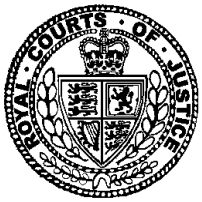

Neutral Citation Number: [2019] EWHC 1975 (Admin)

Case No: CO/63/2019

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24 July 2019

Before :

MRS JUSTICE LANG DBE

- -

Between :

THE QUEEN

on the application of

ELIZABETH WINGFIELD	**Claimant**
- and -	
CANTERBURY CITY COUNCIL	**Defendant**
HNC DEVELOPMENTS LLP	**Interested Party**

- -
- -

Richard Buxton (instructed by **Richard Buxton Solicitors**) for the **Claimant**
Isabella Tafur (instructed by **Legal Services**) for the **Defendant**
Jenny Wigley (instructed by **Howes Percival Solicitors**) for the **Interested Party**

Hearing dates: 12 & 13 June 2019

- -

Approved Judgment

Mrs Justice Lang:

1. In a claim for judicial review filed on 3 January 2019, the Claimant challenged the grant of outline planning permission by the Defendant (hereinafter "the Council"), on 22 November 2018, for a proposed development on the site of the former Chislet Colliery, Hersden, Westbere, Kent ("the Chislet Site").

2. The Claimant is a local resident, and the Defendant is the local planning authority. The Claimant has brought this claim despite not having objected to the application for planning permission. The Interested Party ("IP") is the owner of the Chislet Site and the applicant for outline planning permission.

3. The grant of outline planning permission, which was subject to conditions, was for a mixed use development of up to 370 dwellings, local centre, open space, community ecological park, hard and soft landscaping and associated infrastructure with access from a new roundabout, on a brownfield site some 19.24 ha in size. Part of the Chislet Site is a Local Wildlife Site.

4. The Claimant relied, in particular, upon the adverse environmental effects of the proposed development. The southern boundary of the Chislet Site is about 30 metres from the Stodmarsh National Nature Reserve ("Stodmarsh"), separated by the Canterbury to Ramsgate railway line. Stodmarsh is a European designated site and includes the Stodmarsh Special Protection Area ("SPA"), the Stodmarsh Special Area of Conservation ("SAC"), the Stodmarsh Site of Special Scientific Interest ("SSSI") and the Stodmarsh Ramsar wetland site. The Chislet Site also falls within the 7.2 km zone of influence for the Thanet Coast and Sandwich Bay SPA and Ramsar wetland site.

5. The Claimant also relied upon a separate judicial review claim, which she filed on 26 March 2019, concerning a proposed development at Hoplands Farm, Island Road, Hersden, Westbere, Kent (the "Hoplands Site"). The Hoplands Site comprises grassland and woodland, and is about 29 ha in size. It is adjacent to the Chislet Site.

6. The Council granted outline planning permission on 5 July 2017, for a development at the Hoplands Site for up to 250 houses, a neighbourhood centre including medical services, retail outlets and a nursery, a commercial estate, a community building, amenity space and parking, together with 15 ha of ecological parkland.

7. In the Hoplands claim, the Claimant challenged the Council's decision, dated 12 February 2019, to grant approval for reserved matters relating to access, appearance, landscaping, layout and scale in respect of part of the Hoplands Site, namely, the erection of 176 dwellings (Phases 1A and 1B) and for parkland (Phase 3).

Grounds for judicial review

8. In her Statement of Facts and Grounds, the Claimant pleaded three grounds of challenge:

    i) **Ground 1**. The Council erred in failing to treat the development at the Chislet Site and the adjacent development at the Hoplands Site as a single project for

the purposes of the Town and Country Planning (Environmental Impact Assessment) Regulations 2011 ("the EIA Regulations 2011"), read with Directive 2011/92/EU ("the EIA Directive"). The Council also erred in failing to consider whether or not the two developments should be treated as a single project.

ii) **Ground 2**. The Habitats Regulations Assessment ("HRA") undertaken by the Council pursuant to regulation 63 of the Conservation of Habitats and Species Regulations 2017 ("the Habitats Regulations 2017") was unlawful because:

a) It was apparent from the draft that it contained errors and omissions and was not a rigorous scientific appraisal;

b) Its approach and conclusions were contrary to the reservations expressed by Natural England in respect of the HRA for the proposed development at the Hoplands Site, and no reasons were given for departing from Natural England's advice.

iii) **Ground 3**. The Council failed to give adequate reasons for its decision to grant outline planning permission and/or the reasons given were irrational.

9. On 13 March 2019, Thornton J. granted permission to apply for judicial review on Ground 1, but refused permission on Grounds 2 and 3.

10. The Claimant applied to renew her application for permission on Grounds 2 and 3, and the application was listed to be heard on the same occasion as the substantive hearing on Ground 1. Prior to the hearing, the Claimant decided not to pursue Ground 3.

Ground 1: Single project

Planning history

11. In June 2013, the previous owner of the Chislet Site (MHP Partnership) and the previous owner of the Hoplands Site (George Wilson Developments) jointly issued a document called a "community brochure" setting out their aim to regenerate the village of Hersden through sustainable mixed-use development on the two Sites. In August 2013, a Highways and Transportation Review was published.

12. Natural England reviewed the Sites and advised that "subject to the following concerns being resolved this development proposal would avoid impacts upon the interest features of Stodmarsh (SSSI, SPA, SAC, Ramsar)". The concerns were cat predation, surface water run-off, recreational pressure, lighting and potential impacts of construction.

13. According to the witness statement of Ms Steele, planning consultant for HNC Developments Ltd, the former owners of the Chislet Site informed her that "the intention was not to have a joint project but simply to identify the possibility of both sites coming forward for development purposes".

14. The two Sites were not promoted as a single allocation in the Development Plan process. In 2014 separate representations were made in respect of the two Sites on the publication draft of the Canterbury District Local Plan. The Council's 2014 Strategic Housing Land Availability Assessment considered the two Sites separately. Chislet Colliery was promoted for allocation in the 2017 Local Plan; Hoplands Farm was not.

    The 2013 proposal was not pursued by the owners of the Chislet Site, and they subsequently sold the Chislet Site to the IP in September 2015.

The Hoplands Site

15. The Hoplands Site was sold to Quinn Estates and Invicta Properties.

16. On 7 October 2015, the Council issued a screening opinion which concluded that the proposed development fell within section 10(b) of schedule 2 to the EIA 2011 Regulations, as an infrastructure project exceeding 150 dwellings and 5 hectares in size. It would be likely to have a significant effect on the environment, because of the characteristics of the site and its location close to designated sites, and cumulation with other development. The Council therefore found that the proposed development was EIA development in respect of which an Environmental Statement was required.

17. On 14 January 2016, Natural England provided written advice on the scope of the Environmental Statement, including cumulative and in-combination effects with other developments.

18. On 20 January 2016, the Council provided a detailed scoping opinion, incorporating the consultation responses received. It advised *inter alia* on the assessment required in respect of the Stodmarsh designated sites, and the financial contribution required in respect of the Thanet Coast Strategic Access Management and Monitoring (SAMM) Plan.

19. On 17 February 2016, Quinn Estates and Invicta Properties submitted an application for outline planning permission for a development at the Hoplands Site. The application was accompanied by a detailed Environmental Statement. As well as assessing the environmental effects of the proposed development, it also assessed cumulative and in-combination effects with other nearby development, including the Chislet Site.

20. Outline planning permission was granted on 5 July 2017.

21. The Hoplands Site was acquired by Redrow Homes, with the benefit of outline planning permission, in October 2017.

The Chislet Site

22. Turning to the Chislet Site, on 3 June 2015, the IP requested a screening opinion from the Council, to determine whether its proposed development at the Chislet Site was EIA development.

23. On 10 September 2015, the Council issued a screening opinion which concluded that the proposed development fell within section 10(b) of schedule 2 to the EIA Regulations 2011, being an Infrastructure Project exceeding 150 dwellings and 0.5 hectares in size.

24. In a thorough report, the Council applied the selection criteria for screening in schedule 3 to the EIA Regulations 2011. Under the heading "Characteristics of the Development", it identified the proposed development as a mixed use development on the former colliery site, extending to approximately 19.2 ha. It did not find that the proposed development was part of any other wider development, whether at the Hoplands Site, or elsewhere. It did, however, identify other planned developments in the area (land to the north of Hersden allocated for up to 800 dwellings and land allocated for 1,000 dwellings at Sturry/Broad Oak). The Council found that there was "potential for the cumulation with other development in the vicinity with likely significant environmental effects". It also identified a likely increase in traffic noise and pollution arising from the Chislet Site, and stated "the in-combination effect of development with other planned housing development in the locality will need to be considered".

25. Under the heading "Location of Development", the Council considered the environmental impact on the Stodmarsh designated sites, including "significant cumulative impacts". It also found that "future housing in-combination" was likely to have a significant impact on coastal SPAs. It advised that an appropriate assessment under the Habitats Regulations could be required.

26. In light of the above, the Council was of the opinion that an environmental impact assessment ("EIA") was required as it considered that the development would constitute EIA development.

27. The IP made an application for outline planning permission on 18 March 2016. The application was accompanied by an Environmental Statement which assessed the likely significant effects of the project alone and in combination with twelve other projects, not including Hoplands Farm. At the time of the Council's Scoping Opinion, there had been no planning application for the Hoplands Site and the Council did not identify that development as a project to be taken into account in the cumulative impact assessment. However, during pre-application discussions, additional prospective developments were identified, including the Hoplands Farm site, and the Council requested the IP to provide an updated cumulative impact assessment which took account of those projects. Chapter 16 of the Environmental Statement assessed cumulative impacts in respect of:

    i) Socio-economic impacts (housing, education, health, community facilities, recreation and open space, job creation and the effect on the local economy);

    ii) Transportation, roads and traffic;

    iii) Air quality;

    iv) Landscape;

    v) Ecology;

vi) Archaeology and cultural heritage;

vii) Hydrology, flood risk and drainage;

viii) Ground conditions;

ix) Noise;

x) Lighting.

28. The Environmental Statement concluded that the cumulative impact with other planned development in the area was negligible and that the project would have no significant environmental effects, either alone or in combination.

29. The IP also provided a report to inform the HRA. The report considered the Stodmarsh designated sites, and assessed the implications of the proposed development on them, both alone, and in combination with other projects including Hoplands Farm. It concluded that the development would not adversely affect the integrity of any designated site.

30. On 19 May 2016, Natural England commented on the application, advising as follows:

i) as the proposed development fell within the 7.2 km zone of influence of the Thanet Coast and Sandwich Bay SPA, where any net increase in residential development will be required to provide mitigation for disturbance of notified bird species, an appropriate financial contribution would be required towards the Strategic Access Management and Monitoring ("SAMM") Plan;

ii) the measures identified in Chapter 10 of the Environmental Statement 'Hydrology, Flood Risk and Drainage' would be required to protect the condition of the Stodmarsh designated sites. Surface water run off was a potential impact and a Sustainable Urban Drainage Strategy ("SUDS"), to manage the run off and filter pollutants, should be implemented. Natural England supported the proposed use of swales (depressions) in the ecology park to control run off.

iii) Natural England was fully supportive of the proposed ecology park, which could offer an important habitat buffer to the Stodmarsh designated sites.

iv) The application could provide opportunities to incorporate features into the design which would be beneficial to wildlife.

31. The officer's report to the planning committee recommended refusal because it was contrary to the Local Plan, and there were not sufficient benefits in favour of granting permission. The Chislet Site was not allocated for development in the Local Plan, and a development of 800 dwellings to the north of Hersden had already been allocated in the Local Plan. Among other matters, the IP had not completed a legal agreement to contribute to the SAMM Plan.

32. The application was considered by the planning committee at its meeting on 5 December 2017. The committee resolved to grant planning permission, subject to

completion of an agreement under section 106 of the Town and Country Planning Act 1990 ("TCPA 1990") in respect of, *inter alia*, a SAMM Plan contribution and also the submission of further evidence on measures to mitigate the impact of the proposed development on air quality. The committee's reasons were that the proposed development was on a brown-field site which was well located in relation to the village and it would deliver additional housing, including 30% affordable housing. These benefits, along with contributions proposed, would outweigh the identified harms of the proposed development in the countryside with the associated visual impacts having regard to the existing industrial estate to the east and the approved development at the Hoplands Site to the west.

33. In April 2018, the CJEU had handed down judgment in *People over Wind v Coillte Teoranta* [2018] PTSR 1668, which held that mitigation measures should not be taken into account so as to "screen out" the need for an appropriate assessment under the Habitats Directive. In light of that judgment, the Council determined to carry out an HRA of the impacts of the proposed development on the designated European sites before the application was determined.

34. In its HRA, adopted on 25 September 2018, the Council assessed the environmental impacts on the designated sites, in particular, recreation impact, water levels/extraction, and water quality. It assessed the development on the Chislet Site alone, and in-combination with proposed developments nearby, including Hoplands Farm. It concluded that the proposal would lead to a likely significant effect on the integrity of the designated sites without mitigation measures, and therefore carried out an appropriate assessment under regulation 63(1) of the Habitats Regulations 2017.

35. In respect of the Thanet Coast and Sandwich Bay SPA and Ramsar Site, the mitigating measures funded by a financial contribution to the SAMM Plan would avoid and mitigate adverse environmental effects. The potential risk to the Stodmarsh designated sites from contaminated ground water and surface water run off would be mitigated by the measures set out in the HRA, cross referenced to the Environmental Statement. The Council therefore concluded that, with the benefit of the proposed mitigation measures, the project would have no adverse effect on the integrity of the designated sites.

36. Prior to adoption of the HRA, the Council consulted Kent County Council and Natural England, on its draft HRA. Natural England concurred with the Council's conclusion that the proposed development would not have an adverse effect on the integrity of the designated sites, in particular:

    i) with an appropriate financial contribution to the SAMM Plan, the proposed developments would not have an adverse effect on the integrity of the Thanet Coast and Sandwich Bay SPA and Ramsar Site;

    ii) the impacts of contaminated surface water run off could be suitably mitigated.

37. The application for outline planning permission was referred back to the planning committee. The officer's report to the planning committee informed members of the outcome of the HRA and the further air quality assessments submitted by the IP, which were considered to accord with the requirements of the Local Plan and

National Planning Policy Framework. The report recommended that the previous resolution to grant outline planning permission be endorsed, subject to conditions.

38. At its meeting on 16 October 2018, the planning committee granted outline planning permission, subject to completion of the section 106 TCPA 1990 agreement and detailed conditions. The section 106 agreement was duly made on 21 November 2018, satisfying the requirement for a contribution to the SAMM Plan. Condition 12 made detailed provision for surface water disposal, based on the Flood Risk Assessment by Hydrock which had been submitted by the IP. Condition 21 required the submission of a Construction Environmental Management Plan ("CEMP") prior to commencement of development, which was to include, amongst other matters, a scheme for protection of areas of ecological interest, including the Stodmarsh designated sites, based upon the mitigation measures set out in the Environmental Statement, chapter 15. Condition 23 required an Ecology Mitigation Strategy to be approved and condition 24 required a Landscape and Ecological Mitigation Plan ("LEMP") to be submitted and approved.

The EIA Directive and the EIA Regulations 2011

39. Article 2(1) of the EIA Directive requires member states to adopt all measures necessary to ensure that projects likely to have a significant effect on the environment are made subject to an assessment of their effects, before consent is given. The term "project" is defined in article 1 as "the execution of construction works or of other installations or schemes" and "other interventions in the natural surroundings and landscape…".

40. The EIA Regulations 2011 (which apply in this case) implemented the EIA Directive into UK domestic law. The EIA Regulations use the term "development" in place of the term "projects" which is used throughout the Directive.

41. Under reg. 3(4) of the EIA Regulations 2011, a local planning authority is prohibited from granting planning permission for "EIA development", as defined, unless before doing so it has "taken the environmental information into account and have stated that they have done so."

42. "EIA development" is defined in reg. 2(1) as "Schedule 1 development; or Schedule 2 development likely to have significant effects on the environment by virtue of factors such as its nature, size or location."

43. Part 2 of the EIA Regulations 2011 provides for a proposed development to be screened by local planning authorities and/or the Secretary of State, to determine whether or not it is EIA development. By reg. 5, a person who is minded to carry out development may request the relevant planning authority to adopt a screening opinion, defined in reg. 2 as "a written statement of the opinion of the relevant planning authority as to whether development is EIA development".

44. Schedule 3 to the EIA Regulations 2011 sets out the selection criteria to be applied when screening Schedule 2 development. These include, in paragraph 1, the characteristics of the development, having regard to "the cumulation with other development" (paragraph 1(b)).

45. Reg. 7 of the EIA Regulations 2011 makes provision for planning authorities to consider whether an application may require a screening opinion, even though it has not been requested.

46. Where a screening opinion determines that the proposed development would constitute EIA development, and so an EIA assessment will be required, reg. 13 of the EIA Regulations 2011 provides for planning authorities to provide a scoping opinion, setting out in writing their opinion as to the information to be provided in an environmental statement.

47. The environmental information which a local planning authority must take into account before determining an application for planning permission is defined in reg. 2(1) as:

> "… the environmental statement, including any further information and any other information, any representations made by any body required by these Regulations to be invited to make representations, and any representations duly made by any other person about the environmental effects of the development."

48. Reg. 2(1) further defines an "environmental statement" as a statement:

> "(a) that includes such information referred to in Part 1 of Schedule 4 as is reasonably required to assess the environmental effects of the development and which the applicant can, having regard in particular to current knowledge and methods of assessment, reasonably be required to compile, but
>
> (b) that includes at least the information referred to in Part 2 of Schedule 4."

Thus, the information required under Part 1 is such as is "*reasonably required*" whereas the information required under Part 2 is a mandatory minimum requirement.

49. Schedule 4 provides as follows:

> "**Information for inclusion in environmental statements**
>
> **Part 1**
>
> 1. Description of the development, including in particular:
>
> > (a) a description of the physical characteristics of the whole development and the land-use requirements during the construction and operational phases;
> >
> > (b) a description of the main characteristics of the production processes, for instance, nature and quantity of the materials used;

(c) an estimate, by time and quantity, of expected residues and emissions (water, air and soil pollution, noise, vibration, light, heat, radiation, etc.) resulting from the operation of the proposed development.

2. An outline of the main alternatives studied by the applicant or appellant and an indication of the main reasons for the choice made, taking into account the environmental effects.

3. A description of the aspects of the environment likely to be significantly affected by the development, including, in particular, population, fauna, flora, soil, water, air, climatic factors, material assets, including the architectural and archaeological heritage, landscape and the inter-relationship between the above factors.

4. A description of the likely significant effects of the development on the environment which should cover the direct effects and any indirect, secondary, cumulative, short, medium and long-term, permanent and temporary, positive and negative effects of the development, resulting from:

(a) the existence of the development;

(b) the use of natural resources;

(c) the emission of pollutants, the creation of nuisances and the elimination of waste,

and the description by the applicant of the forecasting methods used to assess the effects on the environment.

5. A description of the measures envisaged to prevent, reduce and where possible offset any significant adverse effects on the environment.

6. A non-technical summary of the information provided under paragraphs 1 to 5 of this Part.

7. An indication of any difficulties (technical deficiencies or lack of know-how) encountered by the applicant in compiling the required information.

Part 2

1. A description of the development comprising information on the site, design and size of the development.

2. A description of the measures envisaged in order to avoid, reduce and, if possible, remedy significant adverse effects.

> 3. The data required to identify and assess the main effects which the development is likely to have on the environment.
>
> 4. An outline of the main alternatives studied by the applicant or appellant and an indication of the main reasons for his choice, taking into account the environmental effects.
>
> 5. A non-technical summary of the information provided under paragraphs 1 to 4 of this Part."

Case law

50. The assessment of a project's likely significant effects on the environment is made by reference to the project which is the subject of the application to the competent authority, unless in reality that development is an integral part of a more substantial scheme. In *R v Swale BC ex parte RSPB* [1991] 1 PLR 6, Brown J. said, at [16]:

> "… the question whether the development is of a category described in either Schedule must be answered strictly in relation to the development applied for, not any development contemplated beyond that. But the further question arising in respect of a schedule 2 development, the question of whether it 'would be likely to have significant effects on the environment by virtue of factors such as its nature, size or location' should, in my judgment, be answered rather differently. The proposals should not then be considered in isolation if in reality it is properly to be regarded as an integral part of an inevitably more substantial development. This approach appears to me appropriate on the language of the Regulations, the existence of the smaller development of itself promoting the larger development and thereby likely to carry in its wake the environmental effects of the latter. In common sense, moreover, developers could otherwise defeat the object of the Regulations by piecemeal development proposals."

51. The courts have been astute to detect what is colloquially known as 'salami slicing' – the device of splitting a project into smaller components that fall below the EIA thresholds - thereby avoiding the requirement to carry out an environmental assessment.

52. In *Ecologistas en Accion v Ayuntamiento de Madrid* [2009] PTSR 458, in which five segments of an urban road enlargement project in Madrid had been split into separate projects, the CJEU held:

> "44. Last, as the Court of Justice has already noted with regard to Directive 85/337, the purpose of the amended Directive cannot be circumvented by the splitting of projects and the failure to take account of the cumulative effect of several projects must not mean in practice that they all escape the

> obligation to carry out an assessment when, taken together, they are likely to have significant effects on the environment within the meaning of article 2(1) of the amended Directive: see *Commission v Ireland* (Case C-392/96), para 76 and *Abraham v Region Wallonne* (Case C-2/07), para 27.
>
> 45. As regards the projects at issue in the main proceedings, it is clear from the order for reference that they are all part of the larger project "Madrid calle 30". It is for the referring court to verify whether they must be dealt with together, by virtue, in particular, of their geographical proximity and their interactions."

53. AG Kokott went further in her Opinion, stating:

> "52. In the present case, the geographical proximity of the five projects, their similarity, their combined effects in terms of urban traffic management and the fact that they were dealt with together at the hearing and in the development consent procedure would suggest that they should be considered together. Because all the sub-projects affect a limited sector of the urban road network, their environmental effects will in all likelihood overlap and accentuate each other, both in the construction phase and when the improved and widened roads are used."

54. In *Burridge v Breckland DC* [2013] EWCA Civ 228, the Court of Appeal held that planning applications for a biomass renewable energy plant and a combined heat and power plant, situated about 1 km apart, but connected by an underground gas pipe to carry gas between the two sites, should have been treated as a single project. Pill LJ said, at [41]:

> "…The two proposed developments were functionally interdependent and can only be regarded as an "integral part" of the same development. They cannot be treated otherwise than as a single project or development and were actually considered by the committee on the same day and on the basis of cross-referenced reports. The geographical separation of something over 1km does not, in my judgment, defeat that, particularly given the link provided by the pipeline."

55. In *R (Larkfleet Ltd) v South Kesteven DC* [2015] EWCA Civ 887, the Court of Appeal rejected a challenge to the local planning authority's separate consideration of a Link Road and a proposed Urban Extension development. Although the planning and purposes of the two projects were linked and the sites were in the same ownership (albeit with different developers), the Court rejected the submission that they should have been treated as a single project. Sales LJ said, at [36] to [38]:

> "36. Mr Kingston QC, for the Appellant, sought to rely on these passages in support of his submission that SKDC was obliged to assess the proposal for the link road and the proposal

for the residential site as a single project. However, in my view the argument is unsustainable. It is clear from the terms of the EIA Directive that just because two sets of proposed works may have a cumulative effect on the environment, this does not make them a single "project" for the purposes of the Directive: the Directive contemplates that they might constitute two potential "projects" but with cumulative effects which need to be assessed. The passages from Ecologistas to which I have referred also contemplate that two sets of proposed works may constitute different projects for the purposes of the Directive. What these passages are directed towards is avoiding a situation in which no EIA scrutiny is undertaken at all. However, if the two proposed sets of words are properly to be assessed as two distinct "projects" which meet the threshold criteria in the Directive, there will be EIA scrutiny of the cumulative effects of the two projects.

37. It is true that the scrutiny of cumulative effects between two projects may involve less information than if the two sets of works are treated together as one project, and a planning authority should be astute to ensure that a developer has not sliced up what is in reality one project in order to try to make it easier to obtain planning permission for the first part of the project and thereby gain a foot in the door in relation to the remainder. But the EIA Directive and the jurisprudence of the Court of Justice recognise that it is legitimate for different development proposals to be brought forward at different times, even though they may have a degree of interaction, if they are different "projects", and in my view that is what has happened here as regards the application for permission to build the link road and the later application to develop the residential site.

38. The EIA Directive is intended to operate in a way which ensures that there is appropriate EIA scrutiny to protect the environment whilst avoiding undue delay in the operation of the planning control system which would be likely to follow if one were to say that all the environmental effects of every related set of works should be definitively examined before any of those sets of works could be allowed to proceed (and the disproportionate interference with the rights of landowners and developers and the public interest in allowing development to take place in appropriate cases which that would involve). Where two or more proposed linked sets of works are in contemplation, which are properly to be regarded as distinct "projects", the objective of environmental protection is sufficiently secured under the scheme of the Directive by consideration of their cumulative effects, so far as that is reasonably possible, in the EIA scrutiny applicable when permission for the first project (here, the link road) is sought, combined with the requirement for subsequent EIA scrutiny

> under the Directive for the second and each subsequent project. The adequacy and appropriateness of environmental protection by these means under the EIA Directive are further underwritten by the fact that alternatives will have been assessed at the strategic level through scrutiny of relevant development plans (here, the Core Strategy and Masterplan) from an environmental perspective under the SEA Directive."

56. Mr Buxton placed particular reliance upon the Court's acceptance of the proposition that an assessment of cumulative effects would only consider those effects which were liable to be increased as a result of both developments. However, the Court of Appeal did not consider that was a reason why a more comprehensive single project assessment had to be undertaken, particularly when both projects were subject to full individual assessments.

57. Mr Buxton also relied upon paragraph 54 of my judgment at first instance (*R (Larkfleet Ltd) v South Kesteven DC* [2014] EWHC 3760 (Admin)) where I said:

> "It is for the planning authority to decide the following issues:
>
> > i) Is the proposed development within Schedule 1 to the EIA Regulations?
> >
> > ii) If not, is the proposed development within a description and relevant threshold in Schedule 2 and is it likely to have significant effects on the environment by virtue of factors such as its nature, size or location?
> >
> > iii) In considering the questions at (ii) above, the starting point will always be the proposed development. However, the planning authority ought also to go on to consider whether there are other proposed developments in the vicinity and if so, whether they should be assessed jointly with the proposed development, as if they comprised a single Schedule 2 development. The test is whether they ought to be regarded "as part of the same substantial development" (per Davis LJ in *Burridge*) or whether the proposed development is "an integral part of an inevitably more substantial development" (per Simon Brown J. in Swale).
> >
> > iv) If the planning authority concludes that any other developments ought not to be assessed jointly with the proposed development, as if they comprised a single Schedule 2 development, it should go on to consider whether any other developments should be included in the assessment of cumulative effects under paragraph 4 of Schedule 4."

58. Mr Buxton submitted that paragraph 54 was authority for the proposition that the Council should have decided whether or not the Chislet and Hoplands Sites should

have been jointly assessed as a single project, and there was no evidence that the Council made any such decision. In my view, Mr Buxton was reading too much into paragraph 54. Paragraph 54 is no more than a summary of the screening requirements of the EIA Regulations 2011, as explained in the case law. Reg. 4(6) provides:

> "Where a local planning authority or the Secretary of State has to decide under these Regulations whether Schedule 2 development is EIA development the authority or Secretary of State shall take into account in making that decision such of the selection criteria set out in Schedule 3 as are relevant to the development." (*emphasis added)*

Thus, the decision maker must first identify the development (or project under the EIA Directive), and then apply the Schedule 3 selection criteria for screening Schedule 2 development, which include, at paragraph 1(b), the cumulation with other development. As Ms Wigley correctly submitted, consideration of other development will only be required in cases where it is relevant to do so, as reg. 4(6) provides.

59. Moreover, paragraph 54 describes the steps in a decision-making process, ultimately leading to the decision which the local planning authority is required to make under reg. 4(6) of the EIA Regulations 2011, namely, whether the development is EIA development. There is no other formal decision to be made at this stage. Of course, a local planning authority may have to consider at a later stage whether the proposed development is part of a wider development, but only if there is some basis to suggest that it might be.

60. In *Bowen-West v Secretary of State for Communities and Local Government* [2012] EWCA Civ 321, the Court of Appeal dismissed a challenge to an Inspector's decision to grant planning permission for the disposal of low level radioactive waste at a landfill site, without including as part of the 'project' other proposed applications for the further development of the landfill site. The Court found that the Inspector was clearly right to conclude that the application for planning permission was a stand-alone proposal, not part of a wider integrated development. Laws LJ analysed the case law, distinguishing between challenges to screening decisions and scoping decisions, which is of particular relevance to this case. He said, at [32]:

> "I should next point up the fact that some of the principal authorities relied on by the appellant as demonstrating the breadth of the EIA provisions are not about the scope of the EIA to be undertaken in a case where, as here, an Environmental Statement admittedly falls to be made. Rather, they address the question whether an EIA is required at all. They are "screening" rather than "scoping" positions. This is so of *Kraaijeveld, Commission v Spain, Ecologistas* and also *Swale Borough Council ex parte RSPB* [1991] 1 PLR 6, to which reference was made in the written argument. It is in this type of case, screening cases, that the courts have been concerned, energetically concerned, to put a stop to the device of using piecemeal applications as a means of excluding larger developments from the discipline of EIA. That approach cannot

> simply be read across to a case which is not about screening at all, but rather about the appropriate scope of an EIA."

61. The principles established in the *Bowen-West* case were applied by the High Court in *Buckinghamshire CC v Secretary of State for Transport* [2013] EWHC 481 (Admin), in which Ouseley J. rejected the submission that the decision to promote the two phases of the high speed rail link known as HS2 in two separate hybrid bills breached the EIA Directive. He concluded that, as in *Bowen-West*, it was the project for which consent was sought – Phase 1 – which was to be assessed, and there was nothing to suggest that this approach was irrational or otherwise unlawful.

62. In *Preston New Road Action Group v Secretary of State for Communities and Local Government & Ors* [2018] EWCA Civ 9, Lindblom LJ also distinguished the "salami slicing cases" in which the purpose of the EIA Directive is circumvented, where he said, at [69]:

> "I do not see how Mr Willers' argument can gain any strength from European or domestic authority on EIA flawed by the splitting of projects into their constituent phases or parts – sometimes referred to as "salami slicing". The two decisions of the Court of Justice of the European Union most familiar in this context are *Abraham* and *Ecologistas*. The defect of the EIA in *Abraham* was that only the works of improvement to the infrastructure of the airport had been assessed, and the increased numbers of flights that would be enabled by those improvements had not (see paragraphs 26 and 42 to 46 of the court's judgment). The defect in *Ecologistas* was that the works for improving the Madrid urban ring road had been assessed separately, as a number of individual projects, rather than overall, as a composite whole (see paragraphs 34 to 39 and 44 to 46 of the court's judgment). This case is quite different from those. In this case there is no question of the purpose of the EIA Directive being circumvented by splitting into separate parts or phases what is truly a single project. The assessment here was of the whole project, not merely parts of it."

Conclusions

63. The question as to what constitutes the 'project' for the purposes of the EIA Regulations is a matter of judgment for the competent authority, subject to a challenge on grounds of *Wednesbury* rationality or other public law error (*Bowen-West* at [39 - 41]; *Buckinghamshire CC* at [287]; *Evans v Secretary of State for Communities and Local Government* [2013] EWCA Civ 114 at [32 – 43]).

64. Relevant factors may include:

i) Common ownership – where two sites are owned or promoted by the same person, this may indicate that they constitute a single project (*Larkfleet* at [60]);

ii) Simultaneous determinations – where two applications are considered and determined by the same committee on the same day and subject to reports which cross refer to one another, this may indicate that they constitute a single project (*Burridge* at [41] and [79]);

iii) Functional interdependence – where one part of a development could not function without another, this may indicate that they constitute a single project (*Burridge* at [32], [42] and [78]);

iv) Stand-alone projects – where a development is justified on its own merits and would be pursued independently of another development, this may indicate that it constitutes a single individual project that is not an integral part of a more substantial scheme (*Bowen-West* at [24 – 25]).

65. Applying these factors to the facts of this claim, I am entirely satisfied that the Chislet Site and the Hoplands Site are separate developments, and are not part of a single project.

66. The IP has no interest in the Hoplands Site and has no connection to the owners of the Hoplands Site or the promoters of the Hoplands development.

67. Whilst more than five years ago, in 2013, there was some collaboration between the then owners of the Chislet Site and the then owners of the Hoplands Site, this was very limited and ceased altogether by 2014. Since then, the two development schemes have been pursued entirely separately from each other, both in Local Plan allocation procedures and the applications for planning permission. Although the applications for outline planning permission were made within a month of each other, in early 2016, that appears to be a coincidence. As Ms Steele stated in her witness statement:

> "…apart from that point in time in 2013 … there has been no joint collaboration or working in relation to the two sites. They have both been promoted separately through the Development Plan process and have both been the subject of separate planning applications … [which] clearly envisage both sites being developed as stand alone proposals without any joint masterplanning for the two sites. The sites have separate accesses and have no combined drainage strategy arrangements. The Site can and will be developed separately from Hoplands Farm and vice versa."

68. There is no functional inter-dependence between the two schemes or Sites. The Sites are substantial in size and have their own access and drainage arrangements. Although residents on the Chislet Site may choose to access some of the community and retail facilities on the Hoplands Site, Chislet residents may equally well choose to use existing facilities, e.g. in Hersham and nearby.

69. Perhaps the most important factor is that both the Chislet Site scheme and the Hoplands Site scheme are clearly stand-alone projects. Each development has been justified on its own merits and each development would be pursued whether or not the other scheme went ahead.

70. Mr Buxton identified overlapping environmental effects as a factor pointing to a single project, relying upon the opinion of AG Kokott in the *Ecologistas* case. It is accepted that there are overlapping environmental effects between the two Sites, because they are adjacent sites. In my judgment, this is a relevant factor, but not a determinative one. Although overlapping environmental effects will often exist where there is a single project, they may also exist where there are independent projects nearby to one another, in which case an assessment of cumulative effects will be required, as has occurred here. As Sales LJ said in *Larkfleet* at [36], "just because two sets of proposed works may have a cumulative effect on the environment, this does not make them a single "project" for the purposes of the Directive: the Directive contemplates that they might constitute two potential "projects" but with cumulative effects which need to be assessed".

71. As the judgments in *Bowen-West* and *Larkfleet* make clear, it is important to distinguish a challenge such as this one from a challenge to a screening decision, where an applicant avoids the EIA thresholds in the EIA Directive by salami slicing a larger project into several smaller ones. In this case, both proposals have been subject to full assessment under the EIA Regulations 2011 (with both projects assessing the cumulative effects of each with the other) and there can therefore be no suggestion of artificial project splitting in order to avoid EIA scrutiny.

72. Mr Buxton submitted that the Environmental Statement was inadequate in its assessment of the cumulative effects. His primary submission was that this was a consequence of the failure to identify the two developments as a single project, as an assessment of cumulative effects is a narrower exercise than an assessment of both Sites as a single project. In my judgment, this submission was misconceived. As I explained at paragraph 55 above, the Court of Appeal in *Larkfleet* did not treat this as a reason why a more comprehensive 'single project' assessment had to be undertaken. Under both the EIA Directive and the EIA Regulations 2011, once the scope of the project or development has been identified, an assessment of cumulative effects is all that the law requires.

73. Although the first draft of the Environmental Statement prepared by the IP's consultants in 2016 did not refer to the Hoplands application, once the Council informed the IP about it, the Environmental Statement was revised to take account of the Hoplands proposed development, when assessing the cumulative impacts of the development. The initial Environmental Statement was also supplemented by other reports, and assessments, with the benefit of advice from Natural England. On a fair reading, without descending into nit picking, the assessment met the standard required by schedule 4 to the EIA Regulations 2011, read together with the definition of "environmental statement" in reg. 2(1). By the time the Council came to consider and determine the application for outline planning permission, the Council was entitled rationally to conclude that the assessment of environmental effects, including cumulative effects, was sufficient to enable it to determine the application for outline planning permission, in accordance with reg. 3(4) of the EIA Regulations 2011.

74. The Claimant further submitted that the Council erred in failing to make a decision whether or not the Chislet and Hoplands developments should be treated as a single project, relying upon my judgment in *Larkfleet*. As I explained at paragraphs 57 to 59 above, Mr Buxton read too much into paragraph 54 of *Larkfleet*, which was merely a

summary of the screening requirements of the EIA Regulations 2011, as explained in the case law.

75. In this case, the Council, in its screening opinion, applied reg. 4(6) of the EIA Regulations 2011, by reference to the selection criteria in schedule 3, and concluded that the development was EIA development. As part of its decision-making process, it had to identify the characteristics of the development. It is clear from the screening opinion that it considered that the development or project was the Chislet development, as set out in the application. As far as I am aware, the Council adopted the same approach in its scoping opinion. Neither the Claimant nor anyone else suggested that the Chislet development was part of a single project with the Hoplands development, at screening or scoping stage. Furthermore, in my view, there was no information before the Council at that stage which ought reasonably to have triggered an assessment into the question whether the two Sites were part of a single project.

76. During the planning application process, the single project point was raised by Mr Buxton. The planning officer in the Hoplands application advised the planning committee in his report as follows:

> "Concerns have been raised by a solicitor acting on behalf of a number of residents that the Hoplands Farm development should be considered as part of the same project as the approved development on the adjacent Chislet Colliery site. The Council does not consider that the developments form part of the same project. The sites are owned and promoted by different bodies. The applications were considered by the Council's planning committee at different times (with the Hoplands Farm outline planning permission having been granted over a year before the Former Chislet Colliery planning permission). While the two sites lie in close proximity to one another, they are functionally independent of each other and both were justified on their own individual merits and pursued independently of the other. The Hoplands Farm outline planning application was subject to EIA, which considered the cumulative environmental impacts of the proposed development together with other developments included on the Former Chislet Colliery Site (see, for example, Table 3.1 of the Environmental Statement, which identified a proposed development of up to 400 dwellings on the Chislet Colliery site as a project to be considered in the cumulative impact assessment). The Council is therefore satisfied that the environmental information submitted with the outline planning application is adequate to assess the effects of the development on the environment and has taken that information into account in considering this subsequent reserved matters application."

77. In the light of this account, I am satisfied that when the question of a single project was raised, the Council considered it, and reached the conclusion that the Chislet application and the Hoplands application were not a single project. Their conclusion does not disclose any error of law.

Additional matters raised by the Claimant under Ground 1

78. In the Claimant's Statement of Facts and Grounds, Ground 1 was confined to challenging the Council's failure to treat the Chislet Site and the Hoplands Site as a single project. The Claimant expressly excluded any challenge to the "quality" of the assessment which the Council undertook of the cumulative environmental effects of the two Sites. The Council and the IP pleaded their responses to this challenge in their Summary Grounds of Defence.

79. On 12 February 2019, the Claimant then filed a document entitled "C Reply to D and IP SGR's" which was not a reply, but instead raised new points and extensively challenged the adequacy of the Council's assessment of the cumulative environmental effects of the two Sites.

80. In my judgment, it was impermissible for the Claimant to seek to add to her grounds in this manner. Under CPR Part 54, there is no provision for the Claimant to file a Reply, or any other response, to the Summary Grounds of Defence filed in a judicial review claim. If the Claimant wished to add to her grounds, she should have applied to amend her Statement of Facts and Grounds, and the Council and IP would have been given a chance to respond. However, even if she had done so, she would have had to seek an extension of time, as the 6 week time limit for challenging the decision on 22 November 2018 had expired by 12 February 2019.

81. Since the Claimant was not entitled to file a Reply or any other response to the Summary Grounds of Defence, it was a matter for the discretion of the permission Judge whether to have any regard to the Claimant's document. It is apparent from the reasons given by Thornton J. that she only gave permission on the original Ground 1, as pleaded in the Statement of Facts and Grounds.

82. In their Detailed Grounds of Defence, filed in April 2019, the Council and the IP both objected to the Claimant's conduct in seeking to add additional grounds in a Reply, and pointed out that permission had not been granted in respect of these grounds, and they were raised outside the 6 week time limit. Therefore the Claimant's legal representatives were put on notice that this irregular procedure ought to be rectified by making an application to amend the Statement of Facts and Grounds out of time.

83. The Administrative Court Judicial Review Guide 2018 advises that Claimants must apply for the Court's permission to amend their grounds and should follow the interim applications procedure by filing an application notice and a draft of the amendments sought (see para 6.10.1 (pre-permission); para 9.2.1 (post-permission) and para 12.7). Whilst CPR 54.15 and PD 11.1 require notice to be served, but do not refer to a draft of the amendments sought, I consider that a party applying to amend a judicial review claim should file a draft amended pleading so that there is no doubt about the nature of the amendments which are sought and, where appropriate, granted.

84. Mr Buxton submitted that he had made an application to amend the Statement of Facts and Grounds because in his skeleton argument, he included the following paragraph:

> "57. The D and IP have complained that the ground go beyond those set out in the SFG. However, they have dealt with any

> such straying in their DGR. Insofar as may be necessary, the C seeks formally to amend grounds to cover points as set out following…"

85. In my judgment, this paragraph was insufficient to meet the requirements of the Administrative Court Judicial Review Guide or CPR 54.15. A separate notice should have been served so that it could be readily identified by the Court and other parties, not a paragraph buried in a lengthy skeleton argument. The draft amended grounds should have been precisely set out. It was difficult to ascertain from the Reply and the subsequent skeleton argument what the additional grounds were. Also, there should have been an application for an extension of time, explaining the reason for the delay and whether there was good reason for an extension of time.

86. Furthermore, I accepted the submissions made by counsel for the Council and the IP that the additional grounds were unarguable. The assessment of cumulative effects is a matter of fact and judgment for decision-makers, reviewable only on public law grounds.

87. In my judgment, it was unarguable that the minimum requirements of an Environmental Statement were not met in this case, or that there was any other public law error in the Council's approach to the assessment. The Claimant's submission that the Council erred in taking into account mitigating factors, based upon the judgment of the CJEU in *People over Wind* in the context of screening decisions under the Habitats Directive, was misconceived. Mitigating factors can properly be taken into account in substantive assessments under the Habitats Directive, and so there is no basis for excluding them from a substantive EIA assessment. In any event, EIA assessment operates under a separate legal framework, and both the EIA Directive (Article 5.3(b)) and the EIA Regulations 2011 (paragraph 5 of Schedule 4) expressly require consideration of mitigation measures.

88. For these reasons, I refused the Claimant permission to amend her claim to add a free-standing challenge to the lawfulness of the Council's assessment of the cumulative environmental effects of the two Sites.

89. However, I permitted Mr Buxton to refer to the alleged failings of the Council's assessment of the cumulative environmental effects of the two Sites in support of his submission under Ground 1 that assessment of the two Sites as a single project would have resulted in a more comprehensive assessment.

Ground 2: Habitats Regulations Assessment

90. The Claimant's Ground 2, as pleaded in the Statement of Facts and Grounds, was that the HRA undertaken by the Council was unlawful because:

    i) It was apparent from the draft that it contained errors and omissions and was not a rigorous scientific appraisal;

    ii) Its approach and conclusions were contrary to the reservations expressed by Natural England in respect of the HRA for the proposed development at the

Hoplands Site, and no reasons were given for departing from Natural England's advice.

Legal framework

91. Regulation 63 of the Habitats Regulations materially provides, so far as is material:

> "(1) A competent authority, before deciding to undertake, or give any consent, permission or other authorisation for, a plan or project which—
> (a) is likely to have a significant effect on a European site or a European offshore marine site (either alone or in combination with other plans or projects), and
> (b) is not directly connected with or necessary to the management of that site,
> must make an appropriate assessment of the implications of the plan or project for that site in view of that site's conservation objectives.
>
> (2) A person applying for any such consent, permission or other authorisation must provide such information as the competent authority may reasonably require for the purposes of the assessment or to enable it to determine whether an appropriate assessment is required.
>
> (3) The competent authority must for the purposes of the assessment consult the appropriate nature conservation body and have regard to any representations made by that body within such reasonable time as the authority specifies.
>
> (4) It must also, if it considers it appropriate, take the opinion of the general public, and if it does so, it must take such steps for that purpose as it considers appropriate.
>
> (5) In the light of the conclusions of the assessment, and subject to regulation 64, the competent authority may agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the European site or the European offshore marine site (as the case may be).
>
> (6) In considering whether a plan or project will adversely affect the integrity of the site, the competent authority must have regard to the manner in which it is proposed to be carried out or to any conditions or restrictions subject to which it proposes that the consent, permission or other authorisation should be given.
>
> ….."

92. Guidance on the interpretation of article 6(3) of the Habitats Directive has been given by the CJEU in Case C-127/02 *Landelijke Vereniging tot Behoud van de Waddenzee v Staatsscretaris van Lanbouw (Coöperatieve Producentenorganisatie van de Nedelandse Kokkelvisserji UA intervening)* [2005] All ER (EC) 353. The court described the threshold for likely significant effects at [41]:

> "the triggering of the environmental protection mechanism provided for in Article 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 of the European Communities, entitled 'Managing Natura 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."

93. The court considered the content of an appropriate assessment in the following passages of its judgment:

> "52. As regards the concept of 'appropriate assessment' within the meaning of Article 6(3) of the Habitats Directive, it must be pointed out that the provision does not define any particular method for carrying out such an assessment.
>
> 53. None the less, according to the wording of that provision, an appropriate assessment of the implications for the site concerned of the plan or project must precede its approval and take into account the cumulative effects which result from the combination of that plan or project with other plans or projects in view of the site's conservation objectives.
>
> 54. Such an assessment therefore implies that all the aspects of the plan or project which can, either individually or in combination with other plans or projects, affect those objectives must be identified in the light of the best scientific knowledge in the field. Those objectives may, as is clear from Articles 3 and 4 of the Habitats Directive, in particular article 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 …..
>
> 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."

94. In Case C-258/11 *Sweetman v An Bord Pleanála (Galway County Council intervening)* [2014] PTSR 1092 the CJEU described the two stages envisaged by article 6(3), at [29] and [31]:

> "29. That provision thus prescribes two stages. The first, envisaged in the provision's first sentence, requires the member states to carry out an appropriate assessment of the implications for a protected site of a plan or project when there is a likelihood that the plan or project will have a significant effect on that site ….."
>
> "31. The second stage, which is envisaged in the second sentence of Article 6(3) of the Habitats Directive and occurs following the aforesaid appropriate assessment, allows such a plan or project to be authorised on condition that it will not adversely affect the integrity of the site concerned, subject to the provisions of Article 6(4)."

95. In Case C-461/17 *Holohan v An Board Pleanala*, the CJEU set out the requirements of a lawful appropriate assessment under article 6(3) of the Directive in the following terms:

> "33. Under Article 6(3) of the Habitats Directive, an appropriate assessment of the implications of a plan or project for the site concerned implies that, before the plan or project is approved, all the aspects of the plan or project which can, either individually or in combination with other plans or projects, affect the conservation objectives of that site must be identified, in the light of the best scientific knowledge in the field. The competent national authorities are to authorise an activity on the protected site only if they have made certain that it will not adversely affect the integrity of that site. That is so when there is no reasonable scientific doubt as to the absence of such effects (judgment of 8 November 2016, *Lesoochranárske zoskupenie VLK*, C- 243/15, EU:C:2016:838, paragraph 42 and the case-law cited).
>
> 34. The assessment carried out under that provision may not have lacunae and must contain complete, precise and definitive findings and conclusions capable of dispelling all reasonable scientific doubt as to the effects of the proposed works on the protected area concerned (judgment of 25 July 2018, *Grace and Sweetman*, C- 164/17, EU:C:2018:593, paragraph 39 and the case-law cited).
>
> …..
>
> 43. In accordance with the case-law cited in paragraphs 33 and 34 of the present judgment, an appropriate assessment of the implications of a plan or project for a protected site entails, first, that, before that plan or project is approved, all aspects of

> that plan or project that might affect the conservation objectives of that site are identified. Second, such an assessment cannot be considered to be appropriate if it contains lacunae and does not contain complete, precise and definitive findings and conclusions capable of dispelling all reasonable scientific doubt as to the effects of the plan or project on that site. Third, all aspects of the plan or project in question which may, either individually or in combination with other plans or projects, affect the conservation objectives of that site must be identified, in the light of the best scientific knowledge in the field.
>
> 44. Those obligations, in accordance with the wording of Article 6(3) of the Habitats Directive, are borne not by the developer, even if the developer is, as in this case, a public authority, but by the competent authority, namely the authority that the Member States designate as responsible for performing the duties arising from that directive.
>
> 45 It follows that that provision requires the competent authority to catalogue and assess all aspects of a plan or project that might affect the conservation objectives of the protected site before granting the development consent at issue."

96. In *R (Champion) v North Norfolk DC* [2015] 1 WLR 3710 at [41]), Lord Carnwath held that, while a high standard of investigation was required, the assessment had to be appropriate to the task in hand, and it ultimately rested on the judgment of the local planning authority:

> "41. The process envisaged by article 6(3) should not be over-complicated. As Richards LJ points out, in cases where it is not obvious, the competent authority will consider whether the "trigger" for appropriate assessment is met (and see paras 41-43 of *Waddenzee*). But this informal threshold decision is not to be confused with a formal "screening opinion" in the EIA sense. The operative words are those of the Habitats Directive itself. All that is required is that, in a case where the authority has found there to be a risk of significant adverse effects to a protected site, there should be an "appropriate assessment". "Appropriate" is not a technical term. It indicates no more than that the assessment should be appropriate to the task in hand: that task being to satisfy the responsible authority that the project "will not adversely affect the integrity of the site concerned" taking account of the matters set in the article. As the court itself indicated in Waddenzee the context implies a high standard of investigation. However, as Advocate General Kokott said in *Waddenzee* [2005] All ER (EC) 353, para 107:
>
> > "the necessary certainty cannot be construed as meaning absolute certainty since that is almost impossible to attain. Instead, it is clear from the second sentence of article 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, there is no absolute certainty."

> In short, no special procedure is prescribed, and, while a high standard of investigation is demanded, the issue ultimately rests on the judgment of the authority."

97. The relevant standard of review by the Court is *Wednesbury* rationality, and not a more intensive standard of review: see *Smyth v Secretary of State for Communities and Local Government* [2015] EWCA Civ 174 at [80] per Sales LJ, and *Mynnyd y Gwynt Ltd v Secretary of State for Business Energy and Industrial Strategy* [2018] 2 CMLR 34 at [8(9)], per Peter Jackson LJ.

Conclusions

98. Thornton J. refused permission on Ground 2 for the following reasons:

> "I am not satisfied that there is any error of law in a decision maker making changes to drafts of an HRA before production of the final version. I accept the IP submissions which demonstrate, by reference to the documents in question, that the HRAs for Chislet and Hoplands Farm differed in relevant respects in relation to mitigation proposals, thereby accounting for NE's different approach to both (e.g. to the Emergency Plan and Construction Management Plan)".

99. The Claimant criticised the first draft of the HRA produced by the Council's planning officer on the grounds that it contained errors and omissions and did not amount to the rigorous scientific appraisal which was required.

100. I accept that there were a number of weaknesses and errors in the first draft. However, it was only an initial draft. It was sent to Kent County Council for comments, which were inserted by tracked changes. Aside from a mistake in the distance from the Site to one of the Stodmarsh car parks, based on information provided by Kent County Council, the errors were corrected by the time the second draft was sent to Natural England and by the time the final version of the HRA was adopted on 25 September 2018.

101. A corrected second draft was sent to Natural England for comment. Having seen the second draft, it was clear that, contrary to Mr Buxton's submission, the only comments added by Natural England were in the final box, under the heading "Summary of Natural England's Comments". There was no impropriety in the way in

which the planning officer prepared the draft prior to sending it to Natural England for comment.

102. Natural England's comments on the draft HRA were provided by Mr Nathan Burns, Area 14 Kent and Sussex, on 24 September 2018, as follows:

i) On the basis that appropriate contributions to the SAMM Plan were secured, it concurred with the Council's conclusion that the proposed developments would not have an adverse effect on the integrity of the Swale SPA and Ramsar Site or the Thanet Coast and Sandwich Bay SPA and Ramsar Site.

ii) It concurred with the Council's conclusion that the impacts of contaminated surface water runoff, in both the construction and operational phase, could be suitably mitigated using the mitigation measures proposed.

iii) It concurred with the conclusion that the proposed developments would not have an adverse effect on the integrity of the European protected sites.

103. These comments followed on from the detailed comments provided on 19 May 2016, in respect of the SAMM Plan, hydrology and drainage, the ecology park, and biodiversity enhancements.

104. Soon afterwards, on 26 September 2018, Mr Burns also provided comments on the HRA undertaken by the Council at reserved matters stage in the Hoplands Site application. Natural England considered there was insufficient information available to determine whether there would be an adverse effect on the integrity of the Stodmarsh designated sites because the mitigation measures proposed were still conceptual and had not been fully realised.

105. On examining the evidence, the obvious explanation for the different responses by Natural England was that more detailed information in respect of mitigation measures, such as drainage and pollution was required, at the Chislet Site than at the Hoplands Site. In the Hoplands HRA and Environmental Statement, reference was made to mitigation schemes and plans which had not yet been produced, or were at a conceptual stage, which led Natural England to conclude that the mitigation measures were still conceptual and had not been fully realised. In my judgment, the Council was entitled to rely upon the advice provided by Natural England in respect of the Chislet Site, and it was not required to justify its conclusions by reference to the advice provided by Natural England in respect of the Hoplands Site, which was a separate application, based on different evidence.

106. For these reasons, I agree with Thornton J. that permission should be refused on Ground 2, as the grounds were unarguable.

Additional matters raised by the Claimant under Ground 2

107. After the Defendant and the IP had filed their Summary Grounds of Defence, the Claimant raised an additional matter under Ground 2 in a reply. I repeat here the points made in paragraphs 75 to 80 in respect of the additional matters raised by the

Claimant under Ground 1. The Claimant then raised further matters in his skeleton argument. No proper application for permission to amend Ground 2 was made.

108. Furthermore, I accept the submissions made by counsel for the Council and the IP that the additional matters raised were unarguable. First, the HRA template required separate assessment of "Existing conditions and potential effect" and "Assessment of likely significant effect". The Council identified a potential increase in recreational pressure on the Stodmarsh designated sites because of the increase in the number of residents. However, when the Council assessed the likely significant effect, it concluded that no likely significant effects were anticipated. In my view, Mr Buxton's submission that these conclusions were inconsistent was unarguable. The Council clearly explained the basis of its assessment. Few residents at the Chislet Site were likely to make frequent visits to Stodmarsh because of the proposed parkland on the Chislet Site, the barrier created by the railway, the lack of direct access from the Site to Stodmarsh. It was likely that any visits would be made to those access points with ample parking provision within the nature reserve, which were actively managed to control public use. Furthermore, Stodmarsh was not currently identified as having detrimental effects due to recreational pressure.

109. Second, Mr Buxton submitted that the Council erred in its assessment that there was no direct access from the Chislet Site to Stodmarsh because it failed to take into account that there is a footpath starting in the village of Westbere which crosses the railway line into the Stodmarsh site. The Council's response was that it was familiar with the public footpath network. As the footpath was circa 2 km distance from the Chislet Site, and could only be accessed via the residential streets of Westbere, the route was hardly direct or nearby for residents of the Chislet Site. Moreover, there was very limited parking near the footpath. In my view, this was a matter of fact and judgment for the Council to determine. The Claimant failed to identify any error of law which could conceivably form the basis of a claim for judicial review.

Conclusion

110. For the reasons set out above, permission to apply for judicial review is refused on Ground 2. Permission to apply for judicial review is also refused in respect of the additional matters raised, but not properly pleaded, under Grounds 1 and 2. The claim on Ground 1 is dismissed.