent upon the out-of-date settlement boundaries of RUR1. Notwithstanding the Council's revised assessment that Policy RUR2 has a high degree of consistency with the Framework, and irrespective that it is negatively expressed, it relates to out-of-date settlement boundaries established by Policy RUR1 and therefore is also out-of-date. Policy RUR3 also relies on the out-of-date settlement boundaries associated with Policy RUR1 and therefore I attached moderate weight to these policies too."

50. They further criticise the failure of the Inspector to engage with the other earlier decisions reached, firstly, in an appeal at Sprat's Hatch Farm, and thereafter of the High Court in R (on the application of Wynn-Williams) v SSCLG [2014] EWHC 3374 (Admin), in which Mr David Elvin QC sitting as a Deputy High Court Judge held that policy RUR2 was, on the basis of the submissions placed before an appeal Inspector in that case, a relevant and up to date policy. He concluded that the policies were not inconsistent with the 2012 Framework. It is contended that the Inspector failed to deal with these decisions which were contrary to his conclusion as to the weight to be attached to policy RUR2.

51. Ground 5 is related to this ground in the sense that it is the contention that the Inspector failed to provide adequate reasons to support his conclusion that limb 1 of policy RUR2 was out of date. In reaching the conclusion that he did in paragraph 43 of the decision it is contended that he failed to address CPC's argument that the protection of the countryside remained a legitimate policy objective supporting the view that the first limb of policy RUR2 remained relevant. This submission is coupled with ground 6 namely that the Inspector misinterpreted policy when he concluded that the first limb of policy RUR2 was inconsistent with paragraph 59 of the 2018 Framework. That paragraph of the 2018 Framework is directed to ensuring that local authorities identify sufficient, specific and deliverable sites to meet housing needs for

their area. In the present case it was agreed that the Interested Party could identify a housing land supply well in excess of 5 years.

52. Grounds 7 and 8 relate to the emerging Local Plan. Ground 7 is the contention that the Inspector failed to have regard to material considerations namely the fact that there were no objections to policy NBE1 of the emerging Local Plan, and therefore that consideration required far greater weight to be afforded to it in the Inspector's decision than he gave it. Ground 8 is related to this in that it is the contention that the Inspector failed to give any adequate reason for affording "very limited weight" to the emerging Local Plan in circumstances where there had been no objection to the application of policy NBE1 to the appeal site.

53. Returning to the contentions in respect of discretion a number of matters are relied upon by CPC in support of their overarching contention that simple reliance on the contribution to SANGS and SAMM did not amount to a complete answer to the impact of the development of the Thames Basin Heaths SPA such that the decisions would inevitably have been the same had Appropriate Assessment been undertaken. Evidence in connection with this issue has been provided by Mr Christopher Dorn who is the Chairman of CPC. Firstly, in connection with the specific location of the proposed development site he notes that whereas the access point to the nearest part of the SPA is 1.7 miles distant, the access point to the Hitches Lane SANG upon which the contribution depends is 3.7 miles distant and therefore significantly further away. The results of an analysis of visitors to the SPA in 2012/13 noted that the average distance driven by visitors for access was 3km (straight line) and that this value had fallen since 2005 indicating an increased reluctance to spend time driving to access the countryside recreational opportunities. Thus, Mr Dorn submits that new residents are far more likely to visit the SPA in preference to the Hitches Lane SANG demonstrating that the Hitches Lane SANG will not be effective in mitigating the impact of recreational pressure on the SPA.

54. Mr Dorn also draws attention to observations in the Hart Open Space Study from 2016, in which the record of a consultation notes that Hampshire County Council observed that many of the sites within the Thames Basin Heaths SPA was still being heavily used by dog walkers and there was a continuing need to encourage the use of alternative provision such as SANGS. The consultation exercise also noted Hampshire and Isle of Wight Wildlife Trust's concerns in relation to whether or not the SANGS strategy was effective. Mr Dorn draws attention to these statements as emphasising firstly, concerns as to whether or not the SANGS strategy is proving effective to divert recreational pressure on the Thames Basin Heaths SPA and, secondly, drawing attention to matters which were likely to have been raised had an Appropriate Assessment been undertaken and consultation taken place.

55. In support of the contention that the court can be sure that the Defendant's decision would have been the same in the Crondall case Mr David Elvin QC on behalf of the Defendant draws attention to the engagement of a wide range of stakeholders in the establishment of the SANGs and SAMM strategy, which he submits is a conventional approach to addressing disturbance and deterioration as consequence of recreational pressure upon European sites of the kind in issue. The Interim Avoidance Strategy for the Thames Basin Heaths Special Protection Area ("the Avoidance Strategy") was a strategy prepared to facilitate residential development by a Joint Strategic Partnership of local authorities, Natural England and other responsible bodies. He draws attention

to the fact that the Avoidance Strategy contains two key measures: firstly, the provision of SANGs and, secondly, the SAMM measures which provide a compliment of full-time and seasonal wardens to support and supplement mechanisms already in place to direct and educate users of the SPA so as to minimise and control their use for countryside recreational purposes. The Avoidance Strategy contains information in relation both the costed tariff contributions that need be provided as well as the SANGs being funded. It identifies the Hitches Lane SANG as a 24 hectare country park provided as part of a housing development at Fleet.

56. Mr Elvin submits that the key principles lying behind the Avoidance Strategy, which has to engage with a geographically fragmented SPA, is based on a sound approach established by the Joint Strategic Partnership Board in their Delivery framework:

> "3.1. The following key principles set out the overarching context for the recommendations within this Delivery Framework.
>
> - All net new residential development- when considered either along or in combination within other plans and projects – is likely to have a significant effect on the SPA and should therefore provide or contribute to the provision of avoidance measures.
>
> - Developments can provide – or make a contribution to the provision of - measures to ensure that they have no likely significant effect on the SPA. In doing so, residential development will not have to undergo an appropriate assessment. The option remains for developers to undertake a Habitats Regulations screening assessment and where necessary a full appropriate assessment to demonstrate that a proposal will not adversely affect the integrity of the SPA.
>
> - A three prong approach to avoiding likely significant effect on the SPA is appropriate, however this framework focuses on the two prongs of SANG (Sustainable Alternative Natural Greenspace) and access management, which the JSPB currently considers are the most appropriate avoidance measures.
>
> - This Framework sets out the JSPB's recommended approach to the provision of avoidance measures. Its key objective is to recommend consistent standards for the application and provision of avoidance measures. However, as a strategic document it cannot address every foreseeable circumstance. It is acknowledged that there may be some exceptional circumstances where local authorities consider that a more or less prescriptive approach needs to be taken, or great local specificity is needed, in the light of local circumstances or evidence base, or the detail of the proposed new residential development. Such circumstances should be carefully justified."

57. Mr Elvin drew attention to observations within the Hart Open Space Study, firstly, in findings from the consultation exercise undertaken in which consultees observed that SANGs were well funded, good quality and highly valued open spaces and, secondly, he drew attention to where within the conclusions of the document the observation that SANGs should continue to be provided to comply with the European legislation related to the Thames Basin Heath SPA.

58. Mr Elvin also referred to a Natural England document published in February 2014 setting out the result of a 2012/13 visitors survey on the Thames Basin Heaths SPA. The conclusions of the document were that a comparison in terms of visitor number between that survey and an original visitor survey in 2005 showed that a total number of people counted in the SPA as being 10% higher than 2005. The conclusion was that this was not significant and fell within the limit of what could have been expected by chance. Thus, Mr Elvin submitted that the evidence showed that the provision of SANGs was working in that there was no evidence of increased visitor pressure in the survey. Furthermore the 2012 survey showed that 81% of visitors lived within 5km of the access point at which they were interviewed supporting the continued use of a 5km zone for requiring mitigation for new development. Mr Elvin submitted that the mitigation relied upon by the Interested Party and the Defendant stemmed from a soundly-based strategy specifically designed to address recreational pressure. In respect of the evidence provided by Mr Dorn, Mr Elvin submitted that the matters raised were not issues put before the Interested Party or the Inspector in the context of the appeal, but rather represented Mr Dorn's personal views, which set against the views of the Joint Strategic Partnership and Natural England, could carry little weight.

59. It will be recalled that in their submission following the publication of the 2018 Framework, the Interested Party drew attention to paragraph 177 of the revised Framework (which reflected pre-existing policy in paragraph 171 of the 2012 Framework) as follows:

> "177. The presumption in favour of sustainable development does not apply where development requiring an Appropriate Assessment because of its potential impact on a habitat site is being planned or determined."

It will also be recalled that "the presumption in favour of sustainable development" is derived from paragraph 11 of the 2018 Framework. In relation to decision-taking at paragraph 11(d), in certain circumstances, including where a relevant development plan policy is out-of-date, a so-called tilted balance applies. When the tilted balance is to be applied it means that permission should be granted unless "any adverse impacts of doing so would significantly and demonstrably outweigh the benefits, when assessed against the policies in this Framework as a whole". By virtue of paragraph 177 of the 2018 Framework (and paragraph 11(d)(i)) this tilted balance cannot be applied where development requires Appropriate Assessment.

60. In the light of the fact that the Inspector had applied the tilted-balance from the presumption in favour of sustainable development in reaching his conclusions on the overall planning balance, Mr Elvin accepted that there was a subsidiary error of law in the proper application of the policy from the Framework in the decision. For the reasons which will be set out below, in the light of the decision in the People Over Wind case and its approach to Appropriate Assessment together with paragraph 177

of the 2018 Framework, Mr Elvin accepted that the tilted balance from the 2018 Framework ought not to have been applied. Nonetheless, it was Mr Elvin's submission that given the strength and extent of the factors identified by the Inspector as supporting the grant of planning permission, the court could be sure that the decisions would have been the same even without the application of the tilted balance.

61. In relation to the domestic law grounds, grounds 2 to 8, Mr Elvin submitted that the Inspector had properly and adequately explained the reasons for his conclusion that policy RUR2 could only be afforded moderate weight, and had addressed the decision in Wyn Williams by refence to his acceptance of the Netherhouse Copse Inspector's conclusions and reference to the restrictive nature of the policy. When read in an appropriate manner and as a whole the reasons provided by the Inspector clearly explained his approach to planning policy which, as a matter of planning judgment, was sound. So far as the emerging Local Plan was concerned Mr Elvin submitted that the Inspector was entitled to conclude, given the stage that the plan had reached, that only very limited weight could be afforded to it.

62. These submissions were supported by Mr Reuben Taylor QC on behalf of the Second Defendant. Moreover he responded to submissions made by Mr Robert McCracken QC on behalf of CPC, that CPC had been unaware of the submissions made by the Second Defendant in the appeal. Both Mr Taylor and Mr Elvin pointed out that the material submitted by CPC to the appeal contained cross references to the Second Defendant's material; they also observed that the Interested Party's appeal representations were publicly available through the Interested Party's website.

63. In reply Mr McCracken emphasised (based on the approach set out below in People Over Wind) that the test of the first sentence of Article 6(3) of the Habitat's Directive was clearly passed. At paragraph 1.5 of the Avoidance Strategy the text provides as follows:

> "Natural England advise planning applications resulting in an increase in the number of dwellings within 5km of the SPA are, without "avoidance measure", likely to have a significant effect on the SPA within the meaning of the Habitat Regulations"

64. Thus Mr McCracken submitted that the advice of Natural England was that a site in the circumstances of the proposed development site would be likely to have a significant effect on the SPA without the avoidance measures. Two further submissions flowed from the effective concession contained in the Avoidance Strategy at paragraph 1.5. Firstly, that there was a clear error in the Inspector, contrary to policy, applying the tiled balance when in the light of the need for Appropriate Assessment he ought not to have done so. Secondly, the Inspector was under a duty to consider the effectiveness of the avoidance measures in the context of the location of this particular site. No consideration was given to the particular circumstances of this site and the distances involved in recreational use of the SPA as opposed to the use of the Hitches Lane SANG and no investigation was undertaken of those issues by the Inspector to be sure that there would be no adverse effect. In paragraph 3.1 (at the final bullet point of the quote set out above) the Delivery Framework published by the Joint Strategic Partnership Board accepts that their approach cannot address every foreseeable circumstance, and that there may be exceptional circumstances where a more or less prescriptive approach would need to be taken. No examination was

undertaken by the Inspector in respect of the particular circumstances of the development proposal site and the relative proximities to the SPA and the Hitches Lane SANG. Furthermore, the generic evidence relied upon by Mr Elvin did not engage with the extent to which Hitches Lane SANG was working well in relation to the demand for countryside recreation arising in Crondall. Thus he submitted that the court could not be at all satisfied that the decision would have been the same had the error of law not occurred.

The Law in relation to Appropriate Assessments

65. The protection of species and habitats of European importance is now of long standing. In respect of habitats Directive 79/409/EEC called for the identification of habitats of particular importance for the conservation of certain bird species and the protection of those habitat sites from deterioration. This approach was extended by the Habitats Directive to engage the protection of habitats for a wider range of specified flora and fauna. The habitats which have been identified pursuant to these Directives by individual member states form the Natura 2000 network of European sites. These sites are subject to protective procedures prescribed in the Habitats Directive. In particular Article 6(2) and 6(3) provide as follows:

> "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 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."

66. It can be seen therefore that Article 6(3) establishes two stages for consideration of effects of a plan or project on a European site. The first sentence of Article 6(3) requires (in the case of a plan or project not connected with or necessary to the management of the site) consideration of whether or not the plan or project on its own or in combination with other plans or projects is likely to have a significant effect on the European site. This stage of assessment is generally referred to as the screening stage, or as a screening assessment, since if the answer at this stage is positive and the plan or project on its own or in combination is likely to have a significant effect on the European site then the second stage must be embarked upon. In the second stage an Appropriate Assessment is undertaken, and the decision taker can only agree to the plan or project proceeding if it will not adversely affect the integrity of the site

concerned. The Directive has been transposed into domestic law in regulation 63 of the 2017 Regulations.

67. The correct approach to the screening stage of the requirements of Article 6(3) of the Directive has been the subject of examination both in the CJEU and also by the domestic courts. In the case of Landelijke Vereniging tot Behound van de Waddenzee v Staatssecretaris Van Landbouw, Natuurbeheer en Visserij ("the Waddenzee case") (case C-127/02); [2005] All ER (EC) 353, the CJEU considered the correct interpretation of the Habitats Directive in the context of mechanical cockle fishing. In her opinion Advocate General Kokott set out her view that the circumstances in which the need for an Appropriate Assessment could be excluded would be very limited. At paragraph 69-74 of her opinion she concluded that an Appropriate Assessment will always be necessary where reasonable doubt exists as to the absence of significant adverse effects. In paragraph 88 of her opinion she expressed the view that any effect on the conservation objectives of a European site would be a significant effect on that site. She noted in her opinion that no methodology was set down for undertaking an Appropriate Assessment. At paragraphs 97 & 98 of her opinion she noted that any assessment would have to, of necessity, compare all of the adverse effects arising from the plan with the European site's conservation objectives.

68. In order to answer the fourth question raised in the reference to the CJEU Advocate General Kokott undertook an examination of the approach that should be taken to whether or not it had been established that there would not be significant effects on the European site. She set out her approach to the authorisation threshold and the precautionary principle as follows:

> "AG105 The authorisation threshold laid down in the second sentence of Art.6(3) of the habitats directive is capable of preventing adverse effects on sites. No less stringent means of attaining this objective with comparable certainty is evident. There could be doubts only as regards the relationship between the authorisation threshold and the protection of the site which can be achieved thereby.
>
> …
>
> AG107 However the necessary certainty cannot be constructed as meaning absolute certainty since it is almost impossible to attain. Instead, it is clear from the second sentence of Art.6(3) of the habitats directive that the competent authorities must take a decision having assessed all the relevant information which is set out in particular in the appropriate assessment. The conclusion of this assessment is, of necessity, subjective in nature. Therefore, the competent authorities can, from their point of view, be certain that there will be no adverse effects even though, from an objective point of view (see [2005] 2 CMLR 31), there is no absolute certainty.
>
> AG108 Such a conclusion of the assessment is tenable only where the deciding authorities at least are satisfied that there is no reasonable doubt as to the absence of adverse effects on the

> integrity of the site concerned. As in the case of preliminary assessment- provided for in the first sentence of Art.6(3) of the habitats directive- to establish whether a significant adverse effect on the site concerned is possible, account must also be taken here of the likelihood of harm occurring in the extent and nature of the anticipated harm. Measures to minimise and avoid harm can also be of relevance. Precisely where scientific uncertainty exists, it is possible to gain further knowledge of the adverse effects by means of associated scientific observation and to manage implementation of the plan or project accordingly.
>
> …
>
> AG111 In summary, the answer to the fourth question- in so far as it relates to Art 6.(3) of the habitats directive- must be that an appropriate assessment must:
>
> - Precede agreement to a plan or project;
>
> - Take account of cumulative effects; and
>
> - Document all adverse effects on conservation objectives
>
> The competent authorities may agree to a plan or project only where, having considered all the relevant information, in particular the appropriate assessment, they are certain that the integrity of the site concerned will not be adversely affected. This presupposes that the competent authorities are satisfied that there is no reasonable doubt as to the absence of such adverse effects."

69. The court endorsed Advocate General Kokkott's approach and set out its conclusions, in some detail, in the following paragraphs:

> "39. According to the first sentence of Art.6(3) of the Habitats Directive, any plan or project not directly connected with or necessary to the management of the site but likely to have significant effect thereon, either individually or in combination with other plans or projects, is to be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives.
>
> 40. The requirement for an appropriate assessment of the implications of a plan or project is thus conditional on its being likely to have a significant effect on the site.
>
> 41. Therefore, the triggering of the environmental protection mechanism provided for in Art.6(3) of the Habitats Directive does not presume- as is, moreover, clear from the guidelines for interpreting that article drawn up by the Commission, entitled

"Managin Natura (see [2005] 2 CMLR 31) 2000 Sites: The provisions of Article 6 of the 'Habitats' Directive (92/43/EEC)" – that the plan or project considered definitely has significant effects on the site concerned but follows from the mere probability that such an effect attaches to that plan or project.

42. As regards, Art.2(1) of Directive 85/337, the text of which, essentially similar to Art.6(3) of the Habitats Directive, provides that "Member States shall adopt all measures necessary to ensure that, before consent is given, projects likely to have significant effects on the environment… are made subject to an assessment with regard to their effects", the Court has held that these are projects which are likely to have significant effects on the environment.

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, or the precautionary principle, which is one if the foundations (see [2005] 2 CMLR 31) of the high level of projection 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 the objective information that the plan or project will have significant effects on the site concerned. 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 biodiversity through the conservation of natural habitats 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 the 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 the site of a plan or project not directly connected with or necessary to the management if 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 is 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 the "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 combination of that plan or project with other plans or projects in view of the site's conservation objectives.

54. Such an assessment therefore implied 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. Those objectives must be identified in the light of the best scientific knowledge in the field. Those objectives may, as is clear for Arts 3 and 4 of the Habitats Directive, in particular Art.4(4), be established on the basis, inter alia, of the importance of the sites for the maintenance or restoration at a favourable conservation status of a natural habitat type in Annex I to that directive or a species in Annex II thereto and for the coherence of Natura 2000, and of the threats of degradation or destruction to which they are exposed.

55. As regards the conditions under which activity such as mechanical cockle fishing may be authorised, given Art.6(3) of the Habitats Directive and the answer to the first question, it lies with the competent national authorities, in the light of the conclusions of the assessment of the implications of a plan or project for the site concerned, to approve the plan or project only after having made sure that it will not adversely affect the integrity of that site.

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 and makes it possible effectively to prevent adverse effects on the integrity of protected sites as the result of the plans of 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 to remains as to the absence of such effects.

60. Otherwise, mechanical cockle fishing could, where appropriate, be authorised under Art.6(4) of the Habitats Directive, provided that the conditions set out therein are satisfied.

> 61. In view of the foregoing, the answer to the fourth question must be that, under Art.6(3) of the Habitats Directive, an appropriate assessment of the implications for the site concerned of the plan or project implies that, prior to its approval, all the aspects of the plan or project which can, by themselves or in combination with other plans or projects, affect the site's conservation objectives must be identified in the light of the best scientific knowledge in the field. The competent national authorities, taking account 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 an 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."

70. The need for a strict precautionary approach, and the high level of the threshold of establishing that there will not be significant effects on a European site, has been re-emphasised in subsequent CJEU cases. These cases have reiterated the need to establish that "no reasonable scientific doubt remains as to the absence of such effects". In Sweetman v An Bord Pleanala (case C-258/11); [2014] PTSR 1092 Advocate General Sharpston explained that as a consequence of the very high threshold of establishing an absence of significant effects on European sites there was a correspondingly low threshold for triggering the need for an Appropriate Assessment. Whilst the totality of her opinion on the correct approach to Article 6 of the Habitats Directive repays careful reading, her approach to the screening stage, which is particularly an issue in the present case, was set out as follows:

> "47. It follows that the possibility of there being a significant effect on the site will generate the need for an appropriate assessment for the purposes of article 6(3). An example of the type of confusion that this poorly-drafted piece of legislation can give to can, I suggest, be seen in the judgment in the Landelijke Vereniging case [2004] ECR 1-7405. In para 41, the court talks of an appropriate assessment being required if there is a "mere possibility" that there may be significant effects. In para 43, it refers to there being a "probability or a risk" of such effects. In para 44, it uses the term "in case of doubt". It is the last of these that seems to me best to express the position. The requirement at this stage that the plan or project be likely to have a significant effect is thus a trigger for the obligation to carry out an appropriate assessment. There is no need to establish such an effect; it is, as Ireland observes, merely necessary to determine that there may be such an effect.
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> 48. The requirement that the effect in question be "significant" exists in order to lay down a de minimis threshold. Plans or projects that have no appreciable effect on the site are thereby excluded. If all plans or projects are capable of having any effect whatsoever on the site were to be caught by article 6(3),

> activities on or near the site would risk being impossible by reason of legislative overkill.
>
> 49. The threshold at the first stage of article 6(3) is thus a very low one. It operates merely as a trigger, in order to determine whether an appropriate assessment must be undertaken of the implications of the plan or project for the conservation objectives of the site. The purpose of that assessment is that the plan or project in question should be considered thoroughly, on the basis of what the court has termed "the best scientific knowledge in the field". Members of the general public may also be invited to give their opinion. Their views may often provide valuable practical insights based on their local knowledge of the site in question and other relevant background information that might otherwise be unavailable to those conducting the assessment."

71. The court followed the Advocate General's analysis and expressed its own conclusions in relation to the correct approach to these issues in the following paragraphs of its judgment:

> "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 sites needs to be preserved at a favourable conservation status; this entails, as the Advocate General has observed in her points 54-56 of her opinion above, 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 the site. That it so where no reasonable scientific doubt remains as to the absence of such effects: see European Commission v Spain (Case C-404/09), para 99 and Solvay's case, para 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 projected 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: the Landelijke Vereniging case [2004] ECR 1-7405, paras 57 and 58.
>
> …
>
> 43. The competent national authorities cannot therefore authorise interventions where there is a risk of lasting harm to the ecological characteristics of the sites which host priority natural habitat types. That would particularly be so where there is a risk that an intervention of a particular king will bring about the disappearance or the partial irreparable destruction of a priority natural habitat type present on the site concerned: see, as regards the disappearance of priority species: European Commission v Spain (Case C-308/08) [2010] ECR 1-4281, para 21 and European Commission v Spain (Case C-404) [2011] ECR 1-11853, para 163.
>
> 44. So far as concerns the assessment carried out under article 6(3) of the Habitats Directive, it should be pointed out that it cannot have a 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 European Commission v Spain (Case C-404/09), para 100 and the case law cited. It is for the national court to establish whether the assessment of the implications for the site meets these requirements."

72. Not long after the Waddenzee case an issue emerged as to whether or not it was permissible at the screening stage (or applying the first sentence of Article 6(3)) to take into account measures designed to eliminate any possible adverse effects on a European site, or whether these measures should properly be considered within the Appropriate Assessment which might be required pursuant to the second sentence of Article 6(3). In particular, the case of R (Hart District Council) v Secretary of State for Communities and Local Government [2008] EWHC 1204 (Admin); [2008] 2 P&CR 302 concerned whether or not it was permissible to take account of a SANGs strategy as mitigating or avoiding the impact on a European site at the screening stage. The factual context of the SANGs strategy was similar to the Canterbury case and identical to the Crondall case. The SANGs strategy was designed to provide alternative countryside recreational provision so as to alleviate recreational pressure on the European site in question. At paragraph 76 of the judgment, Sullivan J (as he then was) expressed his conclusion on the issue as follows:

> "I am satisfied that there is no legal requirement that a screening assessment under Regulation 48(1) must be carried

> out in the absence of any mitigation measures that form part of a plan or project. On the contrary, the competent authority is required to consider whether the project, as a whole, including such measures, if they are part of the project, is likely to have a significant effect on the SPA. If the competent authority does not agree with the proponent's view as to the likely efficacy of the proposed mitigation measures, or is left in some doubt as to their efficacy, then it will require an appropriate assessment because it will not have been able to exclude the risk of a significant effect on the basis of objective information."

73. In Smyth v SSCLG [2015] EWCA Civ 174; [2015] PTSR 1417 the Court of Appeal endorsed the approach of Sullivan J in Hart when considering similar issues. Indeed, Sales LJ (as he then was) considered that Sullivan J's reasoning was clearly correct "to the acte clair standard". He expressed his conclusions as follows:

> "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").
>
> 77. In my judgment, these are all powerful indicators that the proper interpretation of Article 6(3) is as set out by Sullivan J. Accordingly, I do not accept Mr Jones's submission that the Inspector erred in law in the present case in following the approach in *Hart.* The Inspector was lawfully entitled to take into account the proposed preventive safeguarding measures in respect of the SPA and SAC under the first limb of Article 6(3), for the purposes of giving a screening opinion to the effect that no "appropriate assessment" would be required under the second limb of Article 6(3), in the course of his consideration whether to grant planning permission."

74. In practice, and understandably, the approach taken by this court in Hart and the Court of Appeal in Smyth was followed by English and Welsh decision-takers, and, it will be noted, was followed by the decision-takers in the present case. However, it will also have been observed that in the Crondall case reference was made in later submissions in the appeal process to the CJEU's recent decision in People Over Wind v Coillte Teoranta C-323/17; [2018] PTSR 1668. The case concerned the laying of a cable connecting a wind farm to the electricity grid and the effect which it had on two European sites, including a river containing a protected mollusc known as the Nore Pearl Mussel. The judgment records that the population of the Nore Pearl Mussel had been recorded as being as low as 300 individuals, and whilst each individual has a life span of between 70-100 years, the Nore Pearl Mussel has not reproduced itself since 1970. The species was recorded as being threatened with extinction on account of high levels of sedimentation of the bed of the River Nore which was inhibiting the successful restocking of the river by juveniles.

75. In order to determine whether it was necessary to carry out Appropriate Assessment consultants were instructed to undertake a screening assessment. They concluded that "in the absence of protective measures, there is potential for the release of suspended solid into water bodies along the proposed route including directional drilling locations". They further concluded that the release of silt or other pollutants like concrete into the river through the pathway of smaller streams or rivers would have a negative impact on the Nore Pearl Mussel population. The referring court concluded that the decision that Appropriate Assessment was not required was based on the "protective measures" referred to in the screening assessment. The court referred the question to the CJEU as to whether, or in what circumstances, mitigation measures could be considered when carrying out screening for an Appropriate Assessment under Article 6(3) of the Habitats Directive.

76. Having set out that the plan or project in question was not connected with or necessary to the management of the site the court expressed the following conclusions in response to the question referred:

> "34. As regards to the second condition, it is settled case law that article 6(3) of the Habitats Directive makes the

requirement for an appropriate assessment of the implications of a plan or project conditional on there being a probability or a risk that the plan or project in question will have a significant effect on the site concerned. In the light, in particular, of the precautionary principle such a risk exists if it cannot be excluded on the basis of objective information that the plan or project will have a significant effect on the site concerned: European Commission v Kingdom of Belgium (Case C-538/09) EU:C:2011:349, para 39 and the case law cited. The assessment of that risk must be made in light, inter alia, of the characteristics and specific environmental conditions of the site concerned by such a plan or project: see the Orleans case, para 45 and the case law cited.

35. As the Applicants and the European Commission submit, the fact that, as the referring court has observed, measures intended to avoid or reduce the harmful effects of a plan or project on the site concerned are taken into consideration when determining whether it is necessary to carry out an appropriate assessment presupposes that it is likely that the site is affected significantly and that, consequently, such an assessment should be carried out.

36. The conclusion is supported by the fact that a full and precise analysis of the measures capable of avoiding or reducing any significant effects on the site concerned must be carried out not at the screening stage, but specifically at the stage of the appropriate assessment.

37. Taking account of such measures at the screening stage would be liable to compromise the practical effect of the Habitat Directive in general, and the assessment stage in particular, as the latter stage would be deprived of its purpose and there would be a risk of circumvention of that stage, which constitutes, however, an essential safeguard provided for by the Directive.

38. In that regard, the court's case law emphasises the fact that the assessment carried out under article 6(3) of the Habitats Directive may not 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 proposed works on the protected site concerned: see the Orleans case [2017] Env LR 12, para 50 and the case law cited.

39. It is, moreover, from article 6(3) of the Habitats Directive that persons such as the applicants in the main proceedings derive in particular a right to participate in a procedure for the adoption of a decision relating to an application for authorisation of a plan or project likely to have significant effect on the environment: Lesoocharanarske zoskupenie VLK

> v Obvodny urad Trenč in (Case C-234/15) EU:C:2016:838, para 49.
>
> 40. In the light of all the foregoing considerations, the answer to the question referred is that article 6(3) of the Habitats Directive must be interpreted as meaning that, in order to determine whether it is necessary to carry out, subsequently, an appropriate assessment of the implications, for a site concerned, of a plan or project, it is not appropriate, at the screening stage, to take account of the measures intended to avoid to reduce the harmful effects of the plan or project on that site."

77. It is clear that the approach of the CJEU to taking into account mitigation measures at the screening stage is directly contrary to the approach which had been taken in domestic law in Hart and Smyth. The approach to the interpretation and application of Article 6(3) of the Directive set out in those cases can no longer therefore be regarded as good law. The position of the CJEU on the proper interpretation of Article 6(3) of the Directive is clear: to take account of mitigation effects at the screening stage presupposes that there will be likely significant effects on the European site in question and therefore, based on the clear terms of the first sentence of Article 6(3), the requirement for Appropriate Assessment has been made out (see paragraph 38 of People over Wind). To fail to undertake Appropriate Assessment would circumvent the procedural safeguards provided by the Habitats Directive for decision taking in these circumstances, and pre-empting or second-guessing the outcome of the Appropriate Assessment by taking account of mitigation measures at the screening stage is illegitimate. In the light of this analysis the fact that mitigation measures may be relevant within the matters considered in an Appropriate Assessment itself does not justify their inclusion as part of the screening process, and indeed could lead to the circumventing of the Appropriate Assessment stage depriving this requirement of the Habitats Directive of its purpose (see paragraph 37 of People over Wind). In cases where there may be implications for effects upon European sites it is now necessary to follow the approach set out in People Over Wind, and to disregard any mitigation measures when considering the effects of the proposal on the European site at the screening stage. It is against that background that the Defendant in both cases and the Interested Party in the Canterbury case and Second Defendant in the Crondall case accept that there was an error of law in each of these decisions on the basis that the approach from People Over Wind was not adopted in deciding whether Appropriate Assessment was required.

78. As set out above that is not an end to the consideration of these issues, since those parties conceding the error of law also assert that the decision ought not to be quashed in each case. In each case it is contended that discretion should be exercised and the court should not quash the decisions. It is necessary therefore to examine the applicable principles in respect of the exercise of such a discretion.

79. Both of these cases involve applications under section 288 of the Town and Country Planning Act 1990. The approach to be taken is therefore to be derived, first and foremost, from the case of Simplex GE (Holdings) v Secretary of State for the Environment [1989] 57 P&CR 306. In that case the Court of Appeal declined to quash a decision of the Secretary of State that contained an error of law on the basis that they were not satisfied by the Secretary of State that the decision would have been the

same without the legal error having been committed. This approach has been regularly adopted since, including in SSCLG v South Gloucestershire Council [2016] EWCA Civ 74 where Lindblom LJ held at paragraph 25 that the court would need to be satisfied where unlawfulness had been found that the decision-taker would have reached the same decision but for that legal error before it could exercise its discretion not to grant relief. As he pointed out, this is a "stringent test". It is not enough for the court to be persuaded that the decision probably would have been the same or very likely might have been the same. The court "must be persuaded that the decision necessarily would have been the same". These principles were also applied by Holgate J in Goodman Logistics Development (UK) Limited and SSCJG and Another [2017] EWHC 947.

80. The domestic courts have had to consider these principles in the context of cases involving a breach of European environmental law. In Berkeley v Secretary of State for the Environment [2001] 2 AC 603; [2000] 3 WLR 420 the House of Lords held that where there had been a failure to comply with the relevant European law obligations for the provision of an EIA it was not open to the court to dispense with that requirement retrospectively on the basis that the outcome would have been the same, save possibly where the flawed procedure had in fact amounted to a substantial compliance with the relevant Directive. Lord Hoffman observed that counsel for the Defendant had been "right to concede that nothing less than substantial compliance with the Directive could enable the planning permission in this case to be upheld".

81. This position was reviewed, in particular in the judgment of Lord Carnwath, in the case of Walton v Scottish Ministers [2012] UKSC 44; [2013] PTSR 51. Having reviewed both the European and the domestic authorities Lord Carnwath expressed his conclusions in paragraphs 138-140 of his judgment as follows:

> "138. It would be a mistake in my view to read these cases as requiring automatic "nullification" or quashing of any schemes or orders adopted under the 1984 Act where there has been some shortfall in the SEA procedure at an earlier stage, regardless of whether it has caused any prejudice to anyone in practice, and regardless of the consequences for wider public interests. As *Wells* makes clear, the basic requirement of European law is that the remedies should be "effective" and "not less favourable" than those governing similar domestic situations. Effectiveness means no more than that the exercise of the rights granted by the Directive should not be rendered "impossible in practice or excessively difficult". Proportionality is also an important principle of European law.
>
> 139. Where the court is satisfied that the applicant has been able in practice to enjoy the rights conferred by the European legislation, and where a procedural challenge would fail under domestic law because the breach has caused no substantial prejudice, I see nothing in principle or authority to require the courts to adopt a different approach merely because the procedural requirement arises from a European rather than a domestic source.

> 140. Accordingly, notwithstanding Mr Mure's concession, I would not have been disposed to accept without further argument that, in the statutory and factual context of the present case, the factors governing the exercise of the court's discretion are materially affected by the European source of the environmental assessment regime."

82. In the case of R (on the application of Champion) v North Norfolk District Council [2015] UKSC 52; [2015] 1 WLR 3710 Lord Carnwath returned to the issues pertaining to the exercise of discretion in a case involving a breach of European environmental law. Since the case of Walton the CJEU had reached its decision in Gemeinde Altrip v Land Rheinland-Pflaz (Vertreter des Bundesinteresses bim Bundesverwaltungsgericht Intervening) (case C-72/12) [2014] PTSR 311. This case concerned a challenge to a flood retention scheme in the former Rhine flood plain. An issue arose as to whether or not a party could have standing to bring a challenge (and maintain that there had been an impairment of a right) only if, in the circumstances of the case, there was a definite possibility that the contested decision would have been different without the procedural irregularity, and that the procedural irregularity affected a substantive legal position of the applicant. This issue led to the third question from the referring National Court. The court, in paragraph 45 of its judgment, made reference to the principle of equivalence, and the principle of effectiveness. The court went on to consider whether or not an interpretation of impairment of right necessary to give rise to standing which excluded circumstances where the contested decision would not have been different without the procedural defect relied upon by the applicant was justified. The CJEU concluded that the correct approach was as follows:

> "49. Nevertheless, it is unarguable that not every procedural defect will necessarily have consequences that can possibly affect the purport of such a decision and it cannot, therefore, be considered to impair the rights of the party pleading it. In that case, it does not appear that the objective of Directive 85/337 of giving the public concerned wide access to justice would be compromised if, under the law of a member state, an applicant relying on a defect of that kind had to be regarded as not having had his rights impaired and, consequently, as not having standing to challenge that decision.
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> …
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> 51. In those circumstances, it could be permissible for national law not to recognise impairment of a right within the meaning of sub-paragraph (b) of article 10a of that Directive if it is established that it is conceivable, in view of the circumstances of the case, that the contested decision would not have been different without the procedural defect invoked.
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> 52. It appears, however, with regard to the national law applicable in the case in the main proceedings, that it is in general incumbent on the applicant, in order to establish impairment of a right, to prove that the circumstances of the

> case make it conceivable that the contested decision would have been different without the procedural defect invoked. That shifting of the burden of proof into the person bringing the action, for the application of the condition of causality, is capable of making the exercise of the rights conferred on that person by Directive 85/337 excessively difficult, especially having regard to the complexity of the procedures in question and the technical nature of environmental impact assessments.
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> 53. Therefore, the new requirements thus arising under article 10a of that Directive mean that impairment of a right cannot be excluded unless, in the light of the condition of causality, the court of law or body covered by that article is in a position to take a view, without in any way making the burden of proof fall on the applicant, but by relying, where appropriate, on the evidence provided by the developer or the competent authorities and, more generally, of the case file documents submitted to the court or body, that the contested decision would not have been different without the procedural defect invoked by that applicant.
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> 54. In the making of that assessment, it is for the court of law or body concerned to take into account, inter alia, the seriousness of the defect invoked and to ascertain, in particular, whether that defect has deprived the public concerned of one of the guarantees introduced with a view to allowing that public to have access to information and to be empowered to participate in decision-making in accordance with the objectives of Directive 85/337."

83. Albeit that the case of Altrip arose in the context of a national law relating to the question of standing, Lord Carnwath considered that this passage was consistent with the approach that the court had taken in the case of Walton. He went on to express his conclusions about the correct approach and their application to the facts of the case of Champion in the following terms at paragraph 58-61 of his judgment:

> "55. …It leaves it open to court to take the view, by relying "on evidence provided by the developer or the competent authorities and, more generally, on the case file documents submitted to that court" that the contested decision "would not have been different without the procedural defect invoked by that applicant". In making that assessment it should take account of "the seriousness of the defect invoked" and the extent to which it has deprived the public concerned of the guarantees designed to allow access to information and participation in decision-making in accordance with the objectives of the EIA Directive.
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> 56. Judged by those tests I have no doubt that we should exercise our discretion to refuse relief in this case. In para 52 of its judgment, the Court of Appeal summarised the factors

> which in its view entitled the authority to conclude that applying the appropriate tests, and taking into account the agreed mitigation measures, the proposal would not have significant effects on the SAC. That, admittedly, was in the context of its consideration whether the committee arrived at a "rational and reasonable conclusion", rather than the exercise of discretion. However, there is nothing to suggest that the decision would have been different had the investigations and consultations over the preceding year taken place within the framework of the EIA Regulations.
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> 60. This was not a case where the environmental issues were of particular complexity or novelty. There was only one issue of substance: how to achieve adequate hydrological separation between the activities on the site and the river. It is a striking feature of the process that each of the statutory agencies involved was at pains to form its own view of the effectiveness of the proposed measures, and that final agreement was only achieved after a number of revisions. It is also clear from the final report that the public were fully involved in the process and their views were taken into account. It is notable also that Mr Champion himself, having been given the opportunity to raise any specific points of concern not covered by Natural England before the final decision, was unable to do so. That remains the case. That is not to put the burden of proof onto him, but rather to highlight the absence of anything of substance to set against the mass of material going the other way.
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> 61. For completeness I should mention that, in his written submissions to this court, Mr Buxton attempted to rely on a witness statement which had been prepared for the High Court in support of an additional ground relating to failure to consider cumulative effects of "incremental development" at the site over many years. This he suggests can be used as "evidence… that it is at least possible that… lawful screening might produce a different substantive result". However, as he accepts, this ground, and the evidence in support, were not admitted to the High Court. This court can only proceed on the evidence properly before it."

84. To attempt to draw the threads together, it is beyond argument that in cases where there has been a breach of European environmental law the court retains a discretion not to quash that decision on the grounds of that illegality. It is for the decision-taker, in this case the Defendant, to demonstrate that the decision reached would inevitably been the same absent the legal error. In doing so the court must be careful to avoid trespassing into the "forbidden territory" of evaluating the substantive merits of the decision. Ultimately the court is not, unlike some other tribunals or jurisdictions, provided with the complete "case file" or all of the material before the decision-taker, and therefore it is not afforded the same scope for its consideration of the case as the

original decision-taker; it is therefore not equipped to remake the decision in the event that illegality is found. If the court is satisfied that the decision would necessarily have been the same without the error of law which infects it then the court can exercise its discretion not to quash the decision. That judgment must be reached on the basis of the facts and matters as known at the time of the decision being taken. These principles are of equal application to a case involving a breach of European law obligations where the case-law endorses the withholding of substantive relief in cases where the decision in question would not have been different without the procedural defect invoked by the Claimant. In making the evaluation it would be relevant to consider, amongst other matters, the seriousness of the breach of European law and whether or not that breach has deprived the public of a guarantee introduced with a view to allowing the public access to environmental information and "to be empowered to participate in decision making".

The Domestic Law Involved in Each Case

85. In determining an application for planning permission a decision-taker is required by section 70(2) of the Town and Country Planning Act 1990 to have regard to the decisions of the development plan so far as material to that application. Section 38(6) of the Planning and Compulsory Purchase Act 2004 requires that a determination "must be in accordance with the plan unless material considerations indicate otherwise". The 2018 Framework (which in the main is the national planning policy relevant in both of these cases, but which it must be recognised has since been superseded by a 2019 version of the Framework) is a material consideration to which regard must be had in accordance with the statutory decision-taking regime. The interpretation of planning policy is a question of law for the court pursuant to the decision of the Supreme Court in Tesco Stores Limited v Dundee City Council [2012] UKSC 13; [2012] PTSR 983.

86. The jurisdiction of the court under section 288 of the 1990 Act is an error of law jurisdiction. It includes the consideration of whether or not the decision which was reached was one which was Wednesbury unreasonable, although the demonstration of irrationality in a planning case, taken by a suitably qualified expert such as a Planning Inspector, will be a high hurdle to surmount (see Newsmith Stainless v Secretary of State for Environment, Transport and the Regions [2001] EWHC 74 (Admin). In the Canterbury case reliance is placed upon the formulation of the principle given by Sedley J (as he then was) in R v Parliamentary Commissioner for Administration Ex Parte Balchin [1998] 1 PLR 1 in which a legally erroneous decision was described as "a decision which does not add up- in which, in other words, there is an error of reasoning which robs the decision of logic".

87. A further material consideration in a determination in respect of an application for planning permission is the existence of a previous appeal decision bearing upon the issues in the decision being taken. The leading case in relation to this issue is North Wiltshire District Council v Secretary of State for the Environment (1993) 65 P&CR 137 in which in giving the leading judgment in the Court of Appeal Mann LJ observed as follows:

> "In this case the asserted material consideration is a previous appeal decision. It was not disputed in argument that a previous appeal decision is capable of being a material consideration.

> The proposition is in my judgment indisputable. One important reason why previous decisions are capable of being material is that like cases should be decided in a like manner so that there is consistency in the appellate process. Consistency is self-evidently important to both developers and development control authorities. But it is also important for the purpose of securing public confidence in the operation of the development control system. I do not suggest and it would be wrong to do so, that all cases must decide alike. An inspector must always exercise his own judgment. He is therefore free upon consideration to disagree with the judgement of another but before doing so he ought to have regard to the importance of consistency and to give his reasons for departure from the previous decision.
>
> To state that like cases *must* be decided alike presupposes that the earlier case is alike and is not distinguishable in some relevant respect. If it is distinguishable then it usually will lack materiality by reference to consistency although it may be material in some other way. Where it is indistinguishable then ordinarily it must be a material consideration. A practical test for the inspector is to ask himself whether, if I decide this case in a particular way I am necessarily agreeing or disagreeing with some critical aspect of the decision in the previous case? The areas for possible agreement or disagreement cannot be defined but they would include interpretation of policies, aesthetic judgments and assessment of need. Where there is disagreement then the inspector must weigh the previous decision and give his reasons for departure from it. These can on occasion be short, for example in the case of disagreement on aesthetics. On other occasions they may have to be elaborated."

88. This approach has been endorsed and applied by the Court of Appeal in subsequent cases, most recently in the case of DLA Delivery Limited v Baroness of Cumberlege of Newick [2018] EWCA Civ 1305. A further illustration of the principle in play is the case of Gladman Development Limited v SSHCLG and Central Bedfordshire Council [2019] EWHC 127. As was observed in that case, it is well established that when considering the reasons provided by an Inspector or the Secretary of State in a decision on an appeal it is necessary to read the decision benevolently, and as a whole, rather than subjecting it to an inappropriate and detailed forensic scrutiny.

89. The question of the approach to the determination of whether or not a policy is out of date was considered in the case of Gladman Developments Limited v Daventory District Council and SSCLG [2017] JPL 402. In that case the judge at first instance had been satisfied that the Inspector determining the appeal in question had failed to grapple with the assessment under paragraph 215 of the 2012 Framework in respect of whether or not local plan policies bearing upon the grant of planning permission for residential development within villages designated as restricted infill villages (policy HS22), and supporting refusal of planning permission for residential development

other than in strictly controlled circumstances within the open countryside (policy HS24), were out of date. The failure of the Inspector was characterised by Sales LJ in giving the leading judgment in the Court of Appeal as follows:

> "35. In my view, the judge was correct in her reasoning as highlighted above. Even reading the DL benevolently, as is appropriate for planning decisions of this kind; adopting the proper approach of avoiding nit-picking analysis of a decision letter with a view to trying to identify errors when in substance there are none; and also, bearing in mind the expertise of the Inspector and his likely familiarity with the NPPF, it is clear that the Inspector has failed to grapple as he should have done with the issue posed by the NPPF para.215.
>
> 36. This is not a matter of failure to give reasons. It is clear from the DL read as a whole that the Inspector has not sought to assess the issue of the weight to be accorded to policies HS22 and HS24 under the approach mandated by para. 215 at all. As the judge correctly identified, this appears from the deficiencies of the Inspector's reasonings at DL68 and his excessively narrow focus on the NPPF paras 47 and 49, to the exclusion of other relevant policies in the NPPF which ought to have been brought into account in any proper analysis of the consistency of policies HS22 and HS24 with the policies in the NPPF. I add that it is a notable feature of the DL that, after making the necessary correction for the Inspector's slip in DL15 in referring to the NPPF para.215 when he meant para.113, the DL makes no reference at all to para.215, even though that was the provision in the NPPF which set out the approach which the Inspector ought to have followed."

90. On behalf of CPC in the Crondall case reference is made to the obiter remarks in paragraphs 41-45 of Sales LJ's judgment as follows:

> "41. In the particular circumstances of this case, Mr Kimblin submitted:
>
> (i) that the facts that policies HS22 and HS24 appeared in a Local Plan for the period 1991-2006, long in the past, and were tied into the Stricture Plan (in particular, in relation to policy HS24, as set out in the explanatory text at para.4.97 of the Local Plan), which is now defunct, meant that very reduced weight should be accorded to them;
>
> (ii) that the Local Plan in relation to housing supply, which include policies HS22 and HS24, are "broken" and so again should be accorded little weight; and
>
> (iii) that policies HS22 and HS24 have been superseded by more recent guidance, in the form of the NPPF para.47, and so

should be regarded as being outdated in the matter explained by Lord Cylde in *Edinburgh* CC.

I do not accept these submissions.

42. As to (i), policies HS22 and HS24 were saved in 2007 as part of a coherent set of Local Plan polices judges to be appropriate for the Council's area pending work to develop new and up-to-date policies. There was nothing odd or new-fangled in the inclusion of those policies in the Local Plan as originally adopted in 1997. It is a regular feature of development plans to seek to encourage residential development in appropriate centres to preserve the openness of the countryside, and policies HS22 and HS24 were adopted to promote those objectives. Those objectives remained relevant and appropriate when the policies were saved in 2007 and in general terms one would expect that they remain relevant and appropriate today. At any rate, that is something which needs to be considered by the planning inspector when the case is remitted, along with the question of the consistency of those policies with the range of policies in the NPPF under the exercise required by the NPPF para.215. The fact that the explanatory text for policy HS24 refers to the Structure Plan does not detract from this. It is likely that the Structure Plan itself was formulated to promote those underlying general objectives and the fact that it has now been superseded does not mean that those underlying objectives have suddenly ceased to exist. As the Judge observed at [49]:

"Some planning policies by their very nature continue and are not 'time-limited', as they are re-stated in each iteration of planning policy, at both national and local levels."

43. As to (ii), the metaphor of a plan being "broken" is not a helpful one. It is a distraction from examination of the issues regarding the continuing relevance of policies HS22 and HS24 and their consistency with the policies in the NPPF. As Mr Kimblin developed this submission, it emerged that what he meant was that it appears that the Council has granted planning permission for some other residential developments in open countryside, i.e. treating policy HS24 as outweighed by other material circumstances in those cases, and that it relies on those sites with planning permission, among others, in order to show that it has a five-year supply of deliverable residential sites for the purposes of the NPPF para.47 (second bullet point) and para.49. Mr Kimblin says that it shows that the saved policies of the Local Plan, if applied with full rigour and without exceptions, would lead the Council to fail properly to meet housing need in its area, according to the standard laid down in the NPPF paras 47 and 49. Therefore, he says, no or very reduced weight should be accorded to policies HS22 and HS24.

> 44. In my view, this argument is unsustainable. We were shown nothing by Mr Kimblin to enable us to understand why the Council has decided to grant planning permission for development of these other sites. So far as I can tell, the Council granted planning permission in these other cases in an entirely conventional way, being persuaded on the particular facts that it would be appropriate to treat material considerations as sufficiently strong to outweigh policy HS24 in those specific cases. Having done so, there is no reason why the Council should not bring the contribution from those sites into account to show that it has the requisite five-year supply of sites for housing when examining whether planning permission should be granted on Glandman's application for the site in the present case. The fact that the Council is able to show that with current saved housing policies in place it has the requisite five-year supply tends to show that there is no compelling pressure by reason of unmet housing need which requires those policies to be overridden in the present case; or- to use Mr Kimblin's metaphor- it tends positively to indicate that the current policies are not "broken" as things stand at the moment, since they can be applied in this case without jeopardising the five-year housing supply objective. In any event, an assessment of the extent of the consistency of policies HS22 and HS24 with the range of policies in the NPPF is required, as set out in the NPPF para.215, before any conclusion can be drawn whether those policies should be departed from in the present case.
>
> 45. Finally, as to point (iii), the Judge dismissed this contention at [51] by ruling that the NPPF para.47 sets out policy for a planning authority's plan-making, not decision-taking. There is a conflicting authority in this point first instance, since Hickinbottom J ruled in *Cheshire East BC v Secretary of State for Communities and Local Government [2013] EWHC 829 (Admin)* at [52], that although the first bullet point of para.47 related to an authority's plan-making function, the rest of the paragraph is not so restricted and applies also to decision-making; and see, to similar effect, the observation in passing of Coulson J in *Wychavon DC v Secretary of State for Communities and Local Government [2016] EWHC 592 (Admin)* at [46]."

91. As I observed in the Central Bedfordshire case, it is important to observe that Sales LJ was not laying down any legal principles in these observations, and ultimately left the conclusion as to whether or not policies HS22 and HS24 were consistent with the policy of the 2012 Framework to an evaluation in the redetermination of that case which would depend critically upon all the facts and submissions bearing upon that contention.

Conclusions in the Canterbury Case

92. I propose to evaluate the submissions made in relation to ground 2 in the Canterbury case first. It will be recalled that ground 2 relates to the contention that the decision reached by the Defendant in granting planning permission was one which was robbed of logic and irrational. In particular, Mr James Pereira QC who appears on behalf of CCC submits that having recognised the need for the Kent BRIS road infrastructure in his minded-to letter of the 23rd March, it was irrational for the Defendant to then conclude in his letter granting planning permission of the 6th August 2018 that planning permission could be granted without any enforceable mechanism to ensure that that necessary infrastructure was in place. Mr Pereira submits that having accepted the Inspector's conclusions on highway infrastructure in paragraphs 55-62 of the "minded-to" letter, including the conclusion that the Kent BRIS was necessary infrastructure which needed to be provided within an acceptable timescale, it was then unaccountable and inexplicable that the Defendant in the letter of the 6th August 2018 went on to grant planning permission in circumstances where there was no guarantee or means of ensuring that the Kent BRIS would be provided at all, let alone in a timely manner. Mr Pereira contends that in the absence of the complete funding package for the Kent BRIS it will not be delivered, and at best the Defendant was taking an open-ended risk with its provision which was wholly unjustifiable. There was, additionally, as set out above, an error in paragraph 32 of the decision of the 6th August 2018 in terms of how much of the Hillborough site was coming forward and whether or not in truth that amounted to any assurance that the funding will be put in place in order to secure the provision of the Kent BRIS.

93. Mr Elvin contends that when the decision letter of the 6th August 2018 is fully evaluated what the Defendant was doing in that letter in relation to the Kent BRIS, along with the other planning considerations, was simply undertaking an exercise of planning judgment. The Defendant had taken account of the change which had occurred since his "minded to" letter in terms of the new planning obligation securing the Interested Party's contribution to the Kent BRIS by the first occupation of the 250th dwelling, which was an earlier timescale to that which had been originally envisaged. The Defendant noted this change in position in paragraph 30 of the decision, and further noted the increased weight to be afforded in favour of the proposal as a consequence. Notwithstanding this, the Defendant weighed against that consideration a clear understanding that there was not an enforceable mechanism to secure the provision of the Kent BRIS which, along with other matters, weighed against the grant of planning permission. Against that background Mr Elvin submitted that the conclusion reached in paragraph 32 was, firstly, a classic exercise of planning judgment in which the court ought not to interfere and, secondly, an entirely coherent risk-based decision based on a clearsighted appraisal of the fact that there was no guarantee that the Kent BRIS would be delivered, but nevertheless the prospects of the occurring at an earlier stage of the development had improved by virtue of the change in circumstances since the "minded to" letter.

94. In my view, notwithstanding the care and focus of Mr Pereira's submissions, there is no error of law in the Defendant's decision of the kind contended for in ground 2. It is far from uncommon in reaching a planning judgment for a decision-taker to have to evaluate the potential risks of various outcomes which cannot be guaranteed, and appraise the weight to be afforded to them in the planning balance. It is clear that after

the "minded to" letter which the Defendant provided, the issues in relation to highways infrastructure were reconsidered, and that the Interested Party had provided an improved planning obligation enhancing the prospect of earlier provision of the Kent BRIS, albeit accepting that its provision could not be guaranteed by the further planning obligation. The extent to which that improved proposal was to be afforded weight in the planning balance was quintessentially a matter for the judgment of the Defendant.

95. It was not irrational for the Defendant to form the view that this amended proposal was something to which he could give significant weight, albeit at the same time also affording significant weight to the absence of an enforceable mechanism to secure the whole of the Hillborough share of the Kent BRIS funding. How these factors were to be weighed against each other in the planning balance along with the other factors which the Defendant identified were questions of planning judgment, and in my view the decision which the Defendant reached was not one which was ultimately robbed of logic or irrational. The Defendant was entitled to adopt the risk-based approach which he did, recognising that the risks involved weighed against the proposal, but that ultimately the improvement in the timing of the funding provided by the Interested Party was sufficient to justify permission being granted. In those circumstances I am entirely satisfied that the decision which the Defendant reached was one which was rational and a proper exercise of planning judgment and therefore CCC's Ground 2 must be dismissed.

96. I turn then to Ground 1 and the question of whether or not, in the light of the accepted error of European law, nonetheless the decision should not be quashed. Having considered the evidence in the Canterbury case I am satisfied that I can be certain that the decision would have been the same absent the error of law which occurred. I have reached that conclusion for the following reasons.

97. It is important to appreciate as set out above that there is no defined methodology or format for the production of an Appropriate Assessment. The documentation which was produced in the present case in the form of the Habitats Regulations Assessment Screening Statement and the EIA was not presented as if they were an Appropriate Assessment. Nevertheless, I am satisfied that it contained in substance a wealth of carefully researched evidence in relation to each of the European sites which might potentially be affected by the proposal development and, in particular, the Thanet Coast and Sandwich Bay SPA/Ramsar which it was conceded might be subject to minor adverse impacts as a consequence of increased recreational use.

98. Whilst the Habitats Regulation Assessment Screening Statement took into account mitigation measures in concluding that there would be no likely significant effects upon that designation, I am satisfied that had the matter proceeded to the undertaking of an Appropriate Assessment the conclusion would have been the same. Firstly, as set out above, all European sites were considered, and in relation to all sites other than the Thanet Coast and Sandwich Bay SPA/Ramsar the conclusion which was reached was that there would be no likely significant effects without the need to examine any mitigation measures.

99. Additionally, the conclusion in relation to the Thanet Coast and Sandwich Bay SPA/Ramsar, whilst dependent upon taking into account the reliance upon the Strategic Access Mitigation Monitoring Plan for European sites relied upon by the

Inspector and the Secretary of State, has the following significant contextual elements. Firstly, the national body charged with responsibility for advising in relation to issues of this kind, Natural England, were clear in their consultation responses that subject to the contribution towards the mitigation initiative there were not likely to be any significant effects on European sites. Secondly, no contention was made as part of the decision-taking process, or subsequently, that has attempted to gainsay this conclusion, in particular by CCC. Thirdly, the proposals were the subject of consultation at the application, and then the appeal stage, together with detailed public scrutiny during a lengthy public inquiry. It is telling that it does not appear that either the Herne and Broomfield Parish Council or any third parties raised any concern in relation to impacts upon European sites (see sections 8 and 9 of the Inspector's report). Thus, it is fair to say that the conclusions of the Habitats Regulations Assessment Screening Statement (and the EIA) were entirely uncontroversial and undisputed by any participant to the decision-taking process.

100. Not only therefore is the Canterbury case one where detailed and comprehensive information was provided, albeit not presented as an Appropriate Assessment, but the analysis having posed the questions required by both the first and second sentences of Article 6(3) of the Directive, reached a conclusion which was wholly uncontroversial so far as the material before the court discloses. There is no evidence to suggest, bearing in mind the extensive nature of the material produced in support of the application, that the public were deprived of any access to information about these issues or disadvantaged in their ability to participate in decision-taking in respect of it. I am satisfied therefore that whilst the error of law in this case was, in principle, significant, when the substance of the position is scrutinised it is clear that had that error of law not been made nonetheless the decision which the Defendant would have reached would have been the same. In effect in this case both of the questions required in the first and second sentence of Article 6(3) were answered in the material provided in the application, that material was subject to extensive consultation, and no party to that consultation sought to suggest that there was any error in the conclusion which had been reached in respect of the impacts on European sites. In these circumstances I am entirely satisfied that I can be certain that the decision of the Defendant would have been the same if the error of law had not occurred. I am therefore satisfied in the Canterbury case that the court should not quash the Defendant's decision.

Conclusions in relation to the Crondall Case

101. I propose, again, to commence my consideration of this case by examining the domestic law challenges which are advanced by CPC. These bear initially upon the approach taken to policy RUR2 of the Local Plan. It will be recalled that Ground 2 of the CPC case is that the Inspector took account of an irrelevant consideration and misunderstood the position of the parties in relation to the first limb of RUR2. In paragraph 10 of the Inspector's decision he stated that there was a "general consensus between the principle parties that the application of settlement boundaries would be inconsistent with the National Planning Policy Framework".

102. In my judgement that observation had to be put into the following context. Firstly, the "principle parties" that the Inspector was referring to were the Second Defendant and the Interested Party. In terms of the Town and Country Planning (Appeals) (Written Representations Procedure) (England) Regulations 2009 CPC were an Interested

Person pursuant to Regulation 13 of the 2009 Regulations, as distinct from the Appellant (who was the Second Defendant) and the local planning authority (who was the Interested Party). Secondly, as set out above, there was a record of the common ground between the Second Defendant and the Interested Party which recorded that the application was not refused because it was outside of the settlement boundary, and that there was no objection in principle to residential development on the site. Within the record of the common ground between the parties that issue relates back to the first part of policy RUR2. Thirdly, in its appeal statement the Interested Party accepted that, following the Netherhouse Copse appeal, moderate weight should be afforded to policies RUR1 and RUR2 in so far as they served a proper planning purpose to protect the countryside from unwanted and unjustified development. Thus I am not satisfied that there was any error in the Inspector's observation in paragraph 10 which reflected accurately the material which was before him.

103. Within ground 2, and also grounds 3 and 4, CPC rely upon the failure of the Inspector to address the earlier decisions in the case of the appeal decision concerning Sprat's Hatch Farm and the decision of this court in Wyn Williams in coming to his conclusion that the settlement boundaries in the Local Plan were out of date, and only moderate weight could be attached to the first part of Local Plan policy RUR2. In his submissions on behalf of CPC Mr McCracken contends, firstly, that there was a failure to discharge the North Wiltshire principle, in that no explanation was provided for the departure from the decisions at Spratt's Hatch Farm and in Wyn Williams, and also that in the light of the existence of a housing land supply well in excess of five years and measured at around nine years it was wholly unjustifiable to conclude that the paragraph 11 of the 2018 Framework should therefore apply.

104. Firstly, so far as the earlier decisions are concerned, it is clear that at paragraph 10 of the decision letter the Inspector specifically referred to the case of Wyn Williams. He went on to provide reasons as to why he has not followed the reasoning in that case on the facts that were before him, namely firstly, that there was a general consensus that amongst the principle parties that only moderate weight could be attached to that policy and the first limb of policy RUR2 and, secondly, later in the decision at paragraph 43, that the more recent decision in the Netherhouse Copse appeal was consistent with the approach which he was taking. In my view these reasons clearly explain why the Inspector has taken the course that he has in relation to policy RUR2 and departed from the earlier Wyn Williams decision.

105. So far as the existence of the nine year housing land supply is concerned again, in paragraph 43, the Inspector explains that whilst that level of housing supply exists, as the Inspector at the Netherhouse Copse appeal had observed in paragraph 63 of that decision the five year housing land supply demonstrated by the Interested Party was a reflection of housing permissions being granted in breach of the first limb of policy RUR2 (and outside settlement boundaries), leading to the conclusion that the policy "is not meeting current housing needs on the basis that the settlement boundaries in the development plan". Furthermore, as the Inspector explained in paragraph 43 of his decision, whilst a nine year supply of deliverable housing sites was in existence, paragraph 55 of the 2018 Framework maintained as a stated objective boosting the supply of housing. Although the Inspector's conclusions were undoubtedly disputed in the representations made by HPC, I am satisfied that in his reasons he adequately explained why, against the backdrop of earlier decisions and the extent of the

identified housing land supply policy, RUR2 was nonetheless to be considered out of date and of moderate weight in determining the appeal.

106. By ground 5 it is contended the Inspector failed to explain in paragraph 43 of the decision why policy RUR2 had "a considerably more restrictive approach by preventing development outside settlement boundaries and was thereby out of date". In this connection Mr McCracken placed particular emphasis on the observations of Sales LJ in the Daventry case in particular, for instance, at paragraph 42, where he pointed out that policies defining the open countryside and seeking to preserve it were a regular feature of development plans and of continuing relevance as a matter of approach.

107. In my view this submission seeks to illegitimately isolate a phrase from the Inspector's decision without setting it in the wider context of the totality of his reasoning. Firstly, taking the extracted phrase at face value, as I observed at paragraph 36 of the judgement in the Central Bedfordshire case, the obiter observations in paragraph 42 of Sales LJ's judgement need to be put in the context that he was leaving the ultimate assessment of whether the policy was out-of-date, which must be a question of planning judgment against the facts of each individual case, to the evaluation of the re-determining decision-taker. Applying paragraph 213 of the 2018 Framework is a fact sensitive exercise. Furthermore, as I observed in paragraph 36 of the judgement in the Central Bedfordshire case, more recent national planning policy has taken a more nuanced and sophisticated approach to the protection of the countryside, which is also reflected in the 2018 Framework. Placing the phrase in the context of the reasoning as a whole, as I have already observed, the Inspector had alluded to the Netherhouse Copse decision in which the Inspector at paragraphs 63 and 64 had explained that the settlement boundaries identified in the Local Plan keyed into the first limb of policy RUR2, were out-of-date and no longer enabled the Interested Party to meet its needs for market and affordable housing, since they had had to be breached in order for a housing land supply to be established. There is, therefore, no substance in my view in ground 5 of the claim.

108. Ground 6 of the claim maintains that the Inspector had misinterpreted paragraph 59 of the 2018 Framework by "interpreting it as requiring him to reduce the weight to be given to development plans that identify sufficient specific, deliverable sites to meet the housing needs for the area based upon the general national objective of Government of boosting housing land supply" (CPC's skeleton paragraph 81). I am unable to detect any error of this kind in paragraph 43 of the Inspector's decision. He was entitled to conclude, as he did, that the policy objective of significantly boosting the supply of homes contained in paragraph 59 did not cease to apply when housing land supply in excess of five years could be established. There was in his observation no misinterpretation of paragraph 59 of the Framework and ground 6 of the claim must be dismissed.

109. Grounds 7 and 8 of the claim relate to the emerging Local Plan. Mr McCracken on behalf of CPC draws attention to the fact that paragraph 216 of the 2012 Framework applied in this case when considering the weight to be attached to the emerging Local Plan, as a consequence of footnote 22 and paragraph 214 of the 2018 Framework. Paragraph 216 of the 2012 Framework indicated that the weight to be attached to emerging plans should be considered in the context of the extent to which there were objections to emerging plan policy, and therefore the likelihood of them continuing

unaffected into an adopted version of the plan. By way of ground 7 it is submitted that this is an exercise which the Inspector failed to do, notwithstanding the evidence that there were no objections made in the emerging Local Plan process in relation to policy NBE1 and the settlement boundary at Crondall. Thus, it is submitted that the Inspector failed to have regard to a material consideration namely the effect of the policy in paragraph 216 of the 2012 Framework on the weight to be attached to policy NBE1. Alternatively, by ground 8 it is contended that the Inspector failed to explain or give reasons for his conclusion at paragraph 13 of the decision.

110. It will be recalled that in paragraph 13 of the decision the Inspector concluded that the emerging Local Plan was not "at a sufficiently advanced stage to influence the outcome of this appeal and as such can be given very limited weight". In my judgment it was not necessary for the Inspector to specifically refer to paragraph in the 2012 Framework, bearing upon the weight to be given to emerging plans, in order to reach a lawful and properly reasoned decision on this point. As Mr Elvin on behalf of the Defendant points out, the conclusion that the Inspector reached as to the weight to be attached to the emerging Local Plan reflected the submission not only of the Second Defendant but also of the Interested Party, who indicated in their updating email following the publication of the 2018 Framework as follows:

> "As the draft Local Plan has not been examined, only limited weight would be attributed to it at this stage."

In my view it was clearly open to the Inspector to conclude, in accordance with paragraph 216 of the 2012 Framework, that the stage of preparation of the emerging plan was sufficient in and of itself to justify the conclusion, shared with the Interested Party, that only limited weight could be afforded to the emerging Local Plan. His reasons adequately explain this conclusion and in my judgment, there is no substance in grounds 7 and 8 of CPC's claim.

111. This brings me to ground 1. It will be recalled, of course, that there is an admitted error of law in relation to the failure to undertake Appropriate Assessment, and a consequential failure to properly apply the relevant policy from the 2018 Framework, in relation to whether or not the tilted balance should apply where Appropriate Assessment is required. In support of the contention that the decision should be quashed Mr McCracken submits that the need for an Appropriate Assessment is a requirement guaranteed by European law, and therefore the examination of the issues guaranteed by European law has not been undertaken in the instant case leading to the requirement that it should be quashed. Moreover Mr McCracken draws attention to the absence of any detailed analysis, beyond simple reliance upon the SANG and SAMM contribution, in either the ecological report submitted with the application or the Inspector's decision.

112. Furthermore Mr McCracken draws attention to the fact that amongst local objections to the scheme were the following observations in the committee report:

> "SPA/SANG
>
> - Harm to SPA
>
> - SANG is insufficient for following reasons:

- **Not accessible location as on edge of the village, there are no safe walking routes to SANG, there are limited access points and there is no car park.

  …

- No sufficient alternative to SPA so people will still use SPA."

Again, the detail of these objections which bear some relation to the evidence provided by Mr Dorn, are not addressed either in the officer's report or in the Inspector's decision. In the absence of an Appropriate Assessment procedure (accompanied by consultation) Mr McCracken submits that it is not possible for the court to be certain in relation to the outcome of the decision. Furthermore, the application of the wrong version of the planning balance reinforces the contention that it is not possible to be certain that the decision would have been the same had the correct planning balance been applied in the light of the need for Appropriate Assessment.

113. In response to these submissions Mr Elvin draws attention to the long established policy in respect of SANGs and SAMMs set out above and relies upon the evidence that the strategy has been effective in resisting visitor pressure on the European site. He submits that consultation is not a pre-requisite of an Appropriate Assessment unlike, for instance, the requirements of European law in relation to EIA development. Mr Elvin draws attention to the absence of any adverse amenity findings in relation to the second limb of policy RUR2 and, also, the absence of any other environmental or amenity objection to the proposal. Thus he contends that reliant upon the well established process of SANG and SAMM mitigation, and taking account of the Inspector's findings, the court can be confident that the decision which would have been reached had Appropriate Assessment been undertaken and the correct planning balance been applied would have been the same.

114. Having reviewed the rival contentions there is clear force in the submissions made by Mr Elvin. Nevertheless, I am concerned that in order to forge the conclusion that the decision would inevitably been the same it would be necessary for the court to undertake a re-evaluation of the planning balance, without deploying the tilted balance applied by the Inspector, and weighing up again in a conventional manner those factors in favour and against the grant of planning permission. Even on the Inspector's findings it is not possible to say that there are no factors weighing against the grant of planning permission. He has concluded that there was an "identified conflict with the development plan", which is of course the starting point for the consideration of an application under section 38(6) of the 2004 Act, prior to any consideration of the tilted balance being applied. In reality in order to reach the conclusion that the decision would inevitably been the same the exercise in this case would require not simply the setting to one side of the matter which gave rise to the error of law in the decision but rather the re-striking of the planning balance. That would involve the court in exercising its own planning judgment about how the planning balance should be struck absent the application of the tilted balance.

115. Furthermore, and in clear distinction to the Canterbury case, there remains in the Crondall case loose threads in respect of the contentions made by objectors based

upon the adequacy of the SANGs strategy. It cannot be observed that the efficacy of the mitigation measures on which the conclusions of the Interested Party and the Inspector relied were uncontentious in respect of the efficacy of the SANGs strategy. Having evaluated the material I am unable to conclude that I could be certain in this case that the decision which would have been reached on the appeal would have been the same without the error of law which occurred. In these circumstances therefore in my view the decision must be quashed and I decline to exercise my discretion not to do so.

116. It has been noted above that in both of these cases submissions were made that the court ought not to exercise its discretion not to quash on the basis that that would encourage the view that decision-takers could dispense with the need for Appropriate Assessment with impunity. I do not consider that that submission has substance. In any case it will be essential for there to be a careful and fact-sensitive examination of the available evidence before a decision could be reached that quashing was inappropriate. The principles at stake in undertaking that exercise which are set out above make plain the case by case nature of any evaluation of an issue of that kind.

117. It follows that for all the reasons that I have set out above the decisions in both cases are affected by an error of law related to the failure to undertake Appropriate Assessment. Whilst I am satisfied that the decision would inevitably be the same in the Canterbury case, that is a test which is not passed in the Crondall case and therefore in that latter case the Defendant's decision must be quashed. I shall therefore await written submissions in relation to the form of orders necessary to give effect to this judgment.