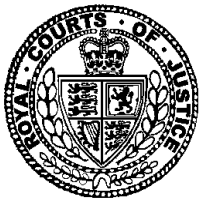

Neutral Citation Number: [2021] EWHC 1434 (Admin)

Case No: CO/4168/2020

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28/05/2021

Before:

MR JUSTICE JAY

- -

Between:

THE QUEEN (on the application of RONALD WYATT, CHAIRPERSON OF BROOK AVENUE RESIDENTS AGAINST DEVELOPMENT (BARAD), ACTING IN A REPRESENTATIVE CAPACITY)	**Claimant**
- and –	
FAREHAM BOROUGH COUNCIL	**Defendant**
- and –	
(1) LORRAINE LOUISE HANSLIP **(2) MICHAEL HANSLIP** **(3) THOMAS LEWIS HANSLIP** **(4) NATURAL ENGLAND**	**Interested Parties**

- -
- -

Gregory Jones QC and Conor Fegan (instructed by **Fortune Green Legal Practice**) for the **Claimant**
Timothy Mould QC (instructed by **Southampton & Fareham Legal Partnership**) for the **Defendant**
David Elvin QC and Matthew Henderson (instructed by **Rachel Francis, Principal Solicitor**) for **Natural England**

The **Hanslips** submitted Detailed Grounds of Resistance but were not represented at the hearing

Hearing dates: 11th and 12th May 2021

- -

Approved Judgment

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be Friday 28th May 2021 at 10.00am.

MR JUSTICE JAY:

Introduction: Essential Factual Background

1. The Solent Region is an internationally recognised magnet for bird species, in particular waders and wildfowl which migrate there in the autumn from more northern climes. These birds are under threat from high levels of nitrogen compounds causing excessive growth of algae and similar plant forms at a number of sites which, for this reason (amongst others), attract legal protection through designation. The birds themselves excrete nitrogen, but sources for which mankind is primarily responsible include agriculture and wastewater from existing housing and other development. Effluent discharges from these sources from a wide catchment area eventually leach into protected sites via local rivers and their tributaries, having passed through chemical treatment plants in the case of discharges from *homo sapiens*. The relevant catchment area is shown in the Annex to this judgment. I am told that 12 local planning authorities are within its scope.

2. The Fourth Interested Party, Natural England, has concluded, following condition assessments of various estuaries, mudflats and sandflats within the Solent Region carried out in 2018 and 2019, that a number of Special Areas of Conservation and Special Protection Areas are in an "unfavourable" condition. Furthermore, in 2019 and 2020 examination of the saltmarsh feature within the Chichester Harbour estuary revealed that it was in "unfavourable declining condition due to the poor quality of the remaining marsh and ongoing net loss". Elevated nitrogen levels are implicated in the causality.

3. In Natural England's opinion, the already widely unfavourable condition of these environments is at risk from additional nutrient outputs. There is a likely significant effect on several internationally designated sites "due to the increase of wastewater from new developments coming forward". Unsurprisingly, there is a considerable degree of scientific uncertainty surrounding the impact of new development on these protected sites. It is clear that the precautionary principle applies in these circumstances. Natural England's philosophy is to ensure, through advice to local planning authorities, that development proposals are closely scrutinised to ascertain their inevitable wastewater implications. Only proposals which are, at worst, "nutrient neutral", should be granted permission. In the simplest of terms, neutrality, or – far better – a nitrogen credit, may be attained by requiring developers to carry out remedial and mitigation measures, such as the building of wetlands in conjunction with construction of houses and similar dwellings, which will serve to extract nitrogen from the land. In this way the bad is counterbalanced by the good, and equilibrium, so the philosophy goes, will safeguard these designated sites. It should be emphasised that the focus of these proceedings has been Natural England's advice for the Solent Region. I was told that national advice is being prepared, but that before publication Natural England wish to consider, amongst other things, the terms of this judgment.

4. The First to Third Interested Parties, the Hanslips, own 1.97 ha of land (the exact area is not consistently described in the documents) at former Egmont Nurseries, Brook Avenue, Warsash SO31 9HN. The site is slightly to the east of the mouth of the River Hamble and approximately 5.6 km from the Solent itself. The site was formerly a busy commercial nursery but that activity ceased over twenty years ago. Simplifying the matter somewhat, 0.87 ha comprises derelict glasshouses and other buildings. The

remainder, approximately 1.10 ha, is open grassland with a small Nissen hut occupying a small part of it. There is some controversy as to the use of this grassland area.

5. In June 2018 Mrs Lorraine Hanslip submitted through planning agents an outline application to the local planning authority, Fareham, for development of the site comprising the demolition of the existing buildings and the construction of eight 4-5 bedroom detached houses, together with the creation of a paddock. This was described as a resubmission of a previously refused application.

6. This application was considered by Fareham's planning committee which on 12th December 2019 resolved to grant outline planning permission subject to the completion of a s. 106 agreement. However, before the formal grant of permission, Natural England published an Advice Note which had the consequence that the application had to be reconsidered. When the application was amended in order to reflect the Advice Note and the concept of nitrogen neutrality, it included a wetland area on the north-west corner of the site. Calculations performed on behalf of the applicant purported to show a credit of 4.5 Kilogrammes of Total Nitrogen over a year (-4.5Kg/TN/yr). This was predicated on an occupancy rate of 2.4 persons per property and part of the grassland area being attributed to "lowland grazing".

7. Given that this was an outline application, full details of the proposal were not provided but the illustrative plan forming part of the application shows the eight houses some distance away from the private road, Brook Avenue, which itself leads to the nearest public highway, Brook Lane. To the north of the site, aside from the wetland area is marked an area of Suitable Alternative Natural Greenspace ("SANG"). It is also clear from the accompanying narrative that these houses will not exceed two storeys.

8. Representations were received from members of the public during the consultation period. Many of these came from the Brook Avenue Residents Against Development whom Mr Ronald Wyatt represents as Claimant in these judicial review proceedings. Objections were made on various grounds including those which now feature in these proceedings: in particular, the 2.4 person occupancy rate and the use of the grassland area as "lowland grazing". Other arguments were advanced which feature in Mr Wyatt's Grounds.

9. On 9th June 2020 Natural England provided its first advice to Fareham on the nutrient neutrality issue *qua* statutory consultee: see regulation 63(3) of the Conservation of Habitats and Species Regulations 2017 (2017 SI No 1012) ("the Habitats Regulations"). It noted *inter alia*:

> "Provided the council, as the competent authority, is assured and satisfied with the site areas are correct and that the existing uses are appropriately precautionary, then Natural England raise no further concerns with regard to the nutrient budget.
>
> Provided the measures set out in the wetland mitigation report are secured with any planning permission, Natural England accepts the conclusion of the report that the design can achieve nitrogen neutrality in this way.

> To ensure that it is effective mitigation, any scheme for neutralising nitrogen must be certain at the time of appropriate assessment so that no reasonable scientific doubt remains as to the effects of the development on the international sites."

10. I do not understand Mr Wyatt to be taking issue with this advice which is obviously correct. Three points may be highlighted. First, the final paragraph of the foregoing citation is an accurate encapsulation of the precautionary principle. Secondly, the advice correctly recognises the demarcation line between Natural England as consultee/advisor and Fareham as decision-maker. Thirdly, the relevant certainty, which in this context means reasonable scientific certitude, must exist at the time of the appropriate assessment.

11. The fifth version of Natural England's Advice on Achieving Nutrient Neutrality for New Development in the Solent Region ("the Advice Note") was issued on 5th June 2020. I cannot judge the extent to which it differed from earlier versions (it matters not) and I have not been told exactly when Fareham became aware of it (again, it matters not). What seems clear is that at some point, whether prompted by the advent of this iteration of the Advice Note or not, the -4.5 Kg/TN/yr figure supplied on behalf of the Hanslips was closely examined by Fareham. Its own calculations, the detailed workings of which have not been disclosed, demonstrated that the development would generate a nutrient "debit" of 10.5 Kg/TN/yr and the wetland mitigation measures a nutrient "credit" of 11.51 Kg/TN/yr. The final figure of -1.01 Kg/TN/yr was, of course, less favourable to the Hanslips but still on the right side of the line for their purposes.

12. The -1.01 Kg/TN/yr figure, and much else, was set out in the planning officer's report to Fareham's planning committee. This document bears the date 19th August 2020, being the date of the relevant meeting, although it was made available at least five working days beforehand. I have said that the detailed workings have not been disclosed, but it is apparent from the report that this figure was based on: (1) an occupancy rate of 2.4 persons per dwelling; (2) what I have called the grassland area to the north of the site being divided into two, with the north-western paddock area (0.747 ha) being classified as "lowland grazing" and the rest of the site (1.223 ha) as "natural greenspace"; (3) a water usage within the new dwellings of 110 litres per person per day; and (4) the application of the 20% "precautionary buffer" as recommended by Natural England. No doubt Fareham's arithmetic could be verified using these basic ingredients, and given Mr Wyatt's silence on this topic must be taken to be correct.

13. As I have said, the planning officer's report was promulgated timeously but Mr Wyatt complains that what was not made available on Fareham's website until 18th August 2020 was the latter's Habitat Regulation Assessment ("HRA") being the formal "appropriate assessment" under the Habitats Regulations triggered by Natural England's conclusion that the proposed development was "likely to have a significant effect" on designated sites. This too referred to the nutrient budget calculation and the resultant "credit" figure of -1.01. The planning officer's report provided more information on various technical and other environmental aspects, and insofar as there was evidence in the appropriate assessment which members needed to consider and the public, if so advised, to make representations upon, in my view that was accurately summarised in the report.

14. One textual difference between the appropriate assessment and the planning officer's report, and Mr Wyatt has spotted this, is that the latter refers to "a *maximum* water use of 110 litres per day". Proposed condition 10 set out in the report was designed to ensure "potable water consumption does not exceed an *average* of 110 litres per day". It should be understood that the water use figure is used as a proxy for the amount of wastewater generated by a household, and to that extent is clearly precautionary. There may be a material difference between average and maximum figures in this context, and I have also noted that the model condition recommended by Natural England refers to the latter and not the former: proposed condition 10, which found its way into the planning condition granted on 1st October 2020 (the target of this application for judicial review), was not loyal to that advice. I will need briefly to consider the ramifications of this in the light of the limited submissions that have been advanced.

15. Mr Wyatt also complains that Fareham did not publish Natural England's second piece of advice given by email timed at 18:05 on 18th August 2020 until the morning of the planning committee meeting. The reason for this lateness is obvious. What is also obvious, in my judgment, is that this second advice added nothing of materiality to the first.

16. Finally, the point is made that the planning officer's report did not include a list of the background papers but simply enumerated a series of planning application references.

17. There was a further difficulty in that Fareham's website was "down" owing to technical problems between 10:00 on 17th August and 11:00 on 19th August which meant that documents were inaccessible during this period. The meeting itself took place electronically on 19th August and the arrangements were that members of the public were able to submit "deputations" in the form of audio or video recordings which would then be played during the meeting. The deadline for this was 15:00 on 18th August.

18. Also made available to the planning committee in advance of the meeting were: (1) the officer's report; (2) Natural England's email advices; (3) the Advice Note; (4) the HRA; (5) the (voluminous) representations made by members of the public, the vast majority objecting to the application (also summarised in the report); (5) the Hanslips' planning statement and plans; and (6) aerial images of the site and a copy licence agreement. The committee resolved that planning permission be granted, subject to conditions, by 7 votes to 2.

The Judicial Review Application

19. Permission to apply for judicial review was granted on Mr Wyatt's eight grounds of challenge by Lang J. There are factual witness statements from Mr Wyatt and the planning officer, Mr Richard Wright, as well as evidence which is a mixture of fact and opinion from Ms Allison Potts for Natural England (three statements) and Dr James O'Neill (for Mr Wyatt). Lang J gave permission to the respective parties for this opinion evidence to be adduced.

20. Many of the judicial review grounds overlap with those arising in the related case of *R (oao Save Warsash and the Western Wards) v Fareham Borough Council* [2021] EWHC 1435 (Admin) which I heard on 13th May 2021. I have striven to avoid unnecessary duplication.

21. The hearing was conducted remotely and I was assisted by oral submissions from Mr Greg Jones QC (for Mr Wyatt), Mr Tim Mould QC (for Fareham) and Mr David Elvin QC (for Natural England).

22. As has become commonplace in these cases, the delete function has not been judiciously applied both to the plenitude of grounds (many of which are at the fringes of arguability, and some of which have an appeal which can only be described as technical) and the bundle (much documentation could safely have been removed). Furthermore, Mr Jones, if I may say so, has been guilty of "mission creep" in seeking to expand the ambit of this challenge through his "Reply to Detailed Grounds of Defence" and his skeleton argument. My approach has been to be as relaxed as possible about all of this, save where it is clear that a party has been prejudiced.

The Legal Framework

23. The Habitats Regulations have transposed into English law the requirements of Council Directive 92/43/EEC of 21st May 1992 on the Conservation of Natural Habitats and of Wild Flora and Fauna ("the Habitats Directive"). The accuracy of the transposition is not in issue in these proceedings: the obligations in articles 6(2) and 6(3) of the Habitats Directive have been mapped into regulations 9(3) and 63 of the Habitats Regulations respectively. Formally, the Habitats Regulations are "EU-derived domestic law" which means that the lens of English law applies to relevant European sources. No one submitted to me that decisions of the ECJ and CJEU were no longer relevant.

24. Article 6 of the Habitats Directive provides in material part:

> "**Article 6**
>
> …
>
> 2. Member States shall take appropriate steps to avoid, in the special areas of conservation, the deterioration of natural habitats and the habitats of species as well as disturbance of the species for which the areas have been designated, in so far as such disturbance could be significant in relation to the objectives of this Directive.
>
> 3. Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. In the light of the conclusions of the assessment of the implications for the site and subject to the provisions of paragraph 4, the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public."

25. Regulation 9 of the Habitats Regulations provides in material part:

> "**9.**—(1) The appropriate authority, the nature conservation bodies and, in relation to the marine area, a competent authority must exercise their functions which are relevant to nature conservation, including marine conservation, so as to secure compliance with the requirements of the Directives.
>
> …
>
> (3) Without prejudice to the preceding provisions, a competent authority, in exercising any of its functions, must have regard to the requirements of the Directives so far as they may be affected by the exercise of those functions."

26. Regulation 63 of the Habitats Regulations provides in material part:

> "**63.**—(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."

27. The relevant principles governing the obligations of competent authorities under the Habitats Regulations, and similar provisions, and the approach of this court on an application for judicial review are well established. In my judgment in *Wealden DC v SSCLG and others* [2017] EWHC 351 (Admin), I ventured an epitome, having been ably assisted by counsel in that case, at paras 44-47. Neither Mr Mould nor Mr Elvin suggested that it required rewriting, although further jurisprudence has come into being since February 1997. There have been other, more authoritative summaries, such as Lindblom LJ's in *R (Mansell) v Tonbridge and Malling BC* [2017] EWCA Civ 1314; [2019] PTSR 1452, at para 42; and – in the context of the court's approach to planning officer's reports – the need for judicial restraint: see Judge LJ in *Selby DC, ex parte Oxton Farms* [1997] PTSR 1103.

28. In view of the parties' submissions, a number of matters should be highlighted.

29. First of all, it is necessary to underscore the distinction between the degree of rigour the local planning authority must apply to the consideration of its HRAs and the approach this court must take as the reviewing body: the two processes must be kept distinct, *pace* a number of passages in Mr Jones' skeleton argument which suggested otherwise. The application of first principles impels this conclusion, but I will be referring below to relevant authority.

30. Secondly, the CJEU has stated on a number of occasions that appropriate assessments must be based on "the best scientific knowledge in the field" (*Holohan v An Bord Pleanála* (Case C-461/17) [2019] PTSR 1054 at para 33) which is both up-to-date and not based on the bare assertion of an expert (on the latter point, see *Smyth v SSCLG* [2015] EWCA Civ 174; [2015] PTSR 1417, at para 83).

31. Thirdly, the absence of adverse effects must be established at the point of consent, which in the present context means the date the appropriate assessment is made (*Cooperatie Mobilisation for the Environment UA, Vereniging Leefmilieu v College van Gedeputeerde Staten van Limburg* (Case C-293/17) [2019] Env LR 27 (the "*Dutch Nitrogen* case"), at para 94 of the opinion of Advocate General Kokott).

32. Fourthly, a high standard of investigation is demanded in line with the precautionary principle. This has been stated and reiterated in a large number of cases, including in particular *Waddenzee* (Case C-127/02) [2004] Env LR 14 and the *Dutch Nitrogen* case. In *Waddenzee*, Advocate General Kokott stated that the burden on the competent authority was to prove that there would be no adverse effects, not to a standard of absolute certainty but to being "at least satisfied that there is no reasonable doubt as to the absence of adverse effects on the integrity of the site concerned". A requirement of absolute certainty would be impossible of scientific attainment as well as being disproportionate (see paras 99, 104, 107 and 108). The ECJ accepted the Advocate General's interpretation of the Habitats Directive in the light of these general principles of EU law, expressing their conclusions in a slightly different way (see paras 44, 58, 59

and 61). At para 58 the CJEU confirmed that the authorisation criterion in the Habitats Directive "integrated" the precautionary principle.

33. In the *Dutch Nitrogen* case the issue was whether Dutch legislation which set generic threshold values for nitrogen deposition could satisfy the requirement for case-specific assessments. That was not the issue which arises in the instant case, and in my view both Advocate General Kokott and the CJEU did no more than restate well-established principles. For example:

> "The assessment carried out under the first sentence of art.6(3) of the habitats Directive may not, therefore 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." [AG47]

and:

> " 101. In order to ensure that all the requirements thus recalled are fulfilled, it is for the national courts to carry out a thorough and in-depth examination of the scientific soundness of the 'appropriate assessment' within the meaning of Article 6(3) of the Habitats Directive accompanying a programmatic approach and the various arrangements for implementing it, including inter alia the use of software such as that at issue in the main proceedings intended to contribute to the authorisation process. The competent national authorities may be entitled to authorise such an individual project on the basis of such an assessment only if the national court is satisfied that that assessment carried out in advance meets those requirements in respect of each specific individual project.
>
> 102. In this regard, it should be noted that under Article 1(e) of the Habitats Directive, the conservation status of a natural habitat is considered to be 'favourable' when, inter alia, its natural range and the areas it covers within that range are stable or increasing and the specific structure and functions which are necessary for its long-term maintenance exist and are likely to continue to exist for the foreseeable future.
>
> 103. In circumstances such as those at issue in the main proceedings, where the conservation status of a natural habitat is unfavourable, the possibility of authorising activities which may subsequently affect the ecological situation of the sites concerned seems necessarily limited.
>
> 104. In the light of the foregoing, the answer to the second question in Case C-294/17 is that Article 6(3) of the Habitats Directive must be interpreted as not precluding national programmatic legislation which allows the competent authorities to authorise projects on the basis of an 'appropriate assessment'

> within the meaning of that provision, carried out in advance and in which a specific overall amount of nitrogen deposition has been deemed compatible with that legislation's objectives of protection. That is so, however, only in so far as a thorough and in-depth examination of the scientific soundness of that assessment makes it possible to ensure that there is no reasonable scientific doubt as to the absence of adverse effects of each plan or project on the integrity of the site concerned, which it is for the national court to ascertain."

34. I read these paragraphs as requiring a case-specific assessment by the competent authority applying rigorous scientific principles to the endeavour. I reiterate that these paragraphs say nothing about the role of the court in exercising its supervisory function.

35. Fifthly, it is clear from the scheme of the Habitats Regulations, the application of common sense and authority that competent authorities must give condign weight to the expert advice of Natural England, and if minded to deviate from that advice furnish cogent reasons for doing so: see, in particular, Baroness Hale JSC in *R (Morge) v Hampshire CC* [2011] UKSC 2; [2011] 1 WLR 268, at para 45.

36. Sixthly, the judgment whether a proposal will adversely affect the integrity of the protected sites for the purposes of regulation 63(5) of the Habitats Regulations is one for the competent authority. Insofar as case law is required for this proposition, it may be found in *R (Champion) v North Norfolk DC* [2015] UKSC 52; [2015] 1 WLR 3170, per Lord Carnwath JSC at para 41, referring to Advocate General Kokott in *Waddenzee*, at para 107. I was also referred to *Compton Parish Council v Guildford BC* [2019] EWHC 3242 (Admin); [2020] JPL 666, para 207 (*per* Sir Duncan Ouseley). Advocate General Kokott's use of the epithet "subjective" requires some care. I consider that all that she meant by that was that reasonable scientific opinion may not converge in complex or disputatious areas.

37. It was common ground before me that *if* the expert advice of Natural England relied on by Fareham were flawed for public law reasons, then the latter's decision would be impugnable even though the former is not the subject of this application for judicial review. I said as much in *Wealden* at para 109 albeit in the different context of Natural England advice that was quite plainly wrong:

> "… if expert advice induces a decision-maker into error in carrying out the judgments mandated by article 6(3), I consider that it would be artificial and wrong to hold that the court should not characterise what has occurred as irrational. The *Wednesbury* error in the underlying advice creates, without more, an equivalent *Wednesbury* error in the evaluative assessments carried out in formulating the HRA."

38. Seventhly, the approach of this court in the exercise of its supervisory function is standard *Wednesbury*, albeit one which accords appropriate cognisance to the nature of the subject-matter and the expertise of the decision-maker: see *Smyth v SSCLG* [2015] EWCA Civ 174; [2015] PTSR 1417 (per Sales LJ at para 80), and *Plan B Earth v Secretary of State for Transport* [2020] EWCA Civ 214; [2020] PTSR 1446, paras 68, 75-79.

39. In this regard, it is true, as we have seen, that para 101 of the judgment of the CJEU in the *Dutch Nitrogen* case refers to the obligations of the national courts to undertake a thorough and in-depth scientific assessment, and that a distinction is made between these and the competent authorities. But as already observed the role of the national court exercising a supervisory function was not in issue in that case: its sole focus was the approach to be taken to the primary assessment under article 6(3). I consider that this point was clearly made by Advocate General Kokott in the passage I have cited at §33 above. It is to be recalled that administrative courts throughout the EU do not apply a uniform standard to what we (and in many cases, they) call judicial review.

40. The parties cited additional authority on discrete matters which I will address at the appropriate stage.

Natural England's Advice Note

41. As Ms Allison Potts explains, the first version of the Advice Note was released in August 2018 and was initially developed to support the realisation of nitrogen neutrality for large, phased developments in the Solent area. In its various iterations the Advice Note has received much expert input and analysis. The fifth version, published in June 2020, covers all development proposals from which treated effluent discharges directly or indirectly into any Solent international site. As Ms Potts further explains:

> "The Advice Note has been prepared by Natural England for competent authorities as one way of ensuring that development can proceed whilst not adding to existing nutrient burdens in European marine sites."

Para 2.6 of the Advice Note makes the same point.

42. Self-evidently, the concept of neutrality indicates that the ambition of the Advice Note is limited to not making things worse. Mr Jones latched onto this apparent limitation and forcefully submitted that it is flawed for that very reason, not least because the environmental condition of some of the protected areas is deteriorating. Article 6(2) of the Habitats Directive requires member states (and now the United Kingdom through a different legal pathway) to take appropriate measures to avoid any deterioration. As was pointed out in the *Dutch Nitrogen* case, the perpetuation of an existing activity is capable of falling within article 6(2). However, I agree with Mr Mould that Mr Jones' submission rather misses the point. Competent authorities are precluded by the terms of the Habitats Directive from sanctioning development which is environmentally harmful. No doubt Natural England and other statutory bodies are taking *other* steps to avoid further deterioration for the purposes of article 6(2), all of which are outside the scope of this application for judicial review. The authorisation of an individual project which is no more than environmentally neutral is not inimical to the language and intendment of the Habitats Directive and/or the Habitats Regulations.

43. In order to ascertain whether nitrogen neutrality is attainable, a nitrogen budget has to be calculated. In very simple terms, this entails a four-stage approach: (1) calculate the total nitrogen in kilogrammes per annum derived from the development that would exit the wastewater treatment works after treatment; (2) adjust the nitrogen load to account for existing nitrogen uses from current land, forming a judgment as to what the load would be if permission were refused; (3) adjust the nitrogen load to account for land

uses with the proposed development; and (4) calculate the net change in the nitrogen load that would result from the development.

44. The detailed methodology needs be considered only in three respects (viz. the 2.4 person per dwelling occupancy rate (relevant to item (1) in §43 above); the attribution of the north-western paddock area to "lowland grazing" (relevant to item (2); and the water usage per person of 110 litres/day (relevant to item (1)). Before considering these, I need to set out Natural England's explanation of the approach to be taken:

> "**4.6** For those developments that wish to pursue neutrality, Natural England advises that a nitrogen budget is calculated for new developments that have the potential to result in increases of nitrogen entering the international sites. A nutrient budget calculated according to this methodology and demonstrating nutrient neutrality is, in our view, ***able to provide sufficient and reasonable certainty*** that the development does not adversely affect the integrity, by means of impacts from nutrients, on the relevant internationally designated sites. This approach must be tested through the 'appropriate assessment' stage of the Habitats Regulations Assessment. The information provided by the applicant on the nutrient budget and any mitigation proposed will be used by the local planning authority, as competent authority, to make an appropriate assessment of the implications of the plan or project on the designated sites in question. Further information of this process is available here.
>
> **4.7** The nutrient neutrality calculation includes key inputs and assumptions that are based on the best-available scientific evidence and research. It has been developed as a pragmatic tool. However, for each input there is a degree of uncertainty. For example, there is uncertainty associated with predicting occupancy levels and water use for each household in perpetuity. Also, identifying current land / farm types and the associated nutrient inputs is based on best-available evidence, research and professional judgement and is again subject to a degree of uncertainty.
>
> **4.8** It is our advice to local planning authorities to take a precautionary approach in line with existing legislation and case-law when addressing uncertainty and calculating nutrient budgets. ***This should be achieved by ensuring nutrient budget calculations apply precautionary rates to variables and adding a precautionary buffer to the TN calculated for developments.*** A precautionary approach to the calculations and solutions helps the local planning authority and applicants to demonstrate the certainty needed for their assessments.
>
> **4.9** By applying the nutrient neutrality methodology, with the precautionary buffer, to new development, the competent authority may be satisfied that, while margins of error will inevitably vary for each development, ***this approach will ensure***

> ***that new development in combination will avoid significant increases of nitrogen load to enter the internationally designated sites***." [emphasis supplied]

45. In my judgment, this advice is impeccable in all material respects. Mr Jones came close to submitting that, because there was scientific uncertainty, no development could properly be permitted because deleterious impacts could not logically be excluded. But that is the whole point of the precautionary principle: the uncertainty is addressed by applying precautionary rates to variables, and in that manner reasonable scientific certainty as to the absence of a predicated adverse outcome will be achieved, the notional burden of proof being on the person advancing the proposal. The application of precautionary values to relevant variables may well have been sufficient, without more; but a further cushion is provided by the application of a precautionary buffer.

46. I invited Mr Elvin in particular to assist me on whether there is any further jurisprudence from international, European or domestic sources as to the meaning of the precautionary principle. I am grateful for his overnight lucubrations although they yielded nothing of additional value. But what I can say – approaching the issue on the basis of both first principles and existing authority - is that paras 4.6-4.9 of the Advice Note represent the implementation *par excellence* of that principle in their acknowledgment that scientific uncertainty and its concomitant margins of error (which will fluctuate in the light of the unknowns) mandate a precautionary approach to the relevant inputs. Exactly how that applies in practice will be considered subsequently.

47. Mr Elvin invited me not to apply any further gloss on the meaning of "apply precautionary rates to variables". In particular, he submitted that exegetical formulations such as "reasonable worst case scenario" should be abjured. During the hearing there was some discussion of "bell curves" and normal distributions, and I ventured a slightly flippant analogy of the Medieval architect who might wish to apply a precautionary approach, rather than to take a simple height average, to the construction of doorways to avoid headaches in tall monarchs (such an approach has not to my knowledge been applied). A statistician could no doubt contribute to this discourse. I do have my own views on whether "reasonable worst case scenario" is an apt synonym for "precautionary", but in the context of judicial review proceedings rather than a witness action in a clinical negligence case (where propositions can be tested by interrogating the expert evidence) I am content to go no further, save to point out that the decision of Sullivan J in *R v Rochdale BC, ex parte Tew* [2000] Env LR 1, relied on by Mr Jones in this regard, was addressing a rather different question, namely whether there were "likely significant effects" in the context of the obligation to conduct an environmental impact assessment.

48. Mr Elvin also submitted that the precautionary principle embodies both proportionality and a degree of inherent flexibility to reflect the nature of the harmful outcome. Whereas it is true that Advocate General Kokott in *Waddenzee* referred to proportionality in terms at para 104 of her Opinion, this was in the context of a stream of reasoning which distinguished between absolute and reasonable certainty, the former being unattainable. If all that Mr Elvin was submitting was that in some circumstances it would be close to impossible to obtain precise scientific data and consequently it may be appropriate, as well as proportionate, to draw from generic data and experience in analogous situations, I would agree with him. As for inherent flexibility, I can understand that if the harmful outcome is death or serious disease the scientist would

wish to be even more cautious in the application of particular variables, but ultimately the test does not permit of much latitude. Reasonable scientific certainty means what it says, and this is what the Advice Note requires. No value judgment as to the relevant worth of birds and mankind needs to be carried out.

49. I move on to paras 4.18 and 4.19 of the Advice Note:

> "**4.18** New housing and overnight accommodation can increase the population as well as the housing stock within the catchment. This can cause an increase in nitrogen discharges. To determine the additional population that could arise from the proposed development, it is necessary that sufficiently evidenced occupancy rates are used. Natural England recommends that, as a starting point, local planning authorities should consider using the average national occupancy rate of 2.4, as calculated by the Office for National Statistics (ONS), as this can be consistently applied across all affected areas.
>
> **4.19** However competent authorities may choose to adopt bespoke calculations tailored to the area or scheme, rather than using national population or occupancy assumptions, where they are satisfied that there is sufficient evidence to support this approach. Conclusions that inform the use of a bespoke calculation need to be capable of removing all reasonable scientific doubt as to the effect of the proposed development on the international sites concerned, based on complete, precise and definitive findings. The competent authority will need to explain clearly why the approach taken is considered to be appropriate. Calculations for occupancy rates will need to be consistent with others used in relation to the scheme (e.g. for calculating open space requirements), unless there is a clear justification for them to differ."

50. These paragraphs are central to Mr Wyatt's case on Ground 1, and I will defer comment at this stage.

51. As for current land use, the following paragraphs of the Advice Note are relevant:

> "**4.45** This next stage is to calculate the existing nitrogen losses from the current land use within the redline boundary of the scheme. The nitrogen loss from the current land use will be removed and replaced by that from the proposed development land use. The net change in land use will need to be subtracted from or added to the wastewater Total Nitrogen load.
>
> **4.46** Nitrogen–nitrate loss from agricultural land can be modelled using the Farmscoper model. A study commissioned by Natural England from ADAS modelled this loss for different farm types across the river catchments that drain to the Solent (ADAS UK Ltd. 2015. Solent Harbours Nitrogen Management Investigation).

> **4.47** If the development area covers agricultural land that clearly falls within a particular farm type used by the Farmscoper model then the modelled average nitrate-nitrogen loss from this farm type should be used …
>
> **Table 2 Farm types and average nitrogen-nitrate loss AVERAGE NITRATE-NITROGEN LOSS PER FARM TYPE IN THE SOLENT CATCHMENT AREA (kg/ha)**
>
> | | |
> |---|---|
> | Cereals | 31.2 |
> | Dairy | 36.2 |
> | General Cropping | 25.4 |
> | Horticulture | 29.2 |
> | Pig | 70.4 |
> | Lowland Grazing | 13.0 |
> | Mixed | 28.3 |
> | Poultry | 70.7 |
> | Average for catchment area | 26.9 |
>
> **4.48** If the proposed development area covers several or indeterminate farm types then the average nitrate-nitrogen loss across all farmland may be more appropriate to use …
>
> …
>
> **4.51** It is important that farm type classification is appropriately precautionary. It is recommended that evidence is provided of the farm type for the last 10 years and professional judgement is used as to what the land would revert to in the absence of a planning application. In many cases, the local planning authority, as competent authority, will have appropriate knowledge of existing land uses to help inform this process.
>
> **4.52** There may be areas of a greenfield development site that are not currently in agricultural use and have not been used as such for the last 10 years. In these areas as there is no agricultural input into the land a baseline nitrogen leaching value of 5 kg/ha should be used. This figure covers nitrogen loading from atmospheric deposition, pet waste and nitrogen fixing legumes."

52. Again, these paragraphs are critical to Mr Wyatt's case on Grounds 2 and 5, and at this stage I say nothing further about them.

Ground 1

53. By Ground 1, Mr Wyatt contends that the use of the 2.4 person per dwelling occupancy rate in the nutrient budget was irrational, unreasoned and contrary to the precautionary principle.

54. This Ground was developed by Mr Jones in various ways but in essence these all reduce to the same point: that the 2.4 figure, being an average for all dwellings in England and Wales, regardless of size, is by definition not precautionary. Even so, it is right that I recognise the various iterations of the submission in Mr Jones' skeleton argument. First, it is said that the figure is irrational in the sense that it "does not add up" in the face of the evidence (see *R v Parliamentary Commissioner for Administration, ex parte Balchin* [1998] 1 PLR 1, at page 13E-F). Secondly, it is submitted that the precautionary principle is infringed because the figure does not reflect the reasonable worst case scenario. Thirdly, complaint is made about the planning officer's reasons which failed to address what was such an important issue in the case. Finally, it is said that Fareham failed to consider and investigate whether an alternative figure would be more appropriate (see *R (Plantagenet Alliance) v Secretary of State for Justice* [2014] EWHC 1662 (Admin); [2015] 3 All ER 261, at para 100).

55. The planning officer's reasons for recommending to members a 2.4 person per dwelling occupancy rate were as follows:

> "**8.38** Natural England recommends that, as a starting point, local planning authorities should consider using the average national occupancy rate of 2.4 persons per dwelling as calculated by the Office for National Statistics (ONS), as this can be consistently applied across all affected areas. However competent authorities may choose to adopt bespoke calculations where they are satisfied that there is sufficient evidence to support this approach.
>
> **8.39** Concern has been raised by third parties over the use of the average occupancy rate of 2.4 for this development of eight houses. Some have expressed the view that a higher occupancy rate ought to be applied since the houses are likely to be larger than average dwellings (although it should be noted that the application is in outline form and scale and layout of the development are reserved matters). Third parties have noted that the Council used bespoke calculations when determining a recent planning application for a sheltered housing development elsewhere in the Borough.
>
> **8.40** It is acknowledged that some houses will have more than the average number of occupants. It is also of course the case that some will have less. The figure of 2.4 is an average based on a well evidenced source (the ONS) and which has been shown to be consistent over the past ten years. As stated above the Natural England methodology allows bespoke occupancy rates however to date the Council has only done so to lower, not raise, the occupancy rate and where clear evidence has been provided to demonstrate that the proposed accommodation has an absolute maximum rate of occupancy. In the case of sheltered housing

> which is owned and managed by the Council for example it has previously been considered appropriate to apply a reduced occupancy rate accordingly.
>
> **8.41** In all instances it is the case that the Natural England methodology is already sufficiently precautionary because it assumes that every occupant of every new dwelling (along with the occupants of any existing dwellings made available by house moves) is a new resident of the Borough of Fareham. There is also a precautionary buffer of 20% applied to the total nitrogen load that would result from the development as part of the overall nutrient budget exercise.
>
> **8.42** Taking the above matters into account, Officers do not consider there to be any specific justification for applying anything other than the recommended average occupancy rate of 2.4 persons per dwelling when considering the nutrient budget for the development."

For the reasons I have already expounded, it is these reasons, rather than the Advice Note, which are directly under challenge. Even so, the nexus between the two is both obvious and inextricable.

56. One of the objectors made the point in written representations to Fareham that a bespoke rate of 2 persons per dwelling was used by Fareham in Planning Application P/19/0840/FP which was for a development of 1 and 2 bedroom apartments. She also referred to the occupancy rate of 3.4 in the ONS 2011 census report for 4-5 bedroom properties in England and Wales as a whole. Other objectors took the same line, although it would be fairer to say that the 3.4 figure applies to houses with 5 or more bedrooms.

57. Data pertaining to the 2011 census are, of course, readily available online. They will soon be superseded by the 2021 census, and Natural England accepts that later versions of the Advice Note will need to reflect that.

58. Dr James O'Neill BSc, PhD, FRCIS has given expert evidence on this topic, although it was not available to the decision-maker. In his view, the 2.4 national average occupancy rate does not represent the best scientific evidence and is not precautionary. In his opinion:

> "The best scientific evidence available are the data that most closely align with the type of development considered, particularly in circumstances, such as the instant case where the regional variations expressed in the local data (in respect of the actual occupancy rates of four and five bedroom house) diverge from the national average."

59. Dr O'Neill's analysis of the ONS Fareham data broke down in terms of household and bedroom size is that the occupancy rate for 4-5 bedroom houses in Fareham is 3. This figure does not leap out of the relevant page, but has not been placed in issue. Even if

it were the best available evidence for this particular development, whether it is the legally mandated figure is a different question.

60. Both Messrs Mould and Elvin observed that Mr Jones did not deign to address Ms Potts' detailed evidence on this topic. I will not expose myself to the same criticism.

61. By way of summary, she makes the following points.

62. First, the 2.4 figure has stood the test of time and is consistent with data for the county of Hampshire and the borough of Fareham. For example, 2014 demographic analysis shows that the average figure for newbuilds in Fareham is 2.2 and the wider Fareham average more or less 2.4, which is in line with the figure for Fareham as a whole.

63. Secondly, the 2.4 figure as an average is supported by modelled data from two local water companies.

64. Thirdly, data from 2014 show that 26% of existing development in Fareham had 4 or more bedrooms and the average was 25% for the county as a whole. Despite a quarter of all houses being larger family homes (compared with 19% nationally), the average occupancy remains consonant with the ONS average for England and Wales.

65. Fourthly, there is no direct linear relationship between occupancy rates and water usage. There is *a* relationship, but the notional line is not necessarily straight, or at the very least does not illustrate a relationship of direct proportion. As Ms Potts observes, data from Southern Water demonstrates that currently a 5 person household uses 31% less water person than average, whereas a single person household uses 28% more than average. There are obvious economies of scale.

66. Fifthly, "the use of the ONS average figure is a robust way to capture normal occupancy for the majority of developments". Ms Potts suggests that it may well be inapt to cover extreme or unusual cases, whether atypically high or low. She adds that "it is not considered that large houses generate extreme occupancy figures, unless the property design makes it more likely to accommodate households that comprise a large number of unrelated people, or multiple households".

67. Sixthly, the housing mix is changing and future projections suggest a decline in average occupancy over time. The 2.4 figure is designed to be a robust yardstick which will be protective for the foreseeable future.

68. Seventhly, the 2.4 figure is additionally protective because it assumes that all occupants of each new dwelling are moving into the affected catchments, which does not reflect the real world.

69. Eighthly, there is a need for a strategic approach which is consistent across local planning authorities . As Ms Potts explains:

> "The overwhelming majority of these strategic solutions, which have jointly enabled tens of thousands of dwellings, apply the ONS average of 2.4 people per dwelling to calculate impact. There are several examples where robust local evidence has led to a lower average being adopted. I am not aware of any

> successful attempts to employ an average greater than 2.4 people per dwelling.
>
> In so far as it is established practice to calculate mitigation requirements based on national occupancy rates, it is also clearly important that LPAs do not apply different occupancy rates within their HRAs for the same house, depending on which international site impacts are considered."

70. Ninthly, Ms Potts points out in her third witness statement that Natural England did consider using finer grain data such as the Fareham dataset but concluded that it was not the best available scientific evidence because:

> "… other inputs to the methodology, such as the water usage figures, were not available at such a specific level, which created additional uncertainties and complexities. A decision to rely on the finer grain detail would have introduced unnecessary and unwieldy complication, as it would have required using 65 different occupancy rates across the area (13 ONS areas x 1-5+ bedroom rates). Had Natural England adopted that more complex approach, it would also have been necessary to use a per bedroom water usage rate to avoid the risk of smaller properties' impacts being underestimated (due to lower occupancy figures and proportionally greater water consumption than larger properties). These figures are not easily obtainable …"

71. Tenthly, and very much by way of conclusion:

> "The use of the best available scientific evidence here did not require the reasonable worst case scenario to be used. In any event, the situation which Dr O'Neill describes in that paragraph would not come to pass, as the methodology embeds the necessary precaution."

72. Although Mr Jones' forensic cannon was not directed to Ms Potts' reasoning, it seems to me that I must look closely at what she has said. If it led Fareham into legal error, it is my duty to say so and explain why. Further, I understand that this judgment may cause ripples extending beyond the individual stones Mr Jones launched into the metaphorical pond.

73. For the avoidance of doubt, I do not believe that the European Commission's document, "Managing Natura 2000 Sites the provisions of Article 6 of the Habitats Directive" (November 2018) adds materially to this debate.

74. My point of departure is that the obligation under the Habitats Regulations construed in harmony with the principles derived from the authorities is to carry out an assessment of the environmental impact any particular development will create judged at the time the assessment is being considered. So, the obligation is directed at this particular project and is time-sensitive. This should exclude consideration being given to likely future demographic changes, even if they are (in this sense) beneficial. I put this point

to Mr Elvin and I did not understand him to demur, at least as a general proposition. Direction of future travel provides further support for the 2.4 per person occupancy figure but only if it were otherwise justifiable.

75. In this context, therefore, the use of an average figure may be problematic. Of course there are swings and roundabouts, and the above-average will tend to be cancelled out over time by the below-average; but the obligation under the Habitats Regulations does not favour a balance sheet approach, even if there may be very sound policy reasons for having one.

76. The impermissibility of a balance sheet approach is not negated, in my judgment, by the consideration that Natural England's view (as advanced by Ms Potts, not as set out in the Advice Note) is that a bespoke approach should be saved for extreme or unusual cases. That may be sound in pragmatic terms, but the conceptual difficulty in not thereby surmounted; it is merely softened.

77. Moreover, this concern holds true even if I were to accept, as I think I can as matter of common sense, that there will be more dwellings to the left of the notional mean line than the right, as Mr Mould deftly submitted. It is also troubling that in practice local planning authorities have, it seems, reduced the occupancy figure but have never increased it. There have been, it appears, more roundabouts than swings.

78. It follows that there is a more than superficial attraction to Dr O'Neill's sustained objection to this methodology, not that it does much more than apply basic statistical principles to the exercise.

79. I do not read para 4.19 of the Advice Note (see §49 above), interpreted without reference to Ms Potts' glosses, as being in any way inconsistent with what I have just said. In particular, competent authorities are advised that the ONS average for England and Wales is only a starting-point, and that they may use bespoke calculations tailored *inter alia* to the particular locality, provided that these have the effect of removing all scientific doubt "based on complete, precise and definitive findings". The overall tenor of para 4.19 is that a lower level may be justified, but its language would permit a higher one – even at the price of possible appeals from disappointed developers. It is right to say that I have received no evidence of appeals brought by developers against the application of the 2.4 figure in the context of smaller developments.

80. Finally, I have some difficulty with Ms Potts' argument that an occupancy rate of 3 would not be the best available scientific evidence. Whether or not it represents a reasonable worst case scenario, this figure is both available (Ms Potts has said that Natural England specifically considered it) and more statistically apposite. It cannot be sensibly argued that a figure based on a narrower and more representative cohort is not more cogent that a countrywide statistic. Although in theory this might require 65 separate calculations, if – as is the case – the available evidence does not allow the ascertainment of water usage on a per bedroom basis, the practical realities would in my view justify taking a relatively broad-brush, albeit precautionary, approach to 1, 2, 3, 4 and 5 bedroom houses. These would succumb, as is currently in the position, in the face of robust, case-specific evidence justifying a different figure.

81. The question is whether my concerns should be elevated to a finding of legal error. The need for judicial deference in a domain of technical and scientific expertise remains.

Moreover, Natural England has specifically considered the application of more size-sensitive datasets but rejected the need for it. Only a judge satisfied that all the *minutiae* and ramifications have been completely absorbed and understood should be prepared to intervene in such circumstances. That is a tall order.

82. Mr Mould accepts that if the correct figure for occupancy levels were 3, the overall nitrogen budget, taking into account the mitigation measures, would be in debit rather than credit. This takes into account the extra layer of precaution supplied by the 20% buffer. Thus, the recruitment of the buffer to support the 2.4 figure cannot avail Fareham: it has already been used once in the calculation, and cannot be deployed twice. Furthermore, the requirement under para 4.8 of the Advice note is to apply precautionary rates to each variable and *then* to add the precautionary buffer. The latter is intended to provide a separate margin for error.

83. An occupancy rate of 3 would be the best available scientific evidence for 4-5 bedroom houses in the Fareham region, and to that extent there is an internal tension between paras 4.6-4.9 of the Advice Note and paras 4.18-4.19, but it does not follow that 2.4 is not sufficiently precautionary. The parties have not done the arithmetic, and it is not right that I perform it, but on the basis of an occupancy rate of 3 the overall debit figure is not a high number. The issue for me is whether I am able to accept Ms Potts' argument that other precautionary elements within the methodology should lead me to the conclusion that the grant of planning permission in this case based on this particular appropriate assessment would not lead to a violation of the Habitats Regulations.

84. Of course, it is necessary to be clear as to which additional precautionary elements may legitimately be brought into account. In my judgment, Ms Potts' fourth and seventh points (on my numbering) have force: that the relationship is not one of direct proportionality, and the algorithm assumes 100% migration to the area. Her other arguments are less persuasive, but only because they serve to explain why 2.4 is a robust average. Plainly it is, but the issue here is logically prior.

85. The planning officer did not specifically advise the committee that the 2.4 figure was precautionary because the relationship between occupancy and water usage was not in direct proportion. However, this omission is immaterial because the advice which guided his report reflected this factor.

86. Having examined Ms Potts' evidence with considerable care, yet applying to it the appropriate margin of appreciation in an area which remains technical and complex, Mr Jones has not been able to persuade me on a *Wednesbury* basis that the appropriate assessment carried out for the purposes of this particular planning application was other than sufficiently precautionary, based as it was on an occupancy value of 2.4. On the facts of this case, I am satisfied that there was an adequate precautionary leeway afforded by the two key factors I have highlighted. That is the expert evidence adduced through Ms Potts, and it is not irrational.

87. The Advice Note will need to be reviewed in the light of this judgment. In particular, I recommend that version 6 of the Advice Note sets out more clearly the circumstances in which bespoke calculations should be used. If Natural England's belief is that bespoke levels should be reserved for atypical cases, the Advice Note should say so and provide a brief explanation. In any event, if para 4.19 of the Advice Note is being interpreted such that only lower bespoke levels are justified, this imbalance should be

rectified. The extent to which it would be appropriate to recommend up to five guideline occupancy rates to reflect what I have said at the end of §80 above is also worthy of further consideration. This judgment should not be interpreted as necessarily giving a clean bill of health to the use of a 2.4 occupancy rate in all circumstances, even those which cannot be described as atypical.

88. Mr Jones' remaining arguments on Ground 1 lead nowhere. If the use of the 2.4 figure cannot be impugned in the particular circumstances of this case on the basis that it is not precautionary, Mr Jones' other formulations cannot advance his argument.

89. It follows that Ground 1 must be dismissed.

Ground 2

90. By Ground 2 Mr Wyatt contends that the classification of part of the site as being in "lowland grazing" was irrational, unreasoned and contrary to the precautionary principle. Ground 2, unlike Ground 5, proceeds on the basis that it is appropriate to take average figures. As is apparent from §51 above, land which would be used for "lowland grazing" receives a value of 13 Kg/Ha whereas it is apparent from other evidence that open grassland which is not being put to any agricultural use is valued at 5 Kg/Ha. The lower figure is more protective.

91. Objectors were saying that there was a complete paucity of evidence that any part of the land had been put to grazing use – on the facts of this case, grazing by horses. Mrs Valerie Wyatt, for example, contended that no area of the site was currently in use as a horse paddock and the Hanslips' planning agent had submitted no evidence to support the claim of current use. The photographs were not probative of this, and no other documentary evidence had been presented. Other objectors made similar points, and it must not be overlooked that as local residents they were in a position to give direct evidence on this issue.

92. On the other hand, as Mr Mould draws to my attention, there was evidence pointing the other way. For example, the planning statement referred to the existence of a horse paddock, there was in evidence a copy licence agreement giving a horse owner the right to graze on the land between 2016-19, and there was also reasonably clear photograph evidence depicting the presence of horses and a horse box in 2017. I was less impressed by Mr Mould's submission that there was evidence of haymaking in 2018, given the dates on the photographs.

93. It is correct that the planning officer's reasons for concluding that the north-west paddock should be allocated a lowland grazing value are not particularly expansive. Yet he correctly and fairly summarised the objectors' cases, and accurately directed himself on the law. The challenge for him was to exercise professional judgment and reach a conclusion as to what use the land would be put if planning permission were refused. There was no evidence of grazing by horses since 2017, but – as Mr Mould submitted with only a molecule of cynicism - this was more or less at the stage that this development was under contemplation. If planning permission were refused, it does rather defy common sense to suggest, at least in the particular circumstances of this case, that the land would lie fallow.

94. The question for me is whether the planning officer's advice was perverse. Plainly it was not, and Ground 2 must fail.

Ground 3

95. By Ground 3 it is contended that there was a failure to make documents available in accordance with Fareham's duties in the Local Government Act 1972, and associated issues relating to procedural fairness.

96. The relevant statutory provisions, and governing authority, are considered in my judgment in *Warsash v Fareham*, where the submission carries far greater weight than it does here.

97. The Defendant concedes that certain documents were not made available within the requisite time-frame, largely because its website was "down". These documents comprise Fareham's HRA and the final consultation response from Natural England. The issue for me is whether I may be satisfied that the outcome would inevitably have been the same had Fareham's statutory duty been fulfilled.

98. I should add that I cannot accept Mr Jones' further submission that an issue properly attaches to Fareham's failure to comply with s. 100(D)(1)(b) of the Local Government Act 1972 in connection with the list of background papers. In contrast to the position in *Hale Bank Parish Council v Veolia ES (UK) Ltd* [2019] EWHC 2677 (Admin), all the relevant material was made available to members and objectors, save (in relation to the latter) the specific documents referred to at §§13 and 15 above.

99. In my judgment, there is no merit in Ground 3. The short answer to it is that the HRA was fairly and accurately summarised in the planning officer's report, which was made available in a timely fashion, and the second email advice from Natural England added nothing of substance to the first. I do take Mr Wyatt's point about the difference between an average and maximum water rate, but in my judgment whatever he now says can make no conceivable difference to the outcome. Ms Potts has fully justified the 110 litre figure which she makes clear is intended to be an average, and no challenge in these proceedings has been brought against planning condition 10 as failing to match the model condition in the Advice Note.

100. Ground 3 is not improved with reference to general considerations of procedural fairness. Even assuming that Fareham acted unfairly at common law, in addition to its breaches of statutory duty, the riposte is always the same: the unfairness is immaterial.

101. It is convenient to take Ground 5 before Ground 4.

Ground 5

102. By Ground 5 it is argued that the methodology in the Advice Note does not meet the required standard of certainty under regulation 63 of the Habitats Regulations, as read in conjunction with article 6(3) of the Habitats Directive.

103. Mr Jones' argument under this rubric boiled down to three essential contentions. The first was that the existence of scientific uncertainty rendered it impossible for Fareham properly to conclude that this project may proceed, because the precautionary principle

is infringed. The second is that the use of an average figure for land use was not precautionary. The third is that the precautionary buffer has been fixed by no more than guesswork, and is not scientifically justified.

104. In my judgment, each of these points has little merit, and the first point is unarguable.

105. I have already addressed the submission about scientific uncertainty: see §45 above. The short answer is that it misunderstands the precautionary principle. We are in the realm of the empirical sciences where uncertainty is inevitable. It is in order to meet this unavoidable uncertainty that the precautionary principle has been devised. The apex of Mr Jones' submission must be that uncertainty rules out *any* development in the Solent Region, an unattractive argument given the exigencies of the real world. By requiring the competent authority effectively to rule out, to a very high standard, the possibility of relevant harm, the requirement under both articles 6(2) and (3) of the Habitats Directive is fully satisfied.

106. As for the second submission, it is correct that the figure of 13 Kg/Ha for lowland grazing is an average, because the Farmscoper model is intended to provide average leachate data for a variety of farms and agricultural uses, and Dr O'Neill makes the obvious methodological criticisms of that. His evidence is that, where doubt exists as to the accuracy of data used to inform the HRAs, site specific measurements could and should be undertaken.

107. Ms Potts' primary justification for taking average figures amounts to the following:

> "This is a practical and robust approach for several reasons. These figures were used to take account of the impact of agricultural activity which would be ongoing in the absence of development. The use of average figures accounts for the nitrogen variations that may exist between farms of the same type within a catchment, as well as temporal variations of farm operations. The actual leaching rates for any specific field or farm are difficult, time-consuming, costly to monitor and not without margins of error, moreover they are greatly influenced by short-term factors such as specific crops being grown in any season and the timing and severity of rainfall events. So, in effect, to measure a meaningful nitrogen leaching figure for a particular development site, it would be necessary to use an average derived over a significant timescale for the site. As these measurements cannot be collected retrospectively, it would introduce considerable delay, with no guarantee of accurate outputs."

Ms Potts adds that the degree of uncertainty engendered by the use of averages is met by encouraging a precautionary approach to selecting land type where evidence is not clear-cut, and comprises one element of the precautionary buffer.

108. It is also important to recognise that, as with the occupancy rate, the Advice Note caters for the use of a more precautionary figure where the empirical evidence exists to support it. Furthermore, and in contrast with the occupancy rate, these data are specific to the Solent Region.

109. Dr O'Neill also criticises para 59 of Ms Potts' second witness statement which addresses the issue of total nitrogen, being the largest component of nitrates (NO_3), and organic nitrogen. In my view, Ms Potts has successfully neutralised that argument by pointing out that the underestimate in total nitrogen leaching will be counterbalanced by the underestimate in the effectiveness of mitigation measures.

110. In my judgment, Dr O'Neill's arguments are not persuasive. Site surveys would, as Ms Potts underlines in her third witness statement, provide no more than a snapshot of existing land use. Aside from the time and expense, it is far from clear that undertaking the overly rigorous approach recommended by Dr O'Neill would in fact yield more protective data. Ms Potts explains why Natural England's data are valid for the Solent Region, and even without applying the high margin of appreciation appropriate to this judicial review application I cannot accept that the outcome is perverse.

111. As for the third submission, it is true that the 20% figure is not derived from any arithmetical calculation or other algorithm. However, Ms Potts informs the court that it has resulted from an evaluation of scientific literature and research, combined with expert judgment. The buffer also reflects the fact that water waste treatment operations in the Solent Region are currently performing on average 25% more effectively than the assumed level and that an unknown but nonetheless significant proportion of nitrogen will be discharged into the sea and not touch the designated sites. In any case, the purpose of the buffer is to supply an extra level of protection in circumstances where there is room for debate between reasonable scientists, using their judgment, expertise and experience, as to whether the figure should be, say, 10%, 20% or 30%. There is no place for judicial intervention on any *Wednesbury* basis.

112. Finally, by para 53 of his skeleton argument Mr Jones seeks to develop an entirely new argument. He submits that as matter of principle it is wrong to include anything for existing land use unless it be established that this use subsisted as at the date of the relevant condition surveys in 2018/19. These, so the submission runs, set out the appropriate baseline.

113. I cannot accept this submission even allowing for the fact that Mr Elvin has not been given a proper opportunity to deal with it. The short answer to it is that there is no evidence of any relevant baseline data in 2018/19 because these were general condition surveys and not surveys which would have enabled any such figures to be extrapolated or inferred.

Ground 4

114. By Ground 4 it is contended that reliance on the Advice Note was contrary to the requirement in article 6(2) of the Habitats Directive to take "appropriate steps" to avoid the deterioration or disturbance of protected species and habitats.

115. Save as regards one matter (addressed at §116 below), I agree with Fareham and Natural England that Ground 4 can have no life separate to Ground 5. If, as I have found, Fareham properly discharged its obligations as competent authority under regulation 63 of the Habitats Regulations, no separate issue arises under regulation 9(3): see *Waddenzee*, at paras 35-37.

116. Mr Jones seeks to avoid this snare by submitting that there is an obligation to take positive steps to avoid harm. However, I have already rejected that argument at §42 above.

117. Ground 4 must therefore fail.

Ground 6

118. By Ground 6 it is contended that Fareham did not have power to determine the application because it did not comply with the requirement to give notice to the owner of land which should have been within the red line of the application, contrary to article 7(1) of the Town and Country Planning (Development Management Procedure) (England) Order 2015 [SI 2015 No 595] ("the DMPO"). Put in these terms, this is a straight *vires* challenge, although there is no evidence that any relevant landowner was not notified by some other means.

119. Article 7(1) provides as follows:

> "7.— **General requirements: applications for planning permission including outline planning permission**
>
> (1) Subject to paragraphs (3) to (5), an application for planning permission must—
>
> (a) be made in writing to the local planning authority on a form published by the Secretary of State (or a form to substantially the same effect);
>
> (b) include the particulars specified or referred to in the form;
>
> (c) except where the application is made pursuant to section 73 (determination of applications to develop land without conditions previously attached) or section 73A(2)(c) (planning permission for development already carried out) of the 1990 Act or is an application of a kind referred to in article 20(1)(b) or (c), be accompanied, whether electronically or otherwise, by—
>
> (i) a plan which identifies the land to which the application relates;
>
> (ii) any other plans, drawings and information necessary to describe the development which is the subject of the application;
>
> (iii) except where the application is made by electronic communications or the local planning authority indicate that a lesser number is required, 3 copies of the form; and
>
> (iv) except where they are submitted by electronic communications or the local planning authority indicate that a lesser number is required, 3 copies of any plans, drawings and information accompanying the application."

120. Mr Jones pointed to articles 7(1)(c)(i) and (ii): the requirements that applications for outline planning permission be accompanied by a plan identifying the land to which the application relates; and any other plans, drawings and information necessary to describe the development in the application. Reading these requirements alongside the Planning Practice Guidance ("PPG"), Mr Jones submitted that the applicant for outline planning permission ought to have included Brook Avenue in the red line of the location plan.

121. The relevant part of the PPG provides:

> "**What information should be included on a location plan?**
>
> A location plan should be based on an up-to-date map. The scale should typically be 1:1250 or 1:2500, but wherever possible the plan should be scaled to fit onto A4 or A3 size paper. A location plan should identify sufficient roads and/or buildings on land adjoining the application site to ensure that the exact location of the application site is clear.
>
> The application site should be edged clearly with a red line on the location plan. ***It should include all land necessary to carry out the proposed development (e.g. land required for access to the site from a public highway***, visibility splays, landscaping, car parking and open areas around buildings). A blue line should be drawn around any other land owned by the applicant, close to or adjoining the application site." [emphasis supplied])

122. There was no dispute that access to the site of the Proposed Development from the public highway (Brook Lane) would be via Brook Avenue, nor that Brook Avenue was not in fact included within the red line area of the location plan. The question for this court is whether the failure to include Brook Avenue within the red line area meant, as Mr Jones submitted, that Fareham did not have *vires* to determine the application. Some support for Mr Jones' case is to be found in the relevant passage from the PPG.

123. On this last matter, I accept the submissions made by Mr Mould as to the status of the PPG. It is a guidance document which is subject to change without forewarning or consultation (see *Solo Retail Ltd v Torridge District Council* [2019] EWHC 489 (Admin) at para 33). It is not binding; it cannot be determinative of the *vires* question. When considering a *vires* challenge such as this, one must, of course, examine the relevant legislative provisions.

124. Article 7(1)(c)(ii) does not require that "the development which is the subject of the application" is shown in the location plan. It allows for the development to be described in "any other plans, drawings and information necessary". The Planning Statement that was submitted with the application explained, in sections 7 and 8, that the site benefits from a right of way over Brook Avenue in order to access Brook Lane. In my judgment, Brook Avenue does not form part of the development which is the subject of the application. But even if it does, by virtue of the fact that Brook Avenue was described in the Planning Statement, being "other…information" accompanying the application, there was no failure to comply with article 7(1)(c)(ii).

125. Mr Jones also raised an issue in relation to article 7(1)(c)(i). It was said that Brook Avenue is "land to which the application relates" such that it needed to be shown in the plan itself. Mr Mould's riposte was that Brook Avenue is not "land to which the application relates" because it is not "land" as defined in the Town and Country Planning Act 1990. The DMPO was made under powers conferred by the 1990 Act and, by dint of s. 11 of the Interpretation Act 1978, the meaning of the word "land" can be taken to have the same meaning in the DMPO as it has under the 1990 Act, unless the contrary intention appears.

126. Section 336 of the 1990 Act provides:

> ""land" means any corporeal hereditament, including a building, and, in relation to the acquisition of land under Part IX, includes any interest in or right over land;"

127. The relevance of Brook Avenue to the application for outline planning permission is the access that it provides to the site. As it is a private road, that access is enjoyed by virtue of the easement granted over Brook Avenue which Mr Jones accepted covered vehicular access. Mr Mould submitted that an easement is an incorporeal hereditament which therefore falls outside of the definition of "land" within article 7(1)(c)(i). I consider that there is force in this submission. Further, the definition of "land" in s. 205(1)(ix) of the Law of Property Act 1925 covers only corporeal hereditaments.

128. Even if I consider Brook Avenue itself, rather than the easement granted over Brook Avenue, I do not accept that Brook Avenue is land "to which the application relates". Para 158.2 of *Butterworths Planning Law Service* assists:

> "The site area should include all of the land to be developed, i.e. the land upon which there is either to be operational development or a material change in use. In practice, difficulties are most often encountered in respect of access. Strictly, it is unnecessary to include the public highway within the application site when works are proposed if the works are to be carried out by the local highway authority because works by the highway authority in the public highway do not constitute development and will usually be dealt with by way of legal agreement with the highway authority. Where there is a new private access proposed involving the carrying out of operations the works will require permission and should be included within the site. ***It is desirable that the applicant also includes within the application site other land required for access to the development***." [emphasis added]

129. The access provided by Brook Avenue does not provide "new private access". As is discussed further below, in relation to Ground 7, the use of the existing easement over Brook Avenue to access the site from Brook Lane does not require any material change in its use. Nor are there any works being carried out on Brook Avenue. In my judgment, it is therefore not "land to which the application relates" such as to fall within article 7(1)(c)(i). Whilst it may be "desirable" for the applicant to include within the application site other land required for access to the development, that is not a mandatory requirement, the non-fulfilment of which could have affected Fareham's *vires* to deal with the application.

Ground 7

130. By Ground 7 it is contended that Fareham erred in its approach to Policy DSP40 of the Local Development Plan. This sets out the criteria which must be met in order for a housing development outside of the settlement boundary to be acceptable, if a five-year housing land supply cannot be demonstrated (as it cannot be here).

131. DSP40 provides as follows:

> "Where it can be demonstrated that the Council does not have a five year supply of land for housing against the requirements of the Core Strategy (excluding Welborne) additional housing sites, outside the urban area boundary, may be permitted where they meet all of the following criteria:
>
> (i) The proposal is relative in scale to the demonstrated 5 year housing land supply shortfall;
>
> (ii) The proposal is sustainably located adjacent to, and well related to, the existing urban settlement boundaries, and can be well integrated with the neighbouring settlement;
>
> (iii) The proposal is sensitively designed to reflect the character of the neighbouring settlement and to minimise any adverse impact on the Countryside and, if relevant, the Strategic Gaps;
>
> (iv) It can be demonstrated that the proposal is deliverable in the short term; and
>
> (v) The proposal would not have any unacceptable environmental, amenity or traffic implications."

132. Mr Jones submitted that Fareham was wrong to conclude, in reliance on the planning officer's report, that the proposal satisfied paras (i), (iii), (iv) and (v) of the policy. The officer concluded that para (ii) had not been fulfilled.

133. The application of planning policy as opposed to its interpretation is not, as acknowledged, the function of this court. However, relying on *Tesco Stores Limited v Dundee City Council* [2012] UKSC 13; [2012] PTSR 983, Mr Jones submitted that Fareham's errors in the application of Policy DSP40 were *Wednesbury* unreasonable and therefore amenable to judicial review. By contrast, Mr Mould submitted that this challenge constituted a prime example of the excessively legalistic approach to the exercise of planning judgments that the court has consistently deprecated, notably in *Selby DC* and *Mansell*.

134. The first issue taken with the application of Policy DSP40 was the planning officer's conclusion that the proposal was "relative" to the demonstrated 5-year housing land supply shortfall, as required by para (i). The officer's report had identified the land supply shortfall as "circa 500 dwellings". It was submitted that this proposal, which would deliver a maximum of eight 4-5 bedroom dwellings, would make a contribution

so small that it was not reasonably open to Fareham to conclude that it was "relative" to the shortfall.

135. The planning officer's approach was set out at paragraph 8.82 of his report:

> "Officers acknowledge that the proposal could deliver 8 dwellings, as well as an off-site contribution towards affordable housing provision, in the short term. The contribution the proposed scheme would make towards boosting the Borough's housing supply would be modest but is still a material consideration in the light of this Council's current 5YHLS."

136. Mr Jones naturally focused on the epithet "modest", submitting that it was irrational to conclude that the contribution made by the proposal was "modest" and yet still "relative" to the shortfall. Mr Mould submitted that Policy DSP40's relativity criterion was clearly designed so that planning permission would not be granted to developments which were "wholly disproportionate" to the shortfall, being far in excess of the housing need. I do not consider it necessary to decide whether "relative" means more than "modest" or less than "wholly disproportionate".

137. In my judgment, no issue of law arises here. To pore over the language of applicable policy in this way would be contrary to the approach set out in *Tesco*. As Lord Reed JSC said, at para 19:

> "Although a development plan has a legal status and legal effects, it is not analogous in its nature or purpose to a statute or a contract…In addition, many of the provisions of development plans are framed in language whose application to a given set of facts requires the exercise of judgment. Such matters fall within the jurisdiction of planning authorities, and their exercise of judgment can only be challenged on the ground that it is irrational or perverse"

138. Similarly, to focus too intensely on the adjective "modest" in the planning officer's report would be contrary to the approach advocated by Lindblom LJ in *Mansell* at para 42 which calls for these reports "not to be read with undue rigour, but with reasonable benevolence". Taking that reasonably benevolent approach, and looking, without any additional gloss, at the language of Policy DPS40, I can see nothing wrong with the planning officer's judgment that this proposal, in making a "modest but still…material" contribution to the housing shortfall, satisfied the criterion in para (i). As a matter of ordinary language and common sense, it cannot be said that Fareham's conclusion on this point was irrational or perverse.

139. The second issue is in relation to Fareham's conclusion that the proposal was "sensitively designed to reflect the character of the neighbouring settlement and to minimise any adverse impacts on the Countryside", as required by para (iii). Mr Jones submitted that it was irrational to find that this criterion had been satisfied because: (1) doing so was inconsistent with the planning officer's conclusion that the proposal "would have an urbanising effect which would be harmful to the character and appearance of the countryside"; (2) the density figure for the proposal, which underpinned the planning officer's analysis, was incorrect; and, (3) the planning

committee did not have sufficient information about the proposal's scale, appearance and layout to reach a conclusion on para (iii), owing to those matters being reserved in the application.

140. As to (1), as Mr Jones rightly points out, the planning officer considered that the proposal would have a harmful effect on the character and appearance of the countryside. He considered that this impact was relevant to Core Strategy Policies CS17 and CS14, which concerned respect for the key characteristics of the area and the protection of the countryside from development which would adversely affect its character, appearance and function respectively. The case officer concluded that the Proposed Development was in conflict with those policies, and that conclusion is not subject to any challenge before this court. Indeed, Mr Jones relies on it.

141. By contrast, the planning officer did not consider that there was any conflict with para (iii). As Mr Mould observed this exception predicates an adverse impact and invites consideration to its possible alleviation. As is apparent from the report, the planning officer considered that that policy was concerned not with whether or not there would be an adverse impact on the character and appearance of the countryside, but with the need to design the proposal sensitively so as to minimise this. That being the case, there was nothing inconsistent about recognising the existence of a harmful urbanising effect whilst also finding that this policy criterion had been satisfied. In concluding that Policy DSP40 (iii) had been complied with, the planning officer focused on the way in which the illustrative site plan showed the site could be laid out so as to retain an element of green space and open frontage as well as the removal of unsightly derelict buildings. In other words, he considered the sensitivity which had been displayed in the design of the Proposed Development. There is nothing at all wrong with his approach in this respect; indeed, it is completely understandable.

142. As to (2), Mr Jones submitted that the density figure of 5.5 used in the officer's report was based on an error of fact because, rather than being calculated with reference solely to the area of land that was being used for the development of dwellings, it was calculated with reference to the whole site (including that which will be used for wetland pond mitigation and SANG). Mr Jones submitted that, had the smaller area of land been used for the calculation, the density figure would have been 7.4 (a revised calculation showing this was never submitted by Mr Jones, but it matters not).

143. In my judgment, Mr Jones' submission was based on a misunderstanding of para (iii). As already noted, the planning officer, in applying Policy DSP40, was not considering whether or not the proposal would adversely affect the character and appearance of the countryside, but whether it had been sensitively designed. I make no finding as to whether the density figure was wrong but, even if it was, it could not possibly have made a difference to the outcome of the decision under question. The planning officer found, on the basis of a density figure of 5.5, that the proposal would have an urbanising effect detrimental to the character and appearance of the countryside. Had he used a higher density figure, he would have obviously reached the same conclusion. Having reached that conclusion, he would have considered whether the proposals include sensitive design features, which is exactly what he did.

144. As to (3), Mr Jones submits that Fareham was required to address the scale and appearance of the proposal in order to consider whether DSP40 para (iii) was satisfied but was unable to do so owing to a lack of information. This argument is misconceived.

Issues as to the scale and appearance of the proposal would plainly be relevant to the question of whether it adversely impacted on the countryside. The starting point for para (iii) is, however, the continuing assumption that there will be an adverse effect to the countryside and the question is to whether sensitive design can mitigate that effect. The planning officer had regard to an illustrative site plan submitted as part of the planning application which showed how the dwellings in the proposal could be arranged. The planning committee and those advising therefore had sufficient information to consider the question of sensitive design. The approach taken cannot be criticised, and certainly not to a *Wednesbury* standard.

145. The third issue is Fareham's conclusion that the proposal would be "deliverable in the short term" as required by DSP40 para (iv). Mr Jones submitted that the planning officer failed to consider whether the Hanslips had a viable private right of way over Brook Avenue, and the impact that this would have over access to, and therefore the short-term deliverability of, the site.

146. At first blush, this criticism of the planning officer's report appeared more promising than the other criticisms levied under Ground 7. Mr Jones referred to a legal opinion he had given on the use and ownership rights over Brook Avenue which he said was either misunderstood or ignored by the planning officer. The opinion noted that Brook Avenue "is private and use is subject to an easement granted to each of the landowners", and advised that it was "most unlikely" that that easement could be relied upon by the applicants to gain access to the site in the absence of compulsory acquisition procedures. However, on closer examination of the case law upon which the advice was based, I consider that there was no significant issue which was incorrectly evaluated by the case officer.

147. Mr Jones' advice indicated, in reliance on *McAdams Homes v Robinson* [2004] EWCA Civ 214, that the use of the route over Brook Avenue would be intensified by the traffic for necessary building works and the occupiers of the dwellings if constructed so as to fall outside the existing easement. In my judgment, this mischaracterises what was said in *McAdams*. In that case, Neuberger LJ was considering whether a drainage easement could continue to be enjoyed following the development of a piece of land from the site of a bakery to the site of two residential houses. He drew a distinction between a development which would represent a "radical change in the character" of the land, and one which would result in a "mere change or intensification in the use of the site" and found that it was only the former that could result in the easement being lost or suspended (see paras 49-51). Mr Jones confirmed in oral argument that, under the terms of the existing easement over Brook Avenue, there is a right of way which allows access to all forms of carriage. There is therefore no question that the applicant's use of the easement would entail a mere intensification of its use, rather than a radical change in its character. When used in the past as a nursery, vehicular traffic passed without let or hindrance over Brook Avenue. That being so, there was no reason for the planning officer to be concerned about the Hanslips' ability to enjoy the existing easement over Brook Avenue so as to access the site. In his report he rightly stated that "nothing [had] been provided to indicate that a private right of access along Brook Avenue would not still enable suitable vehicle, cycle and pedestrian access to the site"; and his conclusion that the proposal was therefore deliverable in the short term, as required by Policy DSP40 (iv), cannot be faulted.

148. The final complaint under Ground 7, as set out in Mr Jones' skeleton argument, was that "[t]he Defendant erred in its conclusion that the Proposed Development would not have any "adverse traffic implications"". However, it is worth noting that the test under Policy DSP40 (v) is not whether or not there were "adverse" traffic implications; rather it is whether there were "unacceptable" traffic implications. The acceptability or otherwise of the traffic implications of proposal is plainly a matter of planning judgment with which this court will not readily interfere. It is also to be borne in mind that planning officers' reports are "written for councillors with local knowledge" which must be relevant to the question of whether traffic implications are or are not acceptable. In this case, the planning officer reached a conclusion on the acceptability of the traffic implications having taken advice from Farehams's Highways Officer and I am far from being persuaded that anything in his approach was irrational or perverse.

149. For all of these reasons, I consider that Ground 7 is without merit and must therefore fail.

Ground 8

150. By Ground 8 it is contended that Fareham erred in its approach to s 38(6) of the Planning and Compulsory Purchase Act 2004, which gives primacy to the development plan unless material considerations indicate otherwise.

151. In order to make sense of this Ground, I need to set out relevant sections of the planning officer's report:

> "**8.78** Section 38(6) of the Planning and Compulsory Purchase Act 2004 sets out the starting point for the determination of planning applications: "If regard is to be had to the development plan for the purpose of any determination to be made under the Planning Acts the determination must be made in accordance with the plan unless material considerations indicate otherwise".
>
> **8.79** This application has previously been the subject of a favourable Committee resolution to grant planning permission. The revised application proposes additional measures to address the matter of nutrient neutrality but is otherwise the same.
>
> **8.80** The site is outside of the defined urban settlement boundary and the proposal does not relate to agriculture, forestry, horticulture and required infrastructure. The principle of the proposed development of the site would be contrary to Policies CS2, CS6 and CS14 of the Core Strategy and Policy DSP6 of Local Plan Part 2: Development Sites and Policies Plan.
>
> **8.81** Officers have carefully assessed the proposals against Policy DSP40: Housing Allocations which is engaged as this Council cannot demonstrate a 5YHLS. In weighing up the material considerations and conflicts between policies; the development of a greenfield site weighted against Policy DSP40, Officers have concluded that the proposal is relative in scale to the demonstrated 5YHLS shortfall (DSP40(i)), can be delivered

in the short-term (DSP40(iv)) and would not have any unacceptable environmental, traffic or amenity implications (DPS40(v)). Whilst there would be harm to the character and appearance of the countryside the unsightly derelict buildings currently on the site would be demolished. Furthermore, it has been shown that the site could accommodate eight houses set back from the Brook Avenue frontage and an area of green space to sensitively reflect nearby existing development and reduce the visual impact thereby satisfying DSP40(iii). Officers have however found there to be some conflict with the second test at Policy DSP40(ii) since the site is acknowledged to be in a sustainable location but is not adjacent to the existing urban area.

8.82 In balancing the objectives of adopted policy which seeks to restrict development within the countryside alongside the shortage in housing supply, Officers acknowledge that the proposal could deliver 8 dwellings, as well as an off-site contribution towards affordable housing provision, in the short term. The contribution the proposed scheme would make towards boosting the Borough's housing supply would be modest but is still a material consideration in the light of this Council's current 5YHLS.

8.83 There is a clear conflict with development plan policy CS14 as this is development in the countryside. Ordinarily, officers would have found this to be the principal policy such that a scheme in the countryside should be refused. However, in light of the Council's lack of a 5YHLS, development plan policy DSP40 is engaged and officers have considered the scheme against the criteria therein. The scheme is considered to satisfy four of the five criteria and in the circumstances, officers consider that more weight should be given to this policy than CS14 such that, on balance, when considered against the development plan as a whole, the scheme should be approved.

8.84 As an Appropriate Assessment has been undertaken and concluded that the development would not have an adverse effect on the integrity of the sites, Paragraph 177 of the NPPF states that the presumption in favour of sustainable development imposed by paragraph 11 of the same Framework is applied.

8.85 Officers have therefore assessed the proposals against the 'tilted balance' test set out at paragraph 11 of the NPPF.

8.86 In undertaking a detailed assessment of the proposals throughout this report and now applying the 'tilted balance' to those assessments, Officers consider that: i) there are no policies within the National Planning Policy Framework that protect areas or assets of particular importance which provide a clear reason for refusing the development proposed; and ii) any adverse impacts of granting planning permission would not

> significantly and demonstrably outweigh the benefits, when assessed against the policies in the National Planning Policy Framework taken as a whole.
>
> **8.87** Having carefully considered all material planning matters, and after applying the 'tilted balance', Officers recommend that planning permission should be granted subject to the prior completion of a planning obligation pursuant to Section 106 of the Town and Country Planning Act 1990 and the imposition of appropriate planning conditions."

152. Applying a close textual approach to these paragraphs, Mr Jones identified what he said were a number of flaws. First, he submitted that there was no clear conclusion, contrary to the adjurations of the late Patterson J in *Tiviot Way Investments Ltd v SSHLG* [2015] EWHC 2489 (Admin); [2016] JPL 171, at para 27, as to whether the proposal did or did not accord with the development plan. Secondly, it was said that even if a conclusion as to accordance had been made, this was irrational: the proposal failed to meet the two most important policies in the plan. Thirdly, Mr Jones submitted that the planning officer's approach to DSP40 was wholly unclear, particularly in circumstances where only four out of the five relevant criteria were said to be satisfied in the context of an exceptional policy. Finally, it is complained that the application of the "tilted balance" was both flawed and inadequately reasoned.

153. There was some force in Mr Jones' submissions on Ground 8 which I must acknowledge. Aside from Ground 1, it was more propitious than the remainder of his grounds.

154. The correct approach to the application of s. 38(6) of the 2004 Act, or more accurately its predecessor, was set out by Lord Clyde in *City of Edinburgh v Secretary of State for Scotland* [1997] 1 WLR 1447, in various passages:

> "…the section has not touched the well-established distinction in principle between those matters which are properly within the jurisdiction of the decision-maker and those matters in which the court can properly intervene. It has introduced a requirement with which the decision-maker must comply, namely the recognition of the priority to be given to the development plan. It has thus introduced a potential ground on which the decision-maker could be faulted were he to fail to give effect to that requirement. But beyond that it still leaves the assessment of the facts and the weighing of the considerations in the hands of the decision-maker. It is for him to assess the relative weight to be given to all the material considerations. It is for him to decide what weight is to be given to the development plan, recognising the priority to be given to it…" [at page 1458F-H]
>
> …
>
> "In the practical application of section 18A it will obviously be necessary for the decision-maker to consider the development plan, identify any provisions in it which are relevant to the

> question before him and make a proper interpretation of them. His decision will be open to challenge if he fails to have regard to a policy in the development plan which is relevant to the application or fails properly to interpret it"." [at page 1459D]

155. I do not read Patterson J's judgment in *Tiviot Way* as altering the position in any material respect.

156. Analysing the planning officer's report in the appropriate fashion, it is clear that he advised the committee that the proposal did not accord with the development plan in a number of respects. In particular, policies CS2, CS6 and CS14 of the Core Strategy were not fulfilled nor was policy DSP6 of the local plan (para 8.80).

157. As for policy DSP40, which I have already considered at some length, four out of its five elements were satisfied and there was *some* conflict with criterion (ii). The site was in a suitable location but it could not be said to be within an existing urban area. Thus, DSP40 was almost satisfied but not quite. Mr Jones submitted that a miss is as good as a mile, but the extent of compliance (or non-compliance) with the development plan must be relevant.

158. It was also relevant that the proposal made a modest albeit a material contribution towards the housing shortfall (para 8.82). This was clearly germane to the application of the exceptional policy set out in DSP40, and it is arguable that para 8.82 should have preceded para 8.81.

159. Para 8.83 gives rise to a degree of interpretative challenge. As I have said, there is some force in Mr Jones' submission that its various strands are difficult to identify and disentangle. Furthermore, I have detected a degree of variance between Mr Mould's very skilful oral submissions and paras 73-74 of his detailed grounds. According to the latter, para 8.83 sets out the planning officer's conclusion on the first stage of the s. 38(6) analysis whereas paras 8.84-8.87 develop the second stage, namely material considerations. Mr Mould's oral argument was that para 8.83 contained a composite conclusion on both stages, and that para 8.84 ff sets forth additional, fortifying reasoning which was not strictly necessary.

160. Para 8.83 is somewhat elliptical and a degree of benevolence is required. The issue is: how much? Overall, this report is a well-written and impressive document, and this planning officer's approach has been diligent and punctilious. Section 38(6) must be familiar territory to him. My reading of para 8.83 corresponds more with Mr Mould's detailed grounds than his oral argument. There, in my judgment the planning officer was dealing with the first stage of the s. 38(6) analysis. He was considering the extent of compliance with the development plan and the ordering of policies within that plan. He found, as he was entitled to, that policy DSP40 was more important in this case than CS14, owing to the shortfall in housing supply, and that the failure to satisfy the second criterion did not undermine this conclusion. The final clause in para 8.83 could be better worded, but it sets out the planning officer's conclusion on the first stage. It is not a conclusion on the s 38(6) issue *tout court*, still less the planning application as a whole.

161. Paras 8.84-8.87 address the second stage of the s. 38(6) exercise. I must reject Mr Jones' conclusion that the planning officer somehow misapplied the "tilted balance". This was applicable in the light of the conclusions on the environmental issues, leading to the

applicability of the presumption in favour of sustainable development. Para 8.86 is a composite conclusion on all remaining material considerations in the light of the tilted balance. The overall conclusion in para 8.87 is legally unexceptionable.

162. Ground 8 therefore fails.

Disposal

163. This application for judicial review must be dismissed.

ANNEX

"X" marks the site