CO/7623/2007

Neutral Citation Number: [2008] EWHC 1204 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
THE ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London WC2A 2LL

Thursday, 1st May 2008

B e f o r e:

MR JUSTICE SULLIVAN

Between:

THE QUEEN ON THE APPLICATION OF HART DISTRICT COUNCIL

Claimant

v

(1) THE SECRETARY OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT
(2) LUCKMORE LIMITED
(3) BARRATT HOMES LIMITED

Defendants

and

(1) TAYOR WIMPEY DEVELOPMENTS LIMITED
(2) NATURAL ENGLAND

Interested Parties

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(Official Shorthand Writers to the Court)

Mr S Hockman QC and Miss A Williams (instructed by Sharpe Pritchard) appeared on behalf of the **Claimant**
Mr J Maurici and Mr R Turner (instructed by the Treasury Solicitor) appeared on behalf of the **First Defendant**
Miss M Cook and Mr A Ranatunga (instructed by Boyes Turner) appeared on behalf of the **Second and Third Defendants**
Mr K Lindholm QC and Mr C Howell-Williams (instructed by Addlesham Goddard) appeared on behalf of the **First Interested Party**
Mr R Drabble QC and Mr G Machin (instructed by Browne Jacobson) appeared on behalf of the **Second Interested Party**

J U D G M E N T

(Approved by the court)

1. MR JUSTICE SULLIVAN:

Introduction

2. This is an application under Section 288 of the Town and Country Planning Act 1990 ("the Act") to quash the decision of the first defendant to allow four appeals made by the second and third defendants under Section 78 of the Act. The first defendant's decision is contained in a decision letter dated 24th July 2007 ("the decision letter").

3. The first defendant appointed an inspector to hold a public inquiry into the four appeals. The Inspector held an inquiry between 12th and 15th December 2006 and on 19th December 2006, and reported to the first defendant on 23rd January 2007. In her report, the Inspector recommended that all four appeals should be dismissed.

4. The Inspector said that the appeal proposals were "in effect a package of proposals to achieve the residential development of land off Dilly Lane." (Paragraph 1). Dilly Lane is on the southern edge of Hartley Wintney, which is one of the larger villages in Hart District. The four appeals were referred to as Appeal A, Appeal G, Appeal E and Appeal F in both the Inspector's Report and the decision letter.

5. As amended, Appeal A related to an application for outline planning permission for 170 dwellings, with an affordable housing content of 40 per cent on the "main appeal site" to the south of Dilly Lane.

6. Appeal G related to a detailed application for planning permission for 170 dwellings, including 68 affordable dwellings on the main appeal site.

7. Appeal E related to proposals to widen and surface footpath 18A King John's Ride, to upgrade it to a 2.5 metre wide footpath and cycle path, and to create two links from the upgraded path into the northern and southern parts of the main appeal site. King John's Ride runs to the west of the main appeal site, between it and existing housing in Wier Road, and then runs in a southwesterly direction and joins the B3016 Road, which leads to Winchfield Station, some 1.6 kilometres to the south.

8. Appeal F related to an application to change the use of the field ("the field site") to the east of and adjoining the main appeal site from agricultural use to informal recreational space to serve the proposed residential development and for use by the local community. In total, 9.52 hectares of new open space was included in the package of proposals, 3.36 hectares as buffer zone in the main appeal site, and 6.16 hectares in the field site. Other mitigation measures that form a part of the package are listed in paragraph 4.9 of the Inspector's Report.

9. On 9th March 2005, the Thames Basin Heaths were classified as a special protection area (SPA) under Article 4 of EC Directive 79/407/EEC on the conservation of wild birds ("the Birds Directive") for three species listed in Annex 1 to the Directive: the

nightjar, the woodlark and the Dartford warbler, because the SPA is regularly used by 1 per cent or more of Great Britain's population of those bird species.

10. Since the adoption of the Habitats Directive 92/43/EEC ("the Habitats Directive"), and as a result of Article 7 of that Directive, SPAs classified under the Birds Directive are protected by the obligations contained in Articles 6(2) and (3) of the Habitats Directive. Articles 6(2) and (3) of that Directive impose the following obligations:

> "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."

11. These provisions are transposed into domestic law by Regulation 48 of the Conservation (Natural Habitats, &c.) Regulations 1984 ("the Regulations"). So far as relevant, Regulation 48 provides:

> "(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 in Great Britain... either alone or in combination with other plans or projects), and
>
> (b) is not directly connected with or necessary to the management of the site,
>
> shall make an appropriate assessment of the implications for the site in view of that site's conservation objectives.
>
> (2) A person applying for any such consent, permission or other authorisation shall provide such information as the competent authority may reasonably require for the purposes of the assessment or to enable them to determine whether an appropriate assessment is required**.**
>
> (5) In the light of the conclusions of the assessment, and subject to regulation 49, the authority shall agree to the plan or project only after

having ascertained that it will not adversely affect the integrity of the European site...

(6) In considering whether a plan or project will adversely affect the integrity of the site, the authority shall have regard to the manner in which it is proposed to be carried out or to any conditions or restrictions subject to which they propose that the consent, permission or other authorisation should be given."

12. The main appeal site lies about 1.5 kilometres south of the nearest point of Hazeley Heath, which is on the north side of Hartley Wintney. Hazeley Heath is a heathland site of Special Scientific Interest (SSSI), and a component of the Thames Basin Heaths SPA. Bramshill SSSI, Castle Bottom to Yateley and Hawley Commons SSSI are also components of the SPA, within 5 kilometres of the appeals site (paragraph 2.3 of the Inspector's Report).

Factual background: The effect on the SPA

13. The planning history of the four appeals is lengthy and complicated. For present purposes, it may be summarised as follows. Having considered the potential for increased visitor pressure on the healthlands within the SPA as a result of permitting residential development some distance away from the SPA, English Nature, now Natural England (NE), indicated in January 2004 that competent authorities should undertake appropriate assessments for proposed residential developments up to 5 kilometres from the (then proposed) SPA.

14. The outline application, which was the subject of Appeal A, was made on 29th July 2004. In a letter dated 12th August 2004, NE stated that the Dilly Lane site was too far from the SPA for there to be an effect on the Annex 1 bird species, and that the proposals were not likely to cause significant damage to Hazeley Heath SSSI. NE, therefore, did not object to the outline application, which subsequently became Appeal A.

15. Mr Colebourn, the ecological consultant instructed by the second and third defendants, explained in his proof of evidence at the inquiry how NE had altered its stance when the detailed application (Appeal G) was made on 1st March 2006:

"2.12 Towards the end of 2005, Natural England reconsidered its policy and 'decided to take a stronger line' in relation to the 'in-combination' effect of multiple residential schemes on the ecological function of the... SPA. In particular, NE's letter to HDC [Hart District Council] dated 25 October 2005 drew attention to further research on heathlands, especially the work of Liley, Clarke, and others, in Dorset; and, in particular, on the mechanisms by which recreational impacts including dog-walking, might affect bird breeding success, and thus be considered a deleterious effect on the habitat.

2.13 Natural England then considered that although it might potentially

> be possible to mitigate such effects through each site providing appropriate alternative recreational facilities, the present Dilly lane application did not provide such Alternative Greenspace, and therefore, in NE's view must fail the Regulation 48 tests.
>
> 2.14 On that basis, Natural England advised HDC that it objected to the Full Planning Application for Dilly Lane."

16. Although Appeal G was made on the basis of the claimant's failure to determine the detailed application within the prescribed period, the claimant subsequently considered the application and its second deemed reason for refusal was as follows:

> "The LPA has insufficient information to allow it to make an Appropriate Assessment under the Conservation (Natural Habitats &c) Regulations 1994. As such it can not be satisfied that the proposed development (on its own and/or in combination with other plans and projects), will not have an adverse impact on the integrity of the Thames Basin Heaths Special Protection Area. Therefore the proposal is contrary to [a number of policies in the development plan]..."

17. In his proof of evidence, Mr Colebourn described the assessments that had been carried out by his company, Ecological Planning and Research Ltd (EPR), and by consultants appointed by the claimant, Jonathan Cox Associates, the latter as part of the claimant's consideration of the first alteration to the plan. It has never been contended that, considered individually, the development of the main appeal site for 170 dwellings would be likely to have a significant effect on the SPA. The issue was whether, in combination with other proposed residential developments in the area, it would be likely to have such an effect.

18. The results of Mr Colebourn's final assessment were contained in a report dated November 2006: "Land at Dilly Lane Hartley Wintney, Measures to Avoid Effects on the Thames Basin Heaths SPA" ("the EPR Report"). The EPR Report described the surveys that had been undertaken by EPR: visitor surveys of the origins of visitors to Hazeley Heath, Bramshill, Warren Heath and Yateley Common; visitor surveys of the users of the common land within Hartley Wintney, and a door-to-door survey of residents of the south-western part of Hartley Wintney. A draft of the EPR Report was sent to NE. NE's questions about the research, and EPR's interpretation of the results, were answered in a technical note from EPR, which was, in substance, incorporated into the final version of the EPR Report.

19. On 20th October 2006, NE wrote to the claimant:

> "Further to our response of 18th August to EPR, who are working for Luckmore Ltd on the above proposals, Natural England has received further information on the mitigation offered. We have also had sight of a draft S106 agreement designed to, amongst other matters, secure the mitigation identified.

> I therefore write to clarify the position of Natural England ahead of the deadline for Proofs of Evidence for the Inquiry into the proposals.
>
> The outstanding matters on the mitigation offer related to whether the site was adequate, in terms of its size and quality, to fully mitigate for the development. This is specifically in terms of whether the space offers the length of walks and varied nature provided by the SPA sites, to ensure that it provides a real alternative for those new residents which may also choose to use the SPA.
>
> On the 12th September EPR provided maps illustrating footpaths in and around the village of Hartley Wintney which may be linked to the mitigation space to provide for longer walks of up to 4 km.
>
> After a great deal of consideration, it has been concluded that on balance a competent authority, in view of the additional information provided on links to the local footpath network, would probably be in a position to conclude that the effects on the SPA arising from this development would be avoided, if the proposals are put in place.
>
> It should be noted that the need for other larger sites, as would be provided by a strategic suite of SANGs [Suitable Alternative Natural Greenspace], to be co-ordinated by the local authority is not a new idea. It is consistently applied through the Delivery Plan and acceptance of mitigation packages prior to the Plan being put in place is on the basis that they are considered in light of highly local circumstances."

The remainder of the letter dealt with the proposed Section 106 agreement and other matters that are not relevant for present purposes.

20. Mr Colebourn wrote to NE suggesting that its advice as the statutory nature conservation adviser was not entirely clear. He suggested that it would be helpful if a Statement of Common Ground could be agreed between NE and EPR. The Statement of Common Ground is dated 2nd November 2006. So far as relevant, it said:

> "1. For the purposes of this Inquiry, the appellants accept that, consistent with the provisions of the Thames Basin Heaths Delivery Plan, a package of mitigation measures sufficient to avoid a likely significant effect on the Thames Basin Heaths SPA is required.
>
> 2. The package of measures offered by the developer, to ensure that the proposed development and associated mitigation and avoidance measures at Dilly Lane does not have an adverse effect on the integrity of the Thames Basin Heaths SPA or any component SSSI, is sufficient in scale and detail to allow a competent authority to conclude that there is not likely to be significant effect on the Thames Basin Heaths SPA, and that no appropriate assessment under the Habitat Regulations is necessary.
>
> 3. The package of measures is set out in the following documents:"

Those documents include the EPR Report.

21. On 10th November 2006 NE wrote to the claimant. The letter referred to the provisions in the draft Section 106 agreement and concluded:

> "Therefore, we are satisfied that the S 106 agreement draft of 10 November 2006, as attached, has been improved through the recent amendments and is now a suitable means to secure the impact avoidance measures.
>
> With reference to the Statement of Common Ground of 2 November 2006 (also attached), we accept this as it is clear that the appellant accepts that the avoidance measures are necessary. We interpret this as an indication of their acceptance of Natural England's opinion; that should the measures not be put in place, and were the development still to go ahead, an adverse effect on the integrity of the SPA may arise.
>
> Given this progress, our concerns have been resolved and we are able to withdraw our objections to the proposals in relation to the Thames Basin Heaths SPA. For this reason it is our expectation that it would not be necessary or helpful for us to attend the inquiry."

The claimant's reply on 14th November 2006 said:

> "As you are aware, Hart District Council has relied on evidence from Natural England in relation to the mitigation package. Given the uncertainty surrounding these issues, and hence, whether adequate mitigation can be secured, we must assume and strongly request that Natural England submit evidence to the Inquiry and give evidence on these matters."

22. NE replied on 17th November 2006, reaffirming its position as to the adequacy of the Section 106 agreement and saying:

> "The applicants have accepted that without the measures secured by the s106 agreement there is likely to be a likely significant effect on the SPA. This can be inferred clearly from the statement of common ground. This leaves a clear position. That is, with those measures secured, Natural England's objection is resolved.
>
> If for some reason the Inspector was to conclude that the measures would not reliably secured, then given the accepted possibility of an adverse effect, we believe the Inspector would have no choice but to dismiss the appeal. Given this position, and in particular the indication given by the statement of common ground that the appellants will not dispute the possibility of impact, it does not appear necessary for Natural England to submit evidence to the inquiry."

That was the position when the inquiry opened on 12th December 2006. NE did not

give evidence at the inquiry. The Inspector said in paragraph 1.2 of her report:

> "The second deemed reason for refusal in Appeal G concerns the Thames Basin Heaths Special Protection Area... Subsequently in November 2006 Natural England withdrew its objections on the basis of the proposed package of measures and the controls on their implementation and retention achieved through planning obligations. In view of the advice from Natural England the Council no longer raises any objections to the proposed mitigation plan. The deemed reason for refusal on Appeal F, on the need to secure a management plan for the long term maintenance of the open space, has also been overcome by a planning obligation."

23. The claimant did not challenge Mr Colebourn's evidence at the inquiry. The only reference to the SPA in the claimant's closing submissions to the Inspector was in these terms:

> "HDC does not raise any objections to the technical mitigation plan proposed. Nor does HDC seek to introduce a fresh reason for refusal. However HDC does consider it right to draw the Inspector's attention [to] the fact that [NE's] Draft Delivery Plan is the subject of scrutiny at the South East Plan proceedings."

24. The Inspector reached the following conclusions as to the effect of the proposals on the SPA:

> "12.5 The Appellants have accepted that, because there is not enough current data to confirm otherwise, the Dilly Lane development may, without mitigation and in combination with other developments, contribute to a significant effect on the SPA. Therefore their approach has been to develop a package of mitigation measures to ensure avoidance of any contribution to such adverse in combination effects. The Appellants are confident that the proposals are able to proceed independently of the Natural England Delivery Plan and its application within Hart. Natural England has advised that the package is sufficient in scale and detail to allow a competent authority to conclude that there is not likely to be a significant effect on the SPA. In Natural England's opinion no appropriate assessment under the Habitats Regulations is necessary.
>
> 12.6 The JCA Assessment and the evidence of EPR suggest that the most likely in combination pressures to be placed on the SPA would be through increased recreational pressure and more particularly disturbance by people and dogs. The HWAG [Hartley Wintney Action Group] highlighted the threat of fire. However, the evidence suggests that heathland fires are most likely to be started by children and young people. The distance between the site and Hazeley Heath is such as to discourage easy access by unaccompanied youngsters from the development.
>
> 12.7 The Appellants, through EPR, have developed the mitigation

package over a period of several years. The proposals have been informed by the specifications in the Draft Delivery Plan and by research into human behaviour with regard to informal recreation. The specific local research and survey work undertaken by EPR came later in June/July 2006 in response to comments by Natural England. Therefore rather than informing and guiding the proposals for the SANGS this later work was undertaken with the purpose of establishing likely levels of its future use.

12.8 As explained by the Appellants at the inquiry the objective has not been to provide replacement heathland but to provide alternative green space that would be equally attractive for some of the purposes people visit the heaths. The field site has been designed to be attractive to walkers and more particularly dog walkers, although able to accommodate other informal recreation activity. I consider the informal recreation area would be of a reasonable size, fenced off from the road, with defined footpaths and open areas to allow dogs to be let off the lead. The hay meadow and areas of additional planting would reinforce local landscape character. However, it would have a quite different character to the heaths, being more enclosed and within a farmland and village setting. It would therefore be more akin to some of the commons and open spaces within the village and to the footpaths through the farmland nearby. The links to the informal amenity areas on the housing site and to the surrounding footpath network would offer opportunities for walks of varying length. Again these walks would not generally replicate the openness and semi-wild character of the heathlands.

12.9 A fundamental conclusion of the Appellants, supported they say by 2006 EPR survey work, is that the measures will avoid any net effect of recreational activity on the SPA. My understanding is that reliance is placed on the SANGS drawing existing users away from the Heath to compensate for the new residents using the Heath on occasion. I have serious doubts about these conclusions. In my view an equally valid conclusion from the EPR survey is that the SANGS, because of its convenience and character, would act as an alternative to the use of the Hartley Wintney commons and green spaces for dog walking and walking by existing residents in the locality of the site. There is little I can see to suggest that it would be successful in diverting existing trips by these residents away from the Heath. Taking a wider view, the residents living closest to Hazeley Heath and who form the greater proportion of visitors, are unlikely to be attracted to the SANGS. It would offer nothing significant over and above the Heath, while being less convenient and with less opportunity for longer walks with dogs off a lead. For new residents the SANGS may well provide opportunities for shorter walks close to home but Hazeley Heath and other components of the SPA remain a convenient and unique destination to satisfy a wider range of recreation needs.

12.10 The timescales associated with providing the informal recreation

area on the field site are also relevant to the ability to avoid any net effect of recreational activity on the SPA. The intention is to carry out the planting and associated works to create this key component of the SANGS before occupation of the first dwelling. The Appellants' expert witness on ecology outlined the timescales for establishing the areas of grass, scrub and trees. In his opinion the spaces would have quite a natural appearance after about 3 or 4 years, although the benefits to biodiversity would take a longer period ranging over 5 to 15 years. I consider the less attractive, newly formed appearance of the open space in its early years will not encourage existing residents to take advantage of the SANGS rather than visiting the more attractive Heath, with its particular landscape qualities. The attractiveness for new residents would also be less. Consequently the likelihood of achieving a net positive effect would be reduced in the short term.

12.11 The proposals also include the provision of information about alternative recreation sites and on the SPA. Whilst a positive measure there is little specific evidence to support the view that the provision of the information would be effective in significantly reducing the number of trips to the SPA. The impression I have gained through all the representations is that local residents are very aware of their surroundings and their particular attributes.

12.12 The Natural England Draft Delivery Plan points out that research has indicated that altering the existing recreational patterns by promoting or providing alternatives is harder to achieve than establishing new use patterns amongst new residents. Bearing this in mind, I do not share the confidence of the Appellants that existing residents will be enticed away from the Heath in any significant numbers. In my opinion, because of the character of the SANGS, it will probably be only successful in attracting existing residents who would otherwise use the local commons and green spaces in the village. Whilst I agree new residents will be likely to use the SANGS to fulfil recreation requirements for convenient walks and exercising the dog, the SPA is not far away and has the advantages of its unique character and opportunities for a wider range of recreations. I do not accept that the measures will avoid any net effect of recreational activity on the SPA.

12.13 The JCA Assessment anticipated that measures would be taken to develop access management plans for the component SSSI in the SPA and to ensure appropriate habitat management across the SPA. These measures were envisaged to be in addition to mitigation directly linked with any planning application. Evidence at the inquiry confirmed that such strategic measures have not been put in place. In my view this consideration would be relevant after carrying out an appropriate assessment rather than in an initial appraisal to establish if the proposal would be likely to have a significant effect on the SPA.

> 12.14 The SPA is of international importance to nature conservation. It enjoys a high level of protection, consistent with the aim of ensuring biodiversity through conservation of natural habitats, fauna and flora. Accordingly, a precautionary approach is to be taken in assessment. Having regard to the conservation objectives for the SPA I am unable to conclude that the proposed package of measures could lead to a judgement of no likely significant effect on the SPA. The probability of the proposals having a significant effect on the SPA in combination with other plans or projects cannot be discounted. It follows that an appropriate assessment should be carried out in order to ascertain if the proposal would adversely affect the integrity of the site.
>
> 12.15 However, there is inadequate information available at this time to enable an appropriate assessment to be carried out. Furthermore, there are alternative sites on which dwellings could be built in the Country or South East region which would have a lesser effect or avoid an adverse effect on the integrity of the SPA. Given these circumstances and the uncertainties over the effect of the proposals on the SPA it follows that the development would not be compliant with the Habitats Regulations. To permit the scheme without formal appropriate assessment would be contrary to LP Policy CON 1 and national policy in PPS9. In the light of these conclusions it is not necessary or appropriate to address the criticism raised by the HWAG on the assessment approach used by Natural England."

25. HWAG's criticism of NE's approach to appropriate assessment was summarised by the Inspector in paragraph 9.12 of her report:

> "9.12 The Appellants have agreed a mitigation package with Natural England but the package is not environmentally acceptable and sustainable. Firstly, the approach used by Natural England in assessing significant effect on Hazeley Heath is flawed. Account was taken of the package of mitigation and avoidance measures in concluding that they will succeed in avoiding a net adverse effect on the SPA and therefore pass the Preliminary Stage Assessment. Referring to the opinion by Robin Purchas QC, consideration should not be given to possible mitigation at that stage (*Document 69*)."

For completeness I should also refer to paragraph 9.13 of the Inspector's Report, where the Inspector summarised HWAG's case that:

> "9.13 Hazeley Heath has an inherent attraction that draws people to it, as indicated by a recent survey (*Document 14 p. 3, Document 64*). The SANGS will not provide the attributes of biodiversity, peacefulness, wilderness, safety, openness, beauty or freedom to roam over a wide area. Even though the SANGS will offer additional recreation land it would be small in comparison to the Heath and be mainly used by dog owners. The field will take some 10 years to take on a natural appearance and the

surrounding farmland and woodland has not the same landscape quality as the SPA. The SANGS would not have the same attractiveness and residents will still wish to visit Hazeley Heath. The extra numbers of people will add pressure, primarily through disturbance and the increased risk of fire."

26. The response of the second and third defendants to HWAG's submissions is recorded by the Inspector in paragraph 8.7 of her report:

> "8.7 In the later stages of the inquiry the HWAG introduced a new point and suggested that the approach of Natural England, one accepted by the Council and endorsed by EPR, is fundamentally flawed. Reliance was based on an opinion of Robin Purchas QC, who concluded that when considering whether an appropriate assessment is necessary one should disregard any mitigation or the manner in which the proposals are intended to be carried out (*Document 69*). However, there is no reason why the Secretary of State should take a different approach to that used by her statutory consultee and which was applied in the Franklands Drive case. In any event whichever way the issue is approached the answer remains the same. Granting permission for the current proposals is not likely to have a significant effect on the SPA either alone or in combination with other plans or projects. Compatibility with the Directive and Habitats Regulations is secured. The net effect will be beneficial in that the likelihood of the Dilly Lane residents (some 400) to use the SPA for recreation will be more than offset by the likelihood of the population in the immediate locality (some 800) to use the proposed open space as part of their recreation. The proposed leaflets and information boards will be the first active steps aimed at educating the public and thus better managing the SPA."

27. In a letter dated 4th April 2007, the first defendant stated that she was minded to disagree with the Inspector's conclusions and recommendations, and was minded to allow the appeals and grant planning permission, subject to conditions and to Section 106 planning obligations, but that before reaching a final decision she required further evidence clarifying the housing supply position within Hart District ("the minded to grant letter"). Paragraphs 13-15 of the minded to grant letter dealt with the effect on the SPA:

> "13. The appeal site is located within 2km of Hazeley Heath, which forms a part of the Thames Basin Heaths Special Protection Area (SPA). The Thames Basin Heaths SPA is protected by the Conservation (Natural Habitats &c.) Regulations 1994, commonly referred to as the Habitats Regulations. These require the consideration of effects of plans or projects on the SPA, which are not directly connected with, or necessary to, its management. Those that are likely to have a significant effect on the European site, either alone or in combination with other plans or projects, must be subject to an appropriate assessment of the implications in view of the European site's conservation objectives.

> 14. The Secretary of State has therefore taken account of the possible impact that allowing these proposals may have on the features of the Special Protection Area that are of conservation interest, namely nightjar, woodlark and Dartford Warbler. In considering this matter she has taken into account the fact that Natural England has withdrawn its objections to the proposed development and has confirmed (IR8.5) it is satisfied that the package of measures offered by the appellant is sufficient in scale and detail to allow a competent authority to conclude that there is not likely to be significant effect on the SPA, and that no appropriate assessment under the Habitats Regulations is necessary. These measures will provide 'suitable alternative natural green space' (SANGS) to serve the residential development and for use by the local community (IR4.8). The Secretary of State gives great weight to Natural England's views as the appropriate nature conservation body in relation to the application of the Conservation (Natural Habitats &c) Regulations 1994. She is therefore satisfied she can proceed to grant planning permission without having to undertake an Appropriate Assessment. Accordingly, the Secretary of State has concluded that there is no need to consider further the Inspector's deliberations in IR12.5-IR12.15 on the effect of the current proposals on the integrity of the habitat. She has gone on to assess the proposals against the other issues identified in paragraph 12 of this letter.
>
> 15. The Secretary of State is aware that the report of the Assessor on the Thames Basin Heaths Special Protection Area and Natural England's draft Delivery Plan was made available in February to the Panel conducting the Examination in Public into the South East plan. She gives the report little weight at this stage, however, given its purpose in informing the SEP Panel, who will in turn report to her. She is therefore not currently in a position to rely upon the Assessor's conclusions and recommendations."

28. Although the Secretary of State had not invited further representations about the effect of the proposals on the SPA, the claimant, in addition to making lengthy representations as to the housing supply and position within its district (see below), also made representations in respect of the SPA:

> "With regard to the SPA there are two issues of particular concern that are explored in further detail in this section of the Council's Statement: i) the SoS's view that there is no requirement for an appropriate assessment in association with the Appeal proposals and that planning permission can be granted in the absence of such an assessment; and ii) the SoS's failure to consider the conclusions of her Inspector relevant to the impact of development on the SPA."

29. Having referred to the Inspector's conclusions, and to another appeal decision in which the Secretary of State had allowed residential development on appeal on the basis that an appropriate assessment ("AA") was not required, the claimant's representations said that:

"3.5... Since that time, matters relevant to the SPA have moved on significantly having regard to the availability of new information and the better level of understanding relevant to the requirements of Article 6(3) of the Habitats Directive.

3.6 In terms of the availability of additional information, the primary development relates to the consideration of a significant body of evidence on the SPA by Peter Burley, a Senior Planning Inspector (the Technical Assessor) between November 2006 and February 2007 as part of the South East Plan Examination in Public. Mr Burley considered all submissions and concluded in his report entitled 'The Thames Basin Heaths Special Protection Area & Natural England's Draft Delivery Plan' published in February 2007 (supported by a clarification note produced in March 2007 and a more recent Addendum issued on the 13 April 2007), that Natural England's approach to the requirements of Article 6(3), namely that the provision of SANGS absolved a Competent Authority from carrying out an AA for a development that would otherwise be considered likely to have a significant effect, was incorrect in law. This conclusion was based on the fact that there was no objective evidence to show that the provision of SANGS would be sufficient to ensure that residential development would be unlikely to have a significant effect on the SPA, and therefore a Competent Authority could not avoid carrying out an AA. This is effectively the position also reached by the Inspector at the Dilly Lane Inquiry.

3.7 The second change since the Franklands Drive decision relates to the increased level of understanding of the procedures required to comply with the requirements of the Article 6(3) of the Habitats Regulations. To this end there have been a number of eminent legal opinions produced as follows:"

Those were opinions by Mr Elvin QC, Mr Griffiths QC, Mr Purchas QC and Mr Drabble QC. The claimant's representations continued:

"3.8 These opinions come to different conclusions relevant to the need to undertake an AA in circumstances where an unmitigated development would have a likely significant effect on the SPA. However in considering these opinions, the Technical Assessor came to the view that,

*'in order to comply with the **Waddenzee** test it will be necessary for the time being at least, for all larger residential developments, which aim to provide SANGS, to be subject to an appropriate assessment'...*"

The representations referred to the Technical Assessor's response to Mr Drabble's opinion and said:

"3.10 In the light of this additional information and the clarification in terms of the application of Article 6(3), HDC considers that the appeal

> proposals require an AA as a matter of law...
>
> 3.11 For these reasons, HDC is of the view that the SoS's conclusion in terms of the need, or lack thereof, for an AA is flawed and that by failing to carryout an AA, the SoS has acted outside the limits of her discretion as set by... both the EU and UK legislative regime."

30. The claimant then contended, in its representations, that the first defendant had failed to consider the Inspector's conclusions and had instead been guilty of "an unacceptable delegation of her authority" to NE:

> "... the significant and overriding weight given by the SoS to the views of Natural England... led her to take the view, without challenge or further consideration, that she need not consider her own Inspector's conclusions (which notably conflicted with Natural England's but which have subsequently been supported by the Technical Assessor), or to come to a conclusion herself on the matter..."

31. Mr Purchas in his opinion dated 8th December 2006, and the Technical Assessor in his report published in February 2007, were both considering the Draft Delivery Plan published by NE's predecessor, English Nature, on 26th May 2006, in the context of the examination in public into the regional spatial strategy for the South East ("the South East Plan"). In his opinion, Mr Purchas said that Regulation 48 (above) should be approached in three distinct and sequential stages. In the first stage, the question was whether the project (either alone or in combination with other plans or projects) was likely to have a significant effect on the SPA.

32. In paragraph 17 of his opinion, Mr Purchas said:

> "Consideration should not be given at this stage to possible mitigation. This is made clear by the European Commission Environment DG publication *Assessment of plans and projects significantly affecting Natura 2000 sites* which states at 2.6 that 'it is important to recognise that the screening assessment should be carried out in the absence of any consideration of mitigation measures that form part of a project or plan and are designed to avoid or reduce the impact of a project or plan on a Natura 2000 site. ... Effective mitigation of adverse effects on Natura 2000 sites can only take place once those effects have been fully recognised, assessed and reported."

33. Paragraph 1.1 of the document ("the Methodological Guidance") explains the nature of the document referred to by Mr Purchas:

> "This document has been produced to provide non-mandatory methodological help to carry out or review the assessments required under Article 6(3) and (4) of the habitats directive...
>
> This guidance must always be read in conjunction with the directives and national legislation, and within the context of the advice set out in the

> Commission services' interpretation document 'Managing Natura 2000 sites: The provisions of Article 6 of the "Habitats" Directive... (referred to in this guidance as MN2000). MN2000 is the starting point for the interpretation of the key terms and phrases contained in the habitats directive and nothing in this guidance document should be seen as overriding or replacing the interpretations provided in MN2000. Furthermore, this guidance should not be read as imposing or suggesting any procedural requirements for the implementation of the habitats directive. Its use is optional and flexible since, under the principle of subsidiarity, it is for individual Member States to determine the procedural requirements deriving from the directive."

The reasons given in paragraph 2.6 of the document for the proposition that the screening assessment should be carried out in the absence of any consideration of mitigation measures that form part of the project or plan, and are designed to avoid or reduce the impact of a project or plan on the Natura 2000 site, are as follows:

> "The proponents' notion of effective levels of mitigation may vary from that of the competent authority and other stakeholders. To ensure the assessment is as objective as possible, the competent authority must first consider the project or plan in the absence of mitigation measures that are designed into a project. Effective mitigation of adverse effects on Natura 2000 sites can only take place once those effects have been fully recognised, assessed and reported. It will then be for the competent authority, on the basis of consultation, to determine what type and level of mitigation are appropriate."

34. The Draft Delivery Plan (or to give the document its formal title: The Thames Basin Heaths SPA: Draft Mitigation Standards for Residential Development) sets out a strategic approach to the provisions of SANGS. For example, in Zone A (within 400 metres of the SPA) no effective avoidance or mitigation is possible; in Zone B (between 400 metres and 2 kilometres away from the SPA) 16 hectares of SANGS per 1,000 of new population is required, with further requirements as to the minimum size of the SANGS and their maximum distance from the proposed development; in Zone C (between 2 and 5 kilometres from the SPA) the standard of provision required reduces to 8 hectares of SANGS per 1,000 of the new population, with further stipulations as to minimum size and maximum distance from the proposed development.

35. The Draft Delivery Plan does not prevent individual assessments of particular proposals. Under the subheading "Individual Assessments", paragraph 2.2.9 says:

> "The Delivery Plan **does not** preclude the local authority deciding to assess a particular individual residential application separately under the Habitats Regulations. Equally, when making an application, a developer could ask the authority to assess the application separately from the Delivery Plan, whether or not mitigation is included. Given the likelihood of significant effect on the SPA, without mitigation, the application would need to be subject to an appropriate assessment, unless for good reasons,

> the authority is satisfied it would not be likely to have a significant effect on the SPA... Such a conclusion should be recorded, with reasons, by the planning authority and should have regard to the advice in Circular 06/2005 and to the findings of the European Court of Justice referred to in paragraph 13 of the Circular." (Emphasis as in the original).

36. Circular 06/2005 provides administrative guidance on the application of the law relating to planning and nature conservation. For present purposes, paragraphs 13 and 14 of the Circular, which deal with the issue or "likely significant effect", are relevant:

> "13. If the proposed development is not directly connected with or necessary to site management, the decision-taker must determine whether the proposal is likely to have a significant effect on a European site. The decision on whether an appropriate assessment is necessary should be made on a precautionary basis. An appropriate assessment is required where there is a probability or a risk that the plan or project will have significant effects on a site. This is in line with the ruling of the European Court of Justice in Case C-127/02 (the Waddenzee Judgment) which said *'any plan or project not directly connected with or necessary to the management of the site is to be subject to an appropriate assessment of its implications for the site in view of the site's conservation objectives if it cannot be excluded, on the basis of objective information, that it will have a significant effect on that site, either individually or in combination with other plans or projects'*.
>
> 14. The decision-taker should consider whether the effect of the proposal on the site, either individually or in combination with other projects, is likely to be significant in terms of the conservation objectives for which the site was classified. The European Commission has also issued guidance, which local planning authorities may wish to consider."

A footnote to the final sentence in paragraph 14 refers to managing the Natura 2000, but not to the Methodological Guidance referred to in the opinion of Mr Purchas.

37. The Technical Assessor considered four main criticisms of the Draft Delivery Plan ("DDP"). They were:

> "... firstly that NE is wrong to hold that developments which provide SANGs of appropriate size and quality would avoid any likely significant effect and therefore not require an appropriate assessment; secondly that its operation of the 'in combination' requirement is unreasonably rigorous; thirdly that its application of the 'precautionary principle' is not proportionate; and finally that the failure to set clear conservation objectives makes it impossible to accurately apply the requirements..."

38. Under the subheading "Avoidance or mitigation" the Technical Assessor said:

> "4.1.11 It is argued, most forcibly by Runnymede Borough Council, that

> NE's approach to avoidance and mitigation is wrong in principle. In particular, it is contended that to maintain that the provision of SANGs would avoid any likely significant effect subverts the intention of the legislation since it means that an appropriate assessment is thereby avoided. It is also suggested that NE has confused avoidance and mitigation.
>
> 4.1.12 It is clear from the wording of the DDP and what was said at the technical meetings by NE that the primary reason it adopted its approach was in an attempt to provide greater certainty for the house building industry and to make the process of complying with the requirements of the legislation easier. I have no reason to doubt that this was a genuine attempt by NE to facilitate the delivery of housing, albeit that it has largely had the opposite effect...
>
> 4.1.14 Whether or not appropriate assessment is more complicated or allows for more flexibility is not the issue. The question is whether the approach adopted by the DDP complies with the legislation. In this regard, I have some doubts that it does. While I accept that in some circumstances steps can be taken to avoid a likely significant effect, for instance by re-siting a proposed development, I am not satisfied that it has been demonstrated on an objective basis that the provision of SANGs would in principle avoid any likely significant effect on the SPA."

39. On this issue, the Technical Assessor concluded in paragraph 4.1.17:

> "It seems to me therefore that, until there is a clearer objective basis for concluding that the provision of SANGs would avoid any likely significant effect, the correct approach would be to undertake an appropriate assessment. It may well be that at that stage the provision of alternative open space either individually or in combination with other measures could be demonstrated to provide sufficient mitigation to avoid any adverse affect on the SPA. However taking into account the precautionary principle I am not satisfied that it can be shown at the initial screening stage that such provision would avoid any possibility of there being a likely significant effect."

In his overall conclusions in paragraph 4.1.43 the Technical Assessor said:

> "I find that the DPP fails to correctly interpret the requirements of the relevant European and UK legislation in a number of respects. In my view its indication that the provision of SANGs will avoid the need for an appropriate assessment is incorrect and its application of the 'in combination' requirement unduly rigorous. More worryingly its application of the precautionary principle would not appear to comply with the advice of the European Commission in terms of proportionality and consistency."

40. As part of its response to the Technical Assessor's report, NE asked Mr Drabble and Mr Machin to provide an opinion. Their joint opinion dated 21st March 2007 said, so far as relevant:

> "... we do not consider that NE are wrongly conflating avoidance and mitigation. Although both words are commonly used, and used in context are helpful, it must be remembered that neither appear in Article 6 itself. If a proposal includes as an integral part of the development a measure which will avoid any significant effect, then in our opinion the competent authority is entitled to so hold at the significant effect stage. If a development was proposed with a wall that could in practice be guaranteed to prevent anybody from reaching the SPA, then it would clearly be right to hold that there was no likely significant effect. The people, put simply, would not reach the site. The example is of course improbable, but it does illuminate the legal principle; and the same principle applies to the provision of SANGs if the ecological assumption that SANGs is effective is accepted."

41. The Technical Assessor's response in an Addendum Report dated 13th April 2007 included the following:

> "7. The comments made under issue 1 of the opinion imply that I concluded that the provision of SANGS could never avoid the need for assessment. This is a misreading of my original report. I accept that in principle the need for such an assessment could be avoided in certain circumstances. However, such an approach would only accord with the principles of ***Waddenzee*** if objective evidence existed to demonstrate that the provision of SANGS, either on their own or together with other measures, would be sufficient to ensure that new residential development of significant scale would be unlikely to have a significant effect on the SPA. It is clear from the ecological evidence presented to me at the technical meetings that no such objective evidence exists at present.
>
> 8. Consequently, I hold to the view that in order to comply with the ***Waddenzee*** test it will be necessary for the time being at least, for all larger residential developments, which aim to provide SANGS, to be subject to an appropriate assessment. If objective evidence is subsequently forthcoming, which confirms that a specific level and quantity of SANGS per head of population would avoid any likely effect on the SPA, then clearly there would be no need for an appropriate assessment to be undertaken, if the requisite SANGS is to be provided as part of the development...
>
> 10. I accept that the lack of objective evidence of the efficacy of SANGS, as a principle, will make it more difficult for any scheme, which seeks to provide SANGS as mitigation, to demonstrate that there will be no significant adverse effect on the SPA at the appropriate assessment stage. Nevertheless, if one is looking at the circumstances of a specific scheme

> in detail, rather than at the general principle, it seems to me that it may well be possible to find sufficient objective evidence to demonstrate that a package of mitigation measures, which might include the provision of SANGS, would avoid an adverse effect on the SPA. In the circumstances, I do not share the view of the opinion that it would not be possible to conclude through an appropriate assessment that the test in ***Waddenzee*** was met."

42. The Technical Assessor's reference to the **Waddenzee** test is a reference to the decision of the European Court of Justice in Case C-127/02 **Landelijke Vereniging tot Behoud van de Waddenzee and Nederlandse Vereniging tot Bescherming van Vogels v Staassecretaris van Landbouw, Natuurbeheer en Visserij**, [2004] Env LR 14.

43. The ECJ dealt with the meaning of the words "likely to have a significant effect" on a protected site under the Habitats Directive in paragraphs 40-45 of its judgment:

> "40. The requirement for an appropriate assessment of the implications of a plan or project is thus conditional on its being likely to have a significant effect on the site.
>
> 41. Therefore, the triggering of the environmental protection mechanism provided for in Art.6(3) of the Habitats Directive does not presume——as is, moreover, clear from the guidelines for interpreting that article drawn up by the Commission, entitled "Managing Natura 2000 Sites: The provisions of Article 6 of the 'Habitats' Directive(92/43/EEC)"—— that the plan or project considered definitely has significant effects on the site concerned but follows from the mere probability that such an effect attaches to that plan or project.
>
> 42. As regards Art.2(1) of Directive 85/337, the text of which, essentially similar to Art.6(3) of the Habitats Directive, provides that 'Member States shall adopt all measures necessary to ensure that, before consent is given, projects likely to have significant effects on the environment...are made subject to an assessment with regard to their effects', the Court has held that these are projects which are likely to have significant effects on the environment (see to that effect Case C-117/02 *Commission v Portugal* [2004] E.C.R. I-0000, [85]).
>
> 43. It follows that the first sentence of Art.6(3) of the Habitats Directive subordinates the requirement for an appropriate assessment of the implications of a plan or project to the condition that there be a probability or a risk that the latter will have significant effects on the site concerned.
>
> 44. In the light, in particular, of the precautionary principle, which is one of the foundations of the high level of protection pursued by Community policy on the environment, in accordance with the first subparagraph of Art.174(2) EC, and by reference to which the Habitats Directive must be

> interpreted, such a risk exists if it cannot be excluded on the basis of objective information that the plan or project will have significant effects on the site concerned (see, by analogy, *inter alia* Case C-180/96 *United Kingdom v Commission* [1998] E.C.R. I-2265, paras 50, 105 and 107). Such an interpretation of the condition to which the assessment of the implications of a plan or project for a specific site is subject, which implies that in case of doubt as to the absence of significant effects such an assessment must be carried out, makes it possible to ensure effectively that plans or projects which adversely affect the integrity of the site concerned are not authorised, and thereby contributes to achieving, in accordance with the third recital in the preamble to the Habitats Directive and Art.2(1) thereof, its main aim, namely, ensuring biodiversity through the conservation of natural habitats and of wild fauna and flora.
>
> 45. In the light of the foregoing, the answer to Question 3(a) must be that the first sentence of Art.6(3) of the Habitats Directive must be interpreted as meaning that any plan or project not directly connected with or necessary to the management of the site is to be subject to an appropriate assessment of its implications for the site in view of the site's conservation objectives if it cannot be excluded, on the basis of objective information, that it will have a significant effect on that site, either individually or in combination with other plans or projects."

44. On 11th June 2007, NE responded to the claimant's representations to the first defendant, saying:

> "Natural England considers that it is perfectly reasonable for the Secretary of State to conclude, on the evidence, and despite the Inspector's recommendations, that the development would not be likely to have a significant effect on the SPA. We understand that, on the basis of our carefully considered advice to the Council and the Inspector, the Secretary of State has concluded that the suitable alternative natural green space (SANGS) offered by the appellants would avoid any net increase in recreational visits to the SPA heathlands (thereby avoiding any increased disturbance to the Annex 1 bird species). We believe that on that basis it is not only appropriate, but legally correct to conclude no likelihood of a significant effect in terms of Regulation 48(1) of the Conservation (Natural Habitats &c) Regulations 1994. No appropriate assessment is necessary and permission can lawfully be granted in respect of these Regulations and the Habitats and Birds Directives."

45. NE's representations then refer to Mr Drabble's opinion and continue:

> "The Secretary of State's letter indicates that she has not considered it necessary to consider the Inspector's deliberations in IR12.5 to IR12.15 on the integrity of the habitat. We assume that this is intended to indicate that having considered the Inspector's conclusions, as to the effects on the SPA, she has preferred the advice of Natural England as the appropriate

nature conservation body, and therefore there is no need to consider the effects on the integrity of the site, because there is no need to undertake an appropriate assessment...

Natural England supports the Secretary of State's application of the Habitats Regulations in this case and her conclusion that, in view of the adequacy of SANGS provided, there is no need to undertake an appropriate assessment in light of there being no likelihood of a significant effect on the SPA."

46. The first defendant responded to the claimant's representations, following the minded to grant letter, in paragraphs 9-11 of her decision letter dated 24th July 2007, under the heading "Effect on the SPA":

"9. For the reasons given in paragraphs 13-15 of her 'minded' letter of 4 April, the Secretary of State was satisfied she could proceed to grant planning permission without having to undertake an Appropriate Assessment. Accordingly, she did not consider further the Inspector's deliberations in IR12.5-IR12.15 on the effect of the current proposals on the integrity of the habitat.

10. Although not a matter on which the Secretary of State sought further representations, Hart District Council took issue with the Secretary of State's approach in their response of 14 May. In particular, it stated that matters relevant to the Special Protection Area (SPA) have moved on significantly, having regard to the availability of new information, and better understanding relevant to the requirements of Article 6(3) of the Habitats Directive. The primary development cited in terms of new information is the report of the Assessor on the Thames Basin Heaths SPA and Natural England's Draft Delivery Plan. In fact, this document was specifically mentioned by the Secretary of State in her 'minded' letter of 4 April. She gave the report little weight, given its purpose in informing the South East Plan Panel, who will in turn report to her. She concluded that she was therefore not currently in a position to rely upon the assessor's conclusions and recommendations. She considers that that remains the position.

11. The Secretary of State continues to give great weight to the views of Natural England as the appropriate nature conservation body in relation to the application of the Conservation (Natural Habitats &c) Regulations 1994. That body has withdrawn its objections to the proposed development and has confirmed (IR8.5) it is satisfied that the package of measures offered by the appellant is sufficient in scale and detail to allow a competent authority to conclude that there is not likely to be a significant effect on the SPA, and that no appropriate assessment under the Habitats Regulations is necessary. The Secretary of State therefore retains the position set out in her 'minded' letter."

The claimant's challenge to the decision letter

47. In its claim form the claimant contended that the defendant's decision was unlawful on a number of grounds. In the claimant's skeleton argument those grounds were grouped under three headings: Ground 1 related to the manner in which the first defendant had dealt with the effect of the proposed development on the SPA; Ground 2 related to the manner in which the first defendant dealt with the issue of housing land supply in Hart District; Ground 3 alleged the first defendant had failed to impose an appropriate condition to secure the works to upgrade King John's Ride. The principal ground of challenge was Ground 1. I will deal with the subsidiary Grounds 2 and 3 below (see paragraphs 85-93 and 94-99 respectively).

48. In respect of Ground 1, the claim form contended that:

> (a) NE, and the first defendant in agreeing with NE, erred in considering the mitigation proposed by the second and third defendants as part of the package at the first, or "screening" stage when deciding whether the proposed development was likely to have a significant effect on the SPA;
>
> (b) the first defendant had erroneously failed to find that an appropriate assessment should be carried out as required by Regulation 48(1);
>
> (c) the first defendant failed to have regard a number of material considerations, namely
>
> > (i) paragraphs 12.5-12.15 of the Inspector's Report,
> >
> > (ii) the claimant's representations following the minded to grant letter on the Technical Assessor's report which, it was said, cast "severe doubts" as to whether NE's approach in the Draft Delivery Plan, as adopted by the first defendant in the decision letter, was "correct in law";
>
> (d) the first defendant had given "undue weight" to the views of NE that the package of proposals, including SANGS, would not have a significant effect on the SPA, and therefore that an appropriate assessment was unnecessary.

49. It was not suggested that the complaint in subparagraph (b) (above) added anything of substance to the complaints in paragraphs (a), (c) and (d), which explained why it was being said that the first defendant had erred in concluding that an appropriate assessment was not necessary. The complaint in subparagraph (d) (above) was not pursued in the claimant's skeleton argument or in the oral submissions of Mr Hockman QC on behalf of the claimant. Mr Hockman rightly accepted that the weight to be given to the views of NE was a matter of planning judgment for the first defendant. Since NE is the "appropriate nature conservation body", as defined by Regulation 4 of the Regulations, the first defendant was entitled to give "great weight" to its views if she

chose to do so. Indeed it would have required some cogent explanation in the decision letter if the first defendant had chosen not to give considerable weight to the views of NE.

50. In the claimant's skeleton argument it was submitted that, as a matter of law, mitigation measures had to be disregarded at the screening stage. At the commencement of the hearing this appeared to be the claimant's principal submission (see subparagraph (a) above). However, in his oral submissions Mr Hockman accepted that there was "no absolute legal rule" that one could never take avoidance or mitigation measures into account at the screening stage. Rather, he submitted that once it was accepted, as it had been accepted in the present case, that avoidance or mitigation measures were necessary, then it would be "difficult" for the competent authority to conclude, without first carrying out an appropriate assessment, that there was no risk that there would be a significant effect on the SPA.

51. The claimant's skeleton argument also contained a number of criticisms of the approach adopted by Mr Colebourn in his evidence at the inquiry, and contended that in agreeing to the measures proposed by Mr Colebourn NE had misdirected itself as to the **Waddenzee** test and had failed to ask itself whether there was a risk of a significant adverse effect. In agreeing with NE, the first defendant had similarly misdirected herself, and moreover, in agreeing with the advice from NE, the first defendant had failed to realise that since NE's advice was based in turn upon its agreement with Mr Colebourn's evidence, the criticisms of that evidence in the Inspector's conclusions applied equally to NE's advice. Thus, the first defendant could not rationally have come to the conclusion that there was no need to consider further the Inspector's conclusions in paragraphs 12.5-12.15 of her report.

52. It was also contended that the first defendant had disregarded a relevant consideration because she had given little weight to the Technical Assessor's report. The reason given in the decision letter for attaching little weight to that report, that its purpose was to inform the South East Plan Panel, was not rational, given that the claimant had relied on the report in its representations to the first defendant.

53. It will be noted that the claimant's grounds of challenge have changed (Mr Hockman would say, "have been refined") since the original grounds in the claim form. Insofar as those changes consisted of alleged errors of law which could be addressed on the face of the documents before the court, none of the other parties objected to them. However, Mr Hockman rightly accepted that since the claimant had not challenged Mr Colebourn's evidence at the inquiry (with which NE had agreed) it could not now argue that such evidence was flawed, save to the extent that the claimant could of course rely upon the criticisms of the evidence in the Inspector's conclusions.

Effect on the SPA: Discussion and conclusions

54. In my judgment, Mr Hockman's concession that avoidance or mitigation measures forming part of the plan or project can, as a matter of law, be considered at the screening stage was correct. Since the point is of general importance and has led NE to participate in these proceedings as an interested party represented by Mr Drabble, I will

set out in some detail my reasons for concluding that the claimant's concession was correctly made.

55. The first question to be answered under Article 6(3) or Regulation 48(1) is: what is the plan or project which is proposed to be undertaken or for which consent, permission or other authorisation is sought? The competent authority is not considering the likely effect of some hypothetical project in the abstract. The exercise is a practical one which requires the competent authority to consider the likely effect of the particular project for which permission is being sought. If certain features (to use a neutral term) have been incorporated into that project, there is no sensible reason why those features should be ignored at the initial, screening, stage merely because they have been incorporated into the project in order to avoid, or mitigate, any likely effect on the SPA.

56. No authority is given for the proposition in paragraph 2.6 of the Methodological Guidance that "the screening assessment should be carried out in the absence of any consideration of mitigation measures that form part of a project or plan and are designed to avoid or reduce the impact of a project or plan on a Natura 2000 site." If the screening assessment should consider all of the other components or characteristics of the proposed plan or project, why should a particular component or characteristic be ignored because it has been incorporated into the project as a mitigation measure? Article 6.3 and Regulation 48(1) require the competent authority to consider whether the project, not some part of the project (shorn of any mitigating features incorporated within it), is likely to have a significant effect on the SPA. No support for the proposition in paragraph 2.6 of the Methodological Study can be found in the EC's interpretation guide for Article 6: "Managing Natura 2000 sites. The provisions of Article 6 of the Habitats Directive 92/43/EEC", which is the guidance referred to in paragraph 14 of Circular 06/2005 (see above). The Circular does not refer to the Methodological Guidance.

57. In **Waddenzee** the ECJ did not consider mitigation measures since none were put forward, and there is nothing in the court's judgment which might suggest that mitigation measures forming part of a project should not be considered at the screening stage (see paragraphs 40-45 of the court's judgment above). The claimant referred to paragraph 71 in the Advocate General's Opinion, where he said:

> "In principle, the possibility of avoiding or minimising adverse effects should be irrelevant as regards determining the need for an appropriate assessment. It appears doubtful that such measures could be carried out with sufficient precision in the absence of the factual basis of a specific assessment."

58. It is not surprising that that passage is not reflected in the court's judgment, because the issue did not arise on the facts of that case. The licence for cockle fishing under consideration did not contain any mitigation measures. The Advocate General was responding, in paragraph 71 of his opinion, to a question which the plaintiffs understood was being asked by the Raad Van State:

> "... whether the <u>possibility</u> of measures to minimise damage could be

> taken into account as earlier as this stage of the application of Art.6(3) of the habitats directive." (Emphasis added).

To which the plaintiffs answered:

> "However, such measures can be taken effectively only on the basis of an appropriate assessment. In the present case the questions posed in connection with an ongoing government study already show that cockle fishing is likely to have significant effect." (See paragraph 65 of the Advocate General's Opinion).

59. No specific mitigation measures were being put forward, much less were such measures incorporated into, so that they formed part of, the cockle fishing licence. There can be no dispute that the mere possibility that mitigation measures might be devised which might reduce the effect of a project on an SPA would not be sufficient to enable a competent authority to conclude, without an appropriate assessment, that the project would not be likely to have a significant effect on the SPA.

60. The two reasons given for the proposition in paragraph 2.6 of the Methodological Guidance do not bear scrutiny, and in any event do not appear to be directed at the kind of measures incorporated into the appeal proposals in the present case. The fact that, in some cases, the proponent's notion of effective levels of mitigation may vary from that of a competent authority and other stakeholders does not mean that, in those cases where the competent authority does agree with the proponent's assessment of the effectiveness of proposed mitigation measures, such measures should be ignored at the screening stage. If the competent authority does not agree with the proponents of the project as to the likely effectiveness of any mitigation measure incorporated into the project, it will not have been able to exclude the risk, on the basis of objective information, that the project will have a significant effect on the SPA, and therefore will require that an appropriate assessment be carried out.

61. While it is true that "effective mitigation of adverse effects on Natura 2000 sites can only take place once those effects have been fully recognised, assessed and reported", if the competent authority is satisfied at the screening stage that the proponents of a project have fully recognised, assessed and reported the effects, and have incorporated appropriate mitigation measures into the project, there is no reason why they should ignore such measures when deciding whether an appropriate assessment is necessary. Under Regulation 48(2), the competent authority may ask the proponent of a plan or project for more information about the plan or project, including any proposed mitigation, not merely for the purposes of carrying out an appropriate assessment, but also in order to determine whether an appropriate assessment is required in the first place. If for any reason the competent authority is still not satisfied, then it will require an appropriate assessment. As a matter of common sense, anything which encourages the proponents of plans and projects to incorporate mitigation measures at the earliest possible stage in the evolution of their plan or project is surely to be encouraged. What would be the point, from the proponents' point of view, of going to the time, trouble and expense of devising specific mitigation measures designed to avoid or mitigate any effect on an SPA, and incorporating those proposals into the project, if the competent

authority was then required to ignore them when considering whether an appropriate assessment was necessary?

62. It is also important to appreciate the kind of measures that were incorporated into the package of proposals put forward by the second and third defendants in the present case. The Draft Delivery Plan draws a distinction between "avoidance measures" and "mitigation measures":

> "1.5.7 Measures to avoid or reduce the effects of a development proposal on the SPA (here referred to as **avoidance measures** and **mitigation measures** respectively) can be proposed as part of the planning application and the Council will take these into account in the assessment. Avoidance measures eliminate the likelihood of any effects on the SPA. Mitigation measures would be designed to reduce likely significant effects to a level that is insignificant or in a way that makes them unlikely to occur. It may be that the project could have an adverse effect on site integrity, but conditions, restrictions or other legally enforceable obligations, would ensure mitigation measures can be included in the project to remove the potential for adverse effects on site integrity.
>
> 1.5.8 The difference between avoidance and mitigation measures is not an academic one. If avoidance measures are proposed, and they are considered to be fully effective and guaranteed by way of legally enforceable conditions or obligations, then the proposal is not subject to the further tests of the Habitats Regulations..."

63. In the present case, there was never any question of there being a direct effect on the SPA. The concern was that, when considered in combination with other proposed residential developments in the area, there might be an indirect effect by reason of increased visitor pressure on the SPA as a result of additional, new, residents using the SPA for recreational purposes, including, in particular, dog walking. The purpose of the SANGS was not to lessen the increase in visitor pressure, but to avoid it altogether by drawing some existing users away from the Heath to compensate for those new residents who might use it on occasion (see paragraph 12.9 of the Inspector's Report).

64. As Mr Colebourn explained in his supplementary evidence in response to the claimant's planning witness:

> "1.2 Through a process of extensive research and development the Appellants have put together a very detailed mitigation package whereby any effects, that might have the potential to occur on the SPA, are avoided. This package has been approved by Natural England.
>
> 1.3 HDC do not have any objection to the technical nature of the package, and therefore it can be concluded that if implemented the development at Dilly Lane is not likely to have a significant effect on the SPA."

In response to supplementary evidence produced by the claimant, Mr Colebourn produced further supplementary evidence in which he said:

> "1.8 The Delivery Plan seeks to establish a mechanism for addressing in-combination effects across the SPA. It says that developers can either contribute to the provision of strategic Suitable Alternative Natural Greenspace (SANGS), or can provide their own comprehensive mitigation/avoidance package, and warns that such packages will be rigorously tested.
>
> 1.9 The discussions about the Delivery Plan at the EiP Technical Session on the SPA, through which EPR has been present, have focussed largely on the first of these courses of action; strategic provision of SANGS, and on the evidence base for some of the presumptions about the effects of human recreation on Annex 1 bird species.
>
> 1.10 The Appellants, however, with our advice, have adopted the second course of action. Through a process of extensive research and development the Appellants have developed their own free-standing and very detailed and comprehensive mitigation package, outside the process of implementing the Delivery Plan strategically through SPDs.
>
> 1.11 The measures to avoid effects on the SPA have been researched in great detail through survey work on patterns of use relevant to the local situation in Hartley Wintney and the surrounding area... The degree of research undertaken has allowed the Appellants to understand the local effects on the SPA and predict the likely effect of new development at Dilly Lane. Measures have then been further adapted and progressively re-designed to ensure that the package will avoid the development having any adverse effect on the SPA.
>
> 1.12 The package and the underlying research demonstrate that it can be concluded that the Dilly Lane development would avoid any potential effects on the SPA.
>
> 1.13 Natural England has accepted this, and has approved the avoidance measures package. I can assure the Inquiry that NE have rigorously tested our proposals over many months through extensive discussions and meetings, have sought further clarification on a number of occasions, and have now pronounced themselves satisfied.
>
> 1.14 In sum, therefore, the Appellants do not seek to rely solely - or at all - on the strategic mechanisms set out in the Natural England Delivery Plan or any future Supplementary Planning Document that may be prepared..."

65. If the first defendant, as the competent authority, agreed with that conclusion, then there was simply no point in conducting an appropriate assessment. As Mr Drabble pointed out in the joint opinion and his skeleton argument:

> "... if it is established, on an appropriately rigorous basis, that there will be no net increase in visitor numbers, it has been established that the housing development will not produce any effect within the site at all. In those circumstances, carrying out an appropriate assessment would not further matters in any way. The routine characteristics of an appropriate assessment, typically involving survey work within the site to establish ecological base-line conditions, would, even if undertaken, have no effect on the conclusion."

NE's skeleton argument makes the point that although the provision of SANGS is referred to as a mitigation measure:

> "... it is not a mitigation measure designed to mitigate effects taking place within the site (e.g. controls on methods of working or replacement planting). There are no such effects."

Mitigation measures of that kind, that is to say measures designed to mitigate effects taking place within the SPA, appear to be the kind of mitigation measures with which the Methodological Guidance was primarily, if not exclusively, concerned.

66. In paragraph 42 of its judgment in **Waddenzee**, the ECJ drew attention to the similarities between Article 6(3) of the Habitats Directive and Article 2(1) of Directive 85/337, the Environmental Impact Assessment Directive, which requires Member States to ensure that certain "projects likely to have significant effects on the environment" are subjected to a process of environmental assessment.

67. The Court of Appeal has made it clear that it is permissible for a local planning authority or the Secretary of State to have regard to proposed mitigation measures when deciding, at the screening stage, under the Town and Country Planning (Assessment of Environmental Effects) Regulations 1988 (which implemented the EIA Directive) whether a project is likely to have significant effects on the environment.

68. In **Gillespie v Secretary of State for Transport Local Government and the Regions & Ors** [2003] Env LR 30 ([2003] EWCA Civ 400), Pill LJ said in paragraphs 36 and 37:

> "36 When making his screening decision, the Secretary of State was not in my judgment obliged to shut his eyes to the remedial measures submitted as a part of the planning proposal. That would apply whatever the scale of the development and whether (as in *BT*) some harm to the relevant environmental interest is inevitable or whether (as is claimed in the present case) the development will actually produce an improvement in the environment. As stated in *Bozen*, it is the elements of the specific

project which must be considered and all the elements of the project relevant to the EIA. In making his decision, the Secretary of State is not required to put into separate compartments the development proposal and the proposed remedial measures and consider only the first when making his screening decision. If the judges in the cases cited took a contrary view, I respectfully disagree, though it appears to me that both Sullivan J. in *Lebus* and Richards J. in the present case did not require all remedial or mitigating measures to be ignored.

37 The Secretary of State has to make a practical judgment as to whether the project would be likely to have significant effects on the environment by virtue of factors such as its nature, size or location. The extent to which remedial measures are required to avoid significant effects on the environment, and the nature and complexity of such measures, will vary enormously but the Secretary of State is not as a matter of law required to ignore proposals for remedial measures included in the proposals before him when making his screening decision. In some cases the remedial measures will be modest in scope, or so plainly and easily achievable, that the Secretary of State can properly hold that the development project would not be likely to have significant effects on the environment even though, in the absence of the proposed remedial measures, it would be likely to have such effects. His decision is not in my judgment pre-determined either by the complexity of the project or by whether remedial measures are controversial though, in making the decision, the complexity of the project and of the proposed remedial measures may be important factors for consideration."

69. Laws LJ said in paragraph 46:

"46 I would express my reasons for dismissing the appeal very shortly as follows. Where the Secretary of State is contemplating an application for planning permission for development which, but for remedial measures, may or will have significant environmental effects, I do not say that he must inevitably cause an EIA to be conducted. Prospective remedial measures may have been put before him whose nature, availability and effectiveness are already plainly established and plainly uncontroversial; though I should have thought there is little likelihood of such a state of affairs in relation to a development of any complexity. But if prospective remedial measures are not plainly established and not plainly uncontroversial, then as it seems to me the case calls for an EIA. If then the Secretary of State were to decline to conduct an EIA, as it seems to me he would pre-empt the very form of enquiry contemplated by the Directive and Regulations; and to that extent he would frustrate the purpose of the legislation."

70. Pill LJ returned to the subject in **R (Catt) v Brighton and Hove City Council & Anor** [2007] EWCA Civ 298**,** which was concerned with the impact of a proposed football stadium:

"31 Relying on a commentary in the Journal of Planning Law, at [2007] J.P.L. 81, on the decision of Collins J. in the present case, Mr Upton [counsel for the applicant] seeks a 'neat distinction' between routine measures and project specific provisions. Neat distinctions may be a comfort to decision makers but carry the danger that they may distract decision makers from their central duty, which is to examine the actual characteristics of the particular project. In the present case, it would be ludicrous to ignore conditions imposed as to the frequency of football matches, the days on which they may be played and the music which may accompany them...

33 This is a very different development from that proposed *Gillespie*. Developments come in all forms and the approach to the screening opinion must have regard to the development proposed. There will be cases, such as *Gillespie*, where the uncertainties present, whether inherent or sought to be resolved by conditions, are such that their favourable implementation cannot be assumed when the screening opinion is formed.

34 On the other hand, there will be cases where the likely effectiveness of conditions or proposed remedial or ameliorative measures can be predicted with confidence...

35 I repeat my statements in *Gillespie*... that the decision maker is not 'obliged to shut his eyes to the remedial measures submitted as a part of the planning proposal', and that 'in making his decision, the Secretary of State... is not required to put into separate compartments the development proposal and the proposed remedial measures and consider only the first when making his screening decision'. Laws L.J. was considering the facts in *Gillespie* and I do not consider he was asserting a general principle that, only when remedial measures are 'uncontroversial', can they be taken into account when giving a screening opinion.

36 Having referred to *Gillespie*, Dyson L.J., at [39] in *Jones* [[2004] Env LR 2, [2003] EWCA Civ 1408], stated:

'The uncertainties may or may not make it impossible reasonably to conclude that there is no likelihood of significant environmental effect. It is possible in principle to have sufficient information to enable a decision reasonably to be made as to the likelihood of significant environmental effects even if certain details are not known and further surveys are to be undertaken. Everything depends on the circumstances of the individual case.'

37 When forming a screening opinion, the Council were not required to ignore either the conditions proposed to limit the scope of the development or the conditions providing for ameliorative or remedial measures. The consequences of providing the additional seating, and other changes, could not be predicted with certainty but, as Collins J.

> noted, the Council had extensive knowledge and experience, supported by surveys, of the impact of existing football league and cup matches upon the environment. On the basis of that, and the studies into future impact, they were entitled to assess the likely impact of the additional capacity proposed in the context of the continuing ameliorative measures also proposed and to form the screening opinion they did."

71. Maurice Kay and Wilson LJJ agreed. Unlike an EIA, which must be in the form prescribed by the EIA Directive, and must include, for example, a non-technical summary, enabling the public to express its opinion on the environmental issues raised (see **Berkeley v the Secretary of State for the Environment** [2001] 2 AC 603 per Lord Hoffmann at page 615), an appropriate assessment under Article 6(3) and Regulation 48(1) does not have to be in any particular form (see paragraph 52 of **Waddenzee** judgment), and obtaining the opinion of the general public is optional. Thus, considering proposed mitigation measures at the screening stage under Article 6(3) would not be frustrating the purpose of the legislation by pre-empting any particular form of inquiry, which was the particular concern expressed by Laws LJ in **Gillespie** (above).

72. The underlying principle to be derived from both the **Waddenzee** judgment and the domestic authorities referred to above is that, as with the EIA Directive, the provisions in the Habitats Directive are intended to be an aid to effective environmental decision making, not a legal obstacle course. If, having considered the "objective information" contained in the EPR Report, and agreed by NE in the Statement of Common Ground, the first defendant, as the competent authority, was satisfied that the package put forward by the second and third defendants, including the SANGS, would avoid any net increase in recreational visits to the SPA (thereby avoiding any increased disturbance to the Annex 1 bird species), it would have been "ludicrous" for her to disaggregate the different elements of the package and require an appropriate assessment on the basis that the residential component of the package, considered without the SANGS, would be likely, in combination with other residential proposals, to have a significant effect on the SPA, only for her to have to reassemble the package when carrying out the appropriate assessment.

73. The fact that Regulation 48(6) refers to the manner in which it is proposed that the plan or project is to be carried out, or to any conditions or restrictions subject to which it is proposed that consent et cetera shall be given, does not mean that those matters may not be considered at the first stage under Regulation 48(1), if they are incorporated into the application for planning permission when the competent authority is deciding whether the project for which planning permission is being sought is likely to have a significant effect on the SPA.

74. In **World Wildlife Fund UK Limited v Secretary of State for Scotland** [1999] Env LR 632, Lord Nimmo Smith, having noted that "plan or project" was not defined in the Regulations, said at page 699:

> "Regulation 49(1) and (2) speak of it as something for which 'consent, permission or other authorisation' is applied, and in my opinion this

> means that the plan or project is that which is the subject-matter of an application and can thus be identified by reference to the application. This appears to me to be consistent with the provisions of the 1988 regulations, and in particular regulation 6(2), which I shall discuss in due course. Thus in the present case the 'plan or project' is as set out in CCC's application for planning permission. I therefore reject the suggestion which counsel for the petitioners made at one point that the 'plan or project' included all the conditions to which it was made subject at the time when planning permission was granted."

75. Lord Nimmo Smith then considered what had to be ascertained under Regulation 48(5) and concluded that Regulation 48(6) enabled proposed conditions to be taken into consideration when considering whether the integrity of the European site would be adversely affected. Lord Nimmo Smith was considering the local planning authority's power to impose conditions, when granting permission, upon the project as described in the planning application, not proposed mitigation measures which had, from the outset of the process, been incorporated into the application itself. Regulation 48(6) merely reflects the reality that in some, perhaps very many, cases where an appropriate assessment has been carried out, changes to the manner in which it is proposed to carry out the project, or to the conditions or restrictions to be imposed in the consent for the project, will be proposed by the proponents or by the competent authority in response to the findings of the assessment. Regulation 48(6) makes it clear, for the avoidance of doubt, that regard must be had to such matters when considering, under Regulation 48(5), whether the plan or project will adversely affect the integrity of the SPA.

76. For all these reasons, I am satisfied that there is no legal requirement that a screening assessment under Regulation 48(1) must be carried out in the absence of any mitigation measures that form part of a plan or project. On the contrary, the competent authority is required to consider whether the project, as a whole, including such measures, if they are part of the project, is likely to have a significant effect on the SPA. If the competent authority does not agree with the proponent's view as to the likely efficacy of the proposed mitigation measures, or is left in some doubt as to their efficacy, then it will require an appropriate assessment because it will not have been able to exclude the risk of a significant effect on the basis of objective information (see **Waddenzee** above).

77. That leads me to the second complaint made by the claimant about the manner in which the first defendant dealt with the SPA issue. Mr Hockman submitted that in agreeing with NE's conclusion "that there is not likely to be a significant effect on the SPA" (see paragraph 11 of the decision letter), both the first defendant and NE had failed to apply the **Waddenzee** test; they had merely considered whether a significant effect was likely rather than whether there was a risk of a significant effect (see paragraph 44 of **Waddenzee** above). I do not accept that submission for the following reasons. Both NE, in agreeing to the Statement of Common Ground, and in its letter dated 11th June 2007, following the minded to grant letter, and the first defendant in both the minded to grant letter and the decision letter, used the statutory formulation in Article 6(3) and Regulation 48(1) "likely to have a significant effect".

78. To an English lawyer, a need to establish a likelihood imposes a more onerous burden than a need to establish a risk. The concept of a "standard of proof" is of little if any assistance in environmental cases, but the nearest analogy would be the difference between the balance of probability (more likely than not) and the real risk standards of proof. Since the ECJ's decision in **Waddenzee**, it has been clear that, applying the precautionary principle, significant harm to an SPA is "likely" for the purposes of Article 6 and Regulation 48 if the risk of it occurring cannot be excluded on the basis of objective information. Since the **Waddenzee** test is set out in Circular 06/2005, which was specifically referred to in paragraph 10 of the minded to grant letter, which was in turn incorporated into the decision letter (see paragraph 6 of the latter), and Circular 06/2005 is also referred to in NE's Draft Delivery Plan (paragraph 1.5.3), it is impossible to conclude that, when using the correct statutory formulation, both the first defendant and NE did not appreciate that the issue of likelihood had to be approached on the basis set out in **Waddenzee**.

79. There is nothing in the material before the court which suggests that NE (whose advice was accepted by the first defendant) approached the issue in any other way in its lengthy and detailed discussions with Mr Colebourn, which led eventually to the Statement of Common Ground.

80. Although Mr Hockman made other criticisms of the phraseology used in that statement, for example, the apparently cautious statement that the package of measures was sufficient to "allow a competent authority to conclude", the claimant was in no doubt at the inquiry that NE was satisfied that there was not likely to be a significant effect on the SPA, and any forensic, as opposed to real, doubt as to its position is removed by NE's letter dated 11th June 2007 (see above).

81. The first defendant was entitled to prefer NE's view to that expressed by the Inspector. The fact that the Inspector had expressed "serious doubts" about EPR's conclusion that the measures incorporated in the package, including the SANGS, would avoid any net effect of recreational activity on the SPA (paragraph 12.9 of the Inspector's Report) did not mean that the first defendant was obliged to accept that there were such doubts, or that they could not, as NE had concluded, "be excluded on the basis of objective information": see, for example, **R (Merricks) v Secretary of State for Trade and Industry** [2006] EWHC 2698 (Admin) at paragraph 6. Merely expressing doubt without providing reasonable objective evidence for doing so is not sufficient.

82. It is important to appreciate that the Inspector was expressing her doubts on essentially the same "objective information" as had satisfied NE. HWAG had submitted a questionnaire and responses in respect of Hazeley Heath (the Inspector's document number 64), but apart from establishing that Hazeley Heath "has an inherent attraction that draws people to it" (see paragraph 9.13 of the Inspector's Report), a matter which was never in dispute, that survey did not add to the objective information prepared by EPR and agreed by NE.

83. The first defendant clearly considered the Inspector's key conclusion in paragraph 12.9 of the Inspector's Report, with which NE disagreed. Once the first defendant decided that she agreed with NE's conclusion, based on the objective information that there

would be no net increase in recreational activity on the Heath, and hence no significant effect on the SPA, she did not need to consider further the Inspector's deliberations in paragraphs 12.5-12.15 of her report.

84. Mr Hockman submitted that in deciding that she did not need to consider further the Inspector's conclusions, the first defendant failed to appreciate that, insofar as the Inspector's criticisms of EPR's evidence were valid, they applied equally to NE's conclusions because those conclusions were based in turn upon EPR's evidence. I do not accept that submission. It would have been obvious, even on the most cursory perusal of the Inspector's Report and accompanying documents, that the "objective information" had been compiled by EPR and agreed, after discussion, by NE. Thus, insofar as the Inspector's doubts were justified, they applied equally to NE's advice to the first defendant. On any common-sense reading of the decision letter, the first defendant did not consider that the Inspector's doubts were justified.

85. Lastly, under this heading, I deal with the complaint that the first defendant accorded little weight to the views of the Technical Assessor on The Draft Delivery Plan. The starting point must be the proposition that the weight to be given to the views of the Technical Assessor was entirely a matter for the first defendant's planning judgment. In saying that she gave the Technical Assessor's report little weight on the basis that its purpose was to inform the South East Panel, who would in turn report to her, the first defendant was not unreasonably refusing to give little weight to a document simply because it was a report to another body. The purpose of the report is reflected both in its status and in its subject matter. Considering the former, the Technical Assessor's report was only the first stage of the examination process. The report was circulated, representations were made by NE and others, and the Technical Assessor responded to those representations in his Addendum Report. All of that information would then be considered by the panel, which would reach its own conclusions on the issue and advise the first defendant accordingly. The first defendant would then decide whether or not to accept the panel's report. In these circumstances, the Technical Assessor's report could not be regarded as definitive. Moreover, it was concerned with the efficacy of SANGS as a strategic concept. As the Technical Assessor made clear in paragraph 10 of his Addendum Report dated 13th April 2007:

> "... if one is looking at the circumstances of a specific scheme in detail, rather than at the general principle... it may well be possible to find sufficient objective evidence to demonstrate that a package of mitigation measures, which might include the provision of SANGS, would avoid an adverse effect on the SPA."

That was precisely what was being proposed by the EPR in the appeal package in the present case (see Mr Colebourn's supplementary evidence cited above). For these reasons, I reject the claimant's criticisms, whether as originally formulated or as subsequently refined, of the manner in which the first defendant dealt with the SPA issue.

Ground 2

86. PPS3: Housing came into effect on 1st April 2007, after the Inspector delivered her report to the first defendant. In the minded to grant decision, the first defendant said in paragraphs 19 and 20:

> "The Secretary of State does not agree with the Inspector's assessment at IR12.25-12.26, that the balance of the evidence suggests that housing supply over a five year period will provide a small but significant excess against development plan requirements. She notes the Inspector, like the Council, has made allowance for contributions from the Queen Elizabeth Barracks site, which is subject to inquiry following the Council's refusal of planning permission. The Secretary of State does not in the circumstances consider that site to be deliverable as defined in PPS3. She also does not have information on the likely level of housing completions delivered by the Council in 2006/07, and the impact that that might have on the average annual requirement for the remainder of the Structure plan period.
>
> The Secretary of State concludes that the housing supply position seems to her to be marginal, and that the Council has not demonstrated a five year supply of specific deliverable sites for housing. In the light of this, and given her conclusions elsewhere in this letter on the impact of the proposal on the Special Protection Area and the benefits of the proposed affordable housing, the Secretary of State considers there are material considerations weighing in favour of a grant of planning permission."

87. The first defendant asked for "up to date evidence concerning whether or not the Council has identified the five year supply of specific deliverable sites for housing for the period April 2007 to end March 2012" (paragraph 21). The claimant and the second and third defendants made detailed representations. In the decision letter the first defendant said in paragraph 13:

> "Evidence was provided by Hart District Council on this issue in its response of 14 May. The Secretary of State has paid careful regard to this assessment, and sets out below her own assessment of housing land supply, based on that information, and that provided by Barton Willmore on behalf of the appellants on 11 June."

88. The decision letter then contained a number of tables: table 1 set out the first defendant's view of the 5-year supply figure (854); table 2 set out the supply figures where the claimant and the second and third defendants agreed (557); table 3 then set out the disputed supply figures, giving the views of the claimant, the second and third defendants, and finally the first defendant's assessment. The total figure under this heading was 558 in the first defendant's assessment, of which 420 were provided by one site, the Queen Elizabeth II Barracks site at Church Crookham. In respect of that site, paragraph 14 of the decision letter said:

> "14. The Secretary of State has carefully considered the arguments put forward by Hart District Council, and accepts its assertion that, notwithstanding the outcome of the particular appeal proposals currently being heard at inquiry, there is a reasonable prospect of this site delivering housing within 5 years. Evidence provided from the inquiry Statement of Common Ground between Hart and the QEII developer indicates that if a decision to grant the appeal is made, the site could deliver over 700 units by 2012. The Secretary of State accepts as reasonable the assumption that if the current appeal proposals were refused, then 420 units could still be delivered by this site. The Secretary of State does not accept the appellant's argument that the Council's reasons for refusal amount to an 'in principle' objection to the development of this site. In particular, she considers that the issue of impact on the Thames Basin Heath SPA does not transcend other matters. In that respect, she draws attention to the fact that the issue of impact on the SPA is among the matters she has determined in this case."

The figures were then drawn together in table 4 in the decision letter, in which the first defendant concluded that there was a supply of 1,115 units or a 6.52 years' supply.

89. In paragraph 21 of the decision letter the first defendant said:

> "The Secretary of State considers that, on the evidence submitted, it would be reasonable to assert that the Council has demonstrated that it has identified a 6.5 year supply of deliverable housing land at this time, and this accords with the advice in paragraph 54 of PPS3. However, the Secretary of State notes that in order to deliver this supply the Council will be dependent on the QEII Barracks site producing some units by 2012. While she finds that it is reasonable to assume a figure of 420 units is likely to be achievable, she is concerned about the consequences should there be delay in bringing this site forward for development. If the timetable set out in the Council's response proves to be over optimistic, then the 5-year supply could be threatened. Her overall conclusion is that although the 5-year supply has been demonstrated, it is fragile and she is concerned about the Council's ability to maintain a continuous five year supply of deliverable sites as advised in paragraph 57 of PPS3."

90. Having considered the provisions of the development plan and PPS3, the first defendant concluded in paragraph 28 of the decision letter:

> "The Secretary of State has considered the greenfield status of the appeal site, and whether allowing the appeal proposals on this site might prevent developable brownfield sites from coming forward. Given her conclusion in paragraph 21 of this letter that the 5-year supply of deliverable sites, while demonstrated, is fragile, and considering the need to maintain a continuous 5-year supply of deliverable sites, she concludes that the development of this site for 170 units would not have the effect of preventing or delaying developable brownfield sites from coming

forward."

91. The claimant's sole criticism of this very careful and detailed analysis by the first defendant of the housing supply position is the first defendant's conclusion that, although a 5-year supply had been demonstrated in terms of PPS3, that 5-year supply was "fragile". Paragraph 54 of PPS3 sets out the circumstances in which sites are considered "deliverable" for the purpose of deciding whether there is "an up-to-date five year supply of deliverable sites" in accordance with paragraph 70 of the Circular:

> "To be considered deliverable, sites should, at the point of adoption of the relevant Local Development Document:
>
> - Be Available - the site is available now.
>
> - Be Suitable - the site offers a suitable location for development now and would contribute to the creation of sustainable, mixed communities.
>
> - Be Achievable - there is a reasonable prospect that housing will be delivered on the site within five years."

92. Mr Hockman submitted that since the first defendant had concluded that it was reasonable to assume a figure of 420 units was likely to be achievable at the Queen Elizabeth II Barracks by 2012, it was illogical or unreasonable also to conclude that the 5 year supply was fragile. The first defendant was adding a further test, fragility, which was not referred to in PPS3. In my judgment, the first defendant was doing no such thing; she was merely responding to the particular circumstances of this case, where a very significant proportion of the 5-year supply (420 out of 1115 units, or some 38 per cent of the 5-year supply) was dependent on one site producing units by 2012 and where, despite reasonable assumptions to the contrary, there might be slippage in the timetable put forward by the claimant for bringing the site forward for development. Far from being unreasonable, the first defendant's observation that this particular 5-year supply is "fragile" was eminently reasonable on the facts of these appeals. A "reasonable prospect" that housing will be delivered on a particular site in 5 years may range from a near certainty (insofar as that is possible in an uncertain world), that housing will be delivered, to it merely being more likely than not that housing will be delivered on a particular site. The first defendant's approach merely reflects the wisdom of not putting too many of one's eggs into the same planning basket.

93. It was also submitted that the first defendant had failed to consider the Inspector's conclusion that there would be possible disadvantages in prematurely releasing the main appeal site for housing "through the unnecessary development of greenfield land" (see paragraphs 12.31 and 12.55 of the Inspector's Report). Having concluded that there was a 5-year supply of deliverable sites, the first defendant considered, in accordance with the advice in paragraph 70 of PPS3, whether granting planning permission would undermine the achievement of wider policy objectives. The Inspector's conclusion that harm would be done through the "unnecessary release of greenfield land" was reached in the context of her assessment of policy H4 of the structure plan. The purpose of that policy was "to ensure sufficient housing land is provided throughout the structure plan

period to meet identified needs while avoiding the unnecessary use of greenfield land" (see paragraph 12.27 of the Inspector's Report). In paragraph 23 of her decision letter, the first defendant explained why she had assessed the appeal proposals against the more recent policies in PPS3:

> "She concludes that as the appeal site is a greenfield site, and as she has identified a greater than 5 year supply of deliverable housing land, of which the majority of sites are previously developed land, that the appeal proposals are not in accordance with the development plan. However, the relevant policy in the development plan predates PPS3, which is the latest statement by the Government on national policy towards the delivery of housing. The Secretary of State considers that the correct approach to take in this case is to consider the appeal proposals against PPS3 policies, which supersede those of the development plan."

94. Hence the first defendant's approach in paragraph 28 of the decision letter (above) to the "greenfield issue" raised by the Inspector in her report. For these reasons, there is no force in the second ground of challenge.

Ground 3

95. In the minded to grant decision the first defendant agreed with the Inspector's conclusion that all the proposed improvements to King John's Ride (KJR) were "a necessary and important element of the overall housing scene" (paragraph 23). At the inquiry the claimant had sought a "Grampian" condition prohibiting the commencement of development until works were carried out. The Inspector thought that this requirement was excessive:

> "In order to ensure the housing is served by the necessary infrastructure the improvements need to be in place before the first occupation of the dwellings, not prior to commencement of development. The works would take place on Council owned land and the Council is also able to grant cycle rights. The Council as local planning authority has endorsed the improvements and the planning brief suggests the improvements would be achieved by way of a commuted contribution. The Council as landowner did not make objections to the planning application. On that basis Council consent may be anticipated. To the best of my knowledge the Appellants have also followed the only available procedure open to them to establish whether permission would be required to carry out the works on common land. Therefore there are reasonable prospects of the improvements being secured within the necessary timescale. The Grampian form of conditions put forward by the Council in relation to Appeals A and G would be unreasonable and would therefore fail one of the tests in Circular 11/95. I am satisfied that the planning obligations in the unilateral undertakings offer an appropriate procedure for securing the improvements." (Paragraph 12.34 of the Inspector's report).

96. The Section 106 obligations put forward by the second and third defendants require them to use "all reasonable endeavours" to obtain the claimant's consent as landowner to the proposed improvements: lighting, widening, permitting it to be used as a path by cyclists and creating the two new links. The second and third defendants also agreed to use all reasonable endeavours to obtain, if required, planning permission, consent for works on common land and a licence from NE under the Habitats Regulations. There was no suggestion that NE would object to the proposed improvements and the claimant did not submit that consent would be required under the Commons Act, merely that there was no certainty about that matter (see paragraph 7.18 of the Inspector's Report). In reality, therefore, whether or not various improvements to King John's Ride could be implemented depended on obtaining the council's consent as landowner and the authority able to grant cycle rides. It had not objected to the appeals in its capacity as landowner, but in its representations in response to the minded to grant letter, the claimant maintained its position that the Grampian conditions it had put forward were necessary, and that the obligation to use reasonable endeavours was inadequate to secure the improvements. The representations criticised the obligations on the basis that:

> "... the Undertakings as drafted and submitted to the Inquiry commit only to use 'reasonable endeavours' to secure these improvements. Notably, the Undertakings commit only to use reasonable endeavours to the point initially of first occupation and then, if necessary, to completion of the development. However, if these improvements have not been secured by this time the submitted Undertakings provide for these obligations to cease. Whilst HDC accepts that there is a reasonable prospect of these essential improvements being delivered in accordance with the Undertakings submitted, there is clearly some potential for any or all of these obligations to cease without the essential improvements being secured."

97. The claimant also complained that the first defendant had not explained why its suggested Grampian condition did not comply with Circular 11/95. The explanation should have been obvious, but the first defendant nevertheless provided it in paragraph 36 of the decision letter:

> "36. The Council's proposed Grampian conditions would require the improvements to King John's Ride to be in place prior to the commencement of development. The Secretary of State considers that the need for the identified improvements to King John's Ride to be in place arises from the point at which the dwellings are first occupied, and considers that requiring the improvements to be in place before development commences is requiring them at too early a stage in the process. She therefore finds this to be unreasonable, and concludes that the proposed Grampian conditions would fail the sixth test of paragraph 14 of Circular 11/95."

98. The first defendant also considered the claimant's criticisms of the obligations put forward by the second and third defendants in paragraphs 33 and 34 of the decision letter:

> "33... She accepts that the improvements are a necessary and important element of the overall housing scheme: She has considered the evidence put forward at the time of the inquiry by the Council and the appellants. She finds the proposed improvements to be in line with the planning brief for the site, adopted by the Council as Supplementary Planning Guidance in 2000. The planning brief also allows for the improvements to be promoted by means of a commuted contribution. The Council is the owner of the land and, as such, is able to grant cycle rights. It has also endorsed the improvements as the local planning authority, and it did not object to the planning application in its capacity as landowner.
>
> 34. The Secretary of State considers that, in these circumstances, it is reasonable to retain the view that there are reasonable prospects of the improvements being secured within the necessary timescale."

99. Although it was not suggested by the claimant at the inquiry, or in its representations following the minded to grant letter, or even in the claim form, which merely referred to the first defendant's failure to impose "an appropriate Grampian or other condition", Mr Hockman submitted that the first defendant should have imposed a Grampian condition which prevented occupation of the dwellings prior to implementation of the improvement works. Whether it was expedient to impose such a condition was a matter for the first defendant's planning judgment. In the particular circumstances of this case, where the only significant potential obstacle to the implementation of the improvement works was the need to obtain the claimant's consent to them as landowner, it is not surprising that both the Inspector and the first defendant considered that the undertakings offered by the second and third defendants were perfectly adequate.

100. Although Circular 11/95 makes it clear that, as a matter of policy, Grampian conditions should be imposed on a planning permission only if there are at least reasonable prospects of the action in question being performed within the time limit imposed by the permission (see paragraph 40 of the Circular), it does not follow that a Grampian condition must be imposed in all cases where it has been concluded that some action is necessary, and that there are reasonable prospects of the action being carried out within the timescale of the planning permission. Had the first defendant not been satisfied that there were reasonable prospects of the improvements being secured, she would not have been willing either to impose a Grampian condition or to accept the undertakings entered into by the second and third defendants. Once she accepted that there were such prospects, it was for her to decide how the improvements should be secured. Since the ability of the second and third defendants to carry out the relevant action in the present case is largely, if not entirely, dependant on obtaining the claimant's agreement as landowner, and as the authority with the power to grant cycle rights, the first defendant was entitled to conclude that a Grampian condition was unnecessary and that the undertakings entered into by the second and third defendants would be sufficient to

secure the necessary improvements. It follows that there is no substance in Ground 3 of the challenge.

A last word

101. For the sake of completeness, I should mention that in Mr Hockman's skeleton argument he submitted that there was no evidence in the decision letter that the first defendant had actually granted planning permission. The decision letter states that the four appeals are allowed, but does not expressly state that the planning permission is granted for the developments that are the subject of the appeals. Mr Hockman drew attention to the powers conferred on the first defendant by Section 79(1) of the Act: on an appeal under section 78 she may allow or dismiss the appeal "and may deal with the application as if it had been made to [her] in the first instance." Wisely, this submission was not pursued in oral argument. It is true that paragraph 39 of this decision letter does not contain the usual form of words "and grants planning permission for..." after "the Secretary of State hereby allows your appeals", but the decision letter has to be construed as a whole and in a common-sense way.

102. Under the subheading "Overall conclusions", paragraph 38 of the decision letter is in these terms:

> "Following her consideration of the further evidence and representations submitted by the parties pursuant to her minded letter of 4 April, the Secretary of State is now satisfied that the Council has demonstrated it has an identifiable five year supply of deliverable housing land, but it is one that is dependent upon timely delivery from a single site. She therefore finds the five year supply of deliverable housing land to be fragile. She also concludes that a grant of planning permission would not undermine the achievement of relevant policy objectives, and that when this is weighed together with those considerations she has identified above which point in favour of granting planning permission, these are of sufficient weight to overcome the proposal's conflict with the development plan."

Having so concluded, it would have been perverse for first defendant not to have granted planning permission. The failure to include a formal statement to that effect in the decision letter was clearly an oversight, but that oversight is of no consequence because the decision letter incorporates the minded to grant decision, in which the first defendant had said that she was "minded to allow the appeals and to grant planning permission subject to conditions..." It also incorporates Annexes 1-4, which set out the first defendant's conditions, and which refer to "the development hereby permitted". In construing the document as a whole, regard may be had to the conditions in Annexes 1-4. Once that is done, there can be no doubt that the first defendant did not merely allow the appeals, she also granted planning permission for the development comprised in the four appeals. It is with some relief that I reach this conclusion since it means that this very lengthy judgment has not been entirely in vain.

Conclusion

103. The claimant's application is dismissed.

104. Right, that really is the end, in more senses than one.

105. Yes?

106. MR TURNER: My Lord.

107. MR JUSTICE SULLIVAN: Is it Mr Turner for the Secretary of State?

108. MR TURNER: That is correct, my Lord.

109. MR JUSTICE SULLIVAN: Yes.

110. MR TURNER: I merely make an application for the first defendant's costs to be paid. I have spoken to my learned friend Mr Hockman and he has given an indication that the application can properly be made for those sums to be assessed at £18,441.25.

111. MR JUSTICE SULLIVAN: Let us just take it turns. Mr Hockman?

112. MR HOCKMAN: My Lord, that is absolutely right. I indicated to my learned friend that if it was appropriate for him to seek costs, as it plainly is, and if he were to apply to your Lordship to assess those costs in that sum, then we would raise no objection, and we do not.

113. MR JUSTICE SULLIVAN: Well, we will take it in stages anyway. The application is dismissed. The claimant is to pay the first defendant's costs. So his costs to be summarily assessed in the sum of £18,441.25. Any more for any more? I am not encouraging people to make any further applications; I am simply asking them whether they have any. No? Everyone keeping their heads below the parapet? Jolly good idea. I would have done as well.

114. Yes, Mr Hockman?

115. MR HOCKMAN: May I ask your Lordship for permission to take the matter further, please?

116. MR JUSTICE SULLIVAN: You may. You simply rely on the arguments you have put forward?

117. MR HOCKMAN: I do.

118. MR JUSTICE SULLIVAN: Well, I hope you will not think it discourteous if I refuse you permission and say that I do not think that there is a real prospect of success for the reasons that have nearly made me hoarse over the last two hours.

119. MR HOCKMAN: Thank you.

120. MR JUSTICE SULLIVAN: Thank you very much indeed. Thank you all.