IN THE HIGH COURT OF JUSTICE No. CO/4040/99
IN THE QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Thursday 16th March, 2000

B e f o r e:

THE HON MR JUSTICE JOWITT

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ADT AUCTIONS LIMITED

- v -

(1) THE SECRETARY OF STATE FOR THE ENVIRONMENT, TRANSPORT AND REGIONS
(2) HART DISTRICT COUNCIL

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(Transcript of the Handed Down Judgment of
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Official Shorthand Writers to the Court)

David Elvin (instructed by Gouldens for the Claimant)
Timothy Corner (instructed by The Treasury Solicitor for the 1st Defendant)
Christopher Katkowski QC (instructed by Solicitor to Hart District Council for the 2nd Defendant)

J U D G M E N T

As Approved by the Court

MR JUSTICE JOWITT:

1. This is a statutory appeal pursuant to section 288(1)(a) of the Town and Country Planning Act 1990 against the decision of the first defendant, the Secretary of State for the Environment, Transport and the Regions, dismissing the claimant's appeal against a refusal by the second defendant, Hart District Council as Local Planning Authority, of an outline application for planning permission to develop for housing 5.68 hectares of low grade agricultural land lying south west to the edge of Yately in Hampshire. The proposal was to build 42 houses. There was an appeal against this refusal to the Secretary of State. He appointed an Inspector, Mr D P Machin (the first Inspector), to hold an inquiry and report to him so that he might decide the appeal. The inquiry was held over a period of 8 days in June and July 1996.

2. The appeal site was close to a Site of Special Scientific Interest (SSSI) and there was at the time of the planning application and appeal a live proposal to designate the SSSI also as a Special Protection Area for Wild Birds (SPA) by reason of the presence on the site of breeding woodlarks, nightjars and Dartford warblers. I shall refer to the site as a conservation site. It is a site to which the public have access.

3. An important issue at the appeal hearing was whether and to what extent the proposed development would adversely affect environmentally the conservation site. It is this aspect of the planning appeal which is relevant in the appeal before me. Appearing before the first Inspector were the claimant, the second defendant, Hampshire County Council, English

Nature and other interested parties and evidence was called and submissions were made by them about the environmental issue.

4. There was evidence that within the conservation site are to be found the largest remnant of heathland habitat and the largest valley bog/heathland complex in the north east Hampshire section of the Thames basin. As well as being a home for the three species of birds, which depend on the heathland, the conservation site is home for a particularly rich intervertebrate fauna, including a number of nationally rare and scarce species. Among the factors which it was said would lead to a degradation of this site from the building of the 42 houses were the added pressure on the conservation site from the activities of the residents and their cats and dogs, from the dumping of garden refuse, the escape of and deliberate planting of garden plant species, fly tipping and the laying of utility services.

5. Additionally, Hart District Council argued that the appeal site, if developed, would need to be provided with an emergency access and that the provision of this would attract further activity which would also lead to a degradation of the conservation site. The claimant's case was that the Secretary of State's guidance as to when an emergency access was required did not call for one and that this guidance, rather than the stricter requirements of the County Council, which did, should be preferred.

6. On the environmental issues the claimant's case was that the adverse effects forecast by those who opposed the planning application were overstated and that the proposed development would have no significant adverse effect on the conservation site.

7. The first Inspector directed himself in these words in paragraph 10.14 of his report,

> "It is agreed with the appellant that the assessment of significant adverse impact has to consider firstly, the nature and extent of the existing use of the SSSI/SPA; secondly, what additional impact the proposed dwellings would have on the SSSI/SPA; and thirdly, what impact could occur even if planning permission is refused, having regard to the fact that access to the SSSI/SPA is unrestricted." (A/56/10.14)

He concluded at paragraph 15.27,

> "I have therefore reached my conclusion based firstly, on the latest distributions of the Annex 1 birds; secondly, on the disturbance that already occurs in the area; thirdly, on the relatively small increase in recreational pressure likely to arise from 42 dwellings; fourthly, the quite different areas available for recreation compared to those in the Cobbetts Lane appeal; and finally, on the fact of unrestricted access to the SSSI/SPA. I conclude that the evidence on the recreational impact, concentrating on the effect of dogs and cats, is simply not persuasive enough to support the argument in this case that the proposed development would have a significant adverse effect." (A/72/15.27)

8. He went on to draw support from the views of another Inspector and the decision of the Secretary of State in relation to an appeal against a refusal of planning permission for residential development of the appeal site that the potential for additional harm to be caused to the nature conservation interests within the SSSI/SPA as a result of the building of 42 houses would not be significant. That appeal had been dismissed on other grounds. The Cobbetts Lane appeal related to a different site and environmental considerations had been a factor in the dismissal of that appeal.

9. As to the emergency access the first Inspector said at paragraph 15.31,

"If an emergency access can be provided in this case, it seems to me that it would be logical to accept the appellant's offer, simply to increase safety. .....
However, I would not recommend that the appeal be dismissed if an emergency access could not be provided." (A/74/15.31)

10. Although the appeal site was not within an area scheduled in the local development plan for residential development it was common ground that Hart DC did not have sufficient land earmarked for residential development to satisfy what was required to sustain such development over the next five years. In these circumstances, since conservation conditions did not call for planning permission to be refused, and the site being suitable for residential development, the first Inspector concluded that policy H7 of the Hampshire County Structure Plan applied so as to permit the development and he recommended to the Secretary of State that the appeal should be allowed.

11. Policy H7 provides:

"In order to make the best and most economical use of land, sites coming forward for development or redevelopment in the plan period which are suitable in planning terms for housing development, but which are not for the time being identified in a local plan, will be considered with regard to overall land availability and other policies of this Plan." (B2/557)

12. After considering the report the Secretary of State concluded, as he was entitled to, that an environmental assessment needed to be prepared and taken into account before he could decide whether or not the appeal should be allowed. Accordingly, in a letter dated 6 January 1997 he required the claimant in the following terms to provide one:

"2. The development proposed, namely residential development of 42 dwellings, falls within the description at paragraph 10(b) of schedule 2 to the 1988 regulations.

Furthermore, in the opinion of the Secretary of State that development would be likely to have significant effects on the environment because of its nature, size and location, having regard, in particular, to the following points:

The likely effect of the proposed development on the adjacent SSSI and potential SPA in terms of

(i) increased recreational activity,

(ii) disturbance to three of the species of birds in Annex 1 to the Wild Birds Directive i.e. woodlark, nightjar and Dartford warbler; and

(iii) use of the proposed emergency access route.

The Secretary of State notes that, notwithstanding the request by English Nature in their letter of 25 April 1995 that the application should be subject to environmental assessment, no such assessment has been carried out, although in response to a request by the Council information was supplied on four different aspects of the proposal. As stated in paragraph 39 of PPG9, the effect of a schedule 2 development on an SSSI, will often be such as to require environmental assessment and that EA will normally be required where a potential or classified SPA could be affected. The Secretary of State considers that such an assessment is required in this case, even though a public inquiry has already taken place. In the absence of such an assessment, he does not consider that the requirements of the above regulations will have been satisfied.

3. The Secretary of State therefore notifies you by this letter, pursuant to regulation 10(1), as applied by regulation 11(1), of the 1988 regulations, that the submission of an environmental statement under those Regulations is required."

(B1/204-5)

13. An environmental assessment was duly prepared and copies were sent by the claimant's solicitors on 17 December 1997 to the Secretary of State together with a copy of the notice which had appeared in a local newspaper informing the public of their right to make representations on it to the Secretary of State. (B1/200-211)

The Secretary of State responded by letter on 18 December 1997 (B1/212) in which he expressed the view that the inquiry would need to be reopened to consider representations on the environmental statement. After correspondence in which the claimant's solicitors questioned the need for the inquiry to be reopened and pointed out the difficulties which this

would cause the Secretary of State decided it should be reopened. He had initially intended it should be conducted by the first Inspector but because of other commitments he had it was decided that the reopened inquiry should be conducted by the second Inspector. In due course the Secretary of State gave notice that the inquiry would recommence on 3 September 1998 and that it would

> "consider the information contained in the Environmental Impact Assessment and any material change in circumstances since the previous inquiry was held in 1996." (B1/227)

14. Complaints are made about the decision to reopen the inquiry particularly before a different Inspector. These are not made by way of challenge to the Secretary of State's decision, though, but to underline the unfairness which it is said resulted from what happened and which was not guarded against or cured by the Secretary of State.

15. The reopened inquiry lasted 5 days and it is apparent from the second Inspector's report that although he did not hear all the evidence relating to the environmental issues which had been heard by the first Inspector he did hear extensive evidence and submissions on them. The claimant was not able to call the environmental expert who gave evidence before the first Inspector because sadly he had died between the two hearings. However, the claimant called another expert, Mr Goodwin. He had prepared the environmental assessment and this and his proof of evidence, as one would expect, dealt in depth with the environmental issues. (B1/353-437 and B4/1005-1086) His conclusion was that there was no environmental reason why planning permission should be refused. That had been the conclusion of the expert called on behalf of the claimant at the first hearing.

16. In his report to the Secretary of State the second Inspector reviewed the more recent evidence about the availability of land earmarked for residential development for the next five years and concluded that although there was still a shortfall the position was less acute than it had been at the time of the hearing before the first Inspector and that Hart DC was making progress in tackling the problem. Next, it was not within the second Inspector's remit to decide whether or not an emergency access was required but he concluded in relation to the one proposed that its construction and use would represent a harmful, long term intrusion across this important nature conservation site. (A/98/12.17) He noted for the Secretary of State's assistance the number of the paragraph in which the report of the first Inspector had dealt with the emergency access. The second Inspector concluded:

> "Not withstanding the absence of a five years' supply of housing in Hart, in nature conservation terms there are too many factors associated with the proposed development which would pose a real or potential threat to the integrity of the Annex 1 Bird habitats on the pSPA to warrant permission being granted."
> (A/98/12.19)

17. In his decision letter of 15 September 1999 the Secretary of State considered both reports. The salient features for the purpose of the appeal before me with which he dealt before stating his decision were the questions of land supply, the environmental issues, the emergency access and policy H7.

18. Land Supply

"The Secretary of State agrees with the conclusions of both Inspectors that there is a deficiency in the five year housing land supply in the district. However, while he agrees that this issue is a material factor which can be taken into account, he does not agree with the first Inspector's conclusion that it should be given very great weight in determining the appeal (IR1:15.7) He has given consideration to planning policy guidance note PPG3 advice that where there is a substantial shortfall in housing the need to increase land supply should be given considerable weight but that land availability considerations should not be regarded as overriding all other factors even when there is a substantial shortfall. He notes the second Inspector's view that the Council is taking appropriate actions to increase the housing supply through its emerging local plan and accepts that the Council is taking the necessary measures to increase the supply (IR2:12.6)." (A/19/16)

19. Environmental Issues and Emergency Access

The Secretary of State said that in considering potential SPAs his policy was that, for the purpose of considering development proposals affecting them they should be treated in the same way as SPAs. This policy has not been challenged. He said he had applied the policy in considering the appeal and considered whether the proposed development would have a significant effect on the proposed SPA, either individually or in combination with other proposals. He said he considered that the proposal would have a significant effect due to its size and location adjacent to the Thames basin heaths proposed SPA creating additional pressure on the habitats within it and that in making this assessment he had taken account of the advice of English Nature. (A/17/7) He noted that the two Inspectors had reached different conclusions on the environmental aspects of the proposed development. (A/17/8) He referred to what the first Inspector said about the relatively small increase in recreational pressure on the conservation site and to what the second Inspector had seen on his visits to the site, a factor to which the Secretary of State clearly attached importance. (A/17/9-A/18/10) The decision letter states:

"11. The Secretary of State considers that the observations of the second Inspector, some two years after the first Inspector's visit to the area must provide a more up to date picture of the situation. He accepts that the second Inspector's conclusions that

the damage which has taken place through rubbish dumping is a continuing problem and that its presence can easily encourage more dumping to take place (IR2:12.15). The Secretary of State also agrees with the second Inspector that it is irrelevant who starts fires but once such a trend has started there is a high risk that it will continue and that the introduction of further housing will increase the risk (IR2:12.16). He considers that these activities are causing harm to the habitats leading to the gradual deterioration of the p/SPA.

12. The first Inspector considered it significant that the Annex 1 birds had continued to breed across the p/SPA despite extensive activities of human disturbance in areas outside the p/SPA such as car auctions and Sunday markets (IR1:15.20). He also took into account that there is no restriction on public access to the p/SPA (IR1:15.24). The Secretary of State agrees with the second Inspector that while there are no up to date figures on the number and distribution of Annex 1 birds in the p/SPA, there is no conclusive evidence that numbers have declined (IR2:12.13). While he accepts this position, he considers that any increase in the number of people who could use the site on a regular basis would increase the potential disturbance to the p/SPA." (A/18/11-12)

20. The Secretary of State noted the differing views of the two Inspectors about the effects of an emergency access and set out what they were and expressed his agreement with the second Inspector's conclusion. (A/18/13) The decision letter goes on to say:

"14. The Secretary of State, therefore, considers that the development proposes a real threat to the integrity of the p/SPA in so far as the construction of the emergency access is concerned and a potential threat in respect of the increase in the numbers of people who could use the site on a regular basis both from the development itself and from possible misuse of the emergency access. In the light of this, and of the Secretary of State's conclusion at paragraph 12 above, the Secretary of State considers that it is not possible to conclude that the proposed development will not adversely affect the integrity of the p/SPA.

18. The Secretary of State accepts Hampshire County Council's view that to accord with its policy an emergency access is required in this particular case (IR1:11.6). He does not agree therefore with the first Inspector's conclusion that the appeal should not be dismissed if an emergency access cannot be provided (IR1:15.31)." (A/19/14; A/20/18)

21. Policy H7

Policy H7 was dealt with in these terms:

> "The Secretary of State has noted the first Inspector's conclusion that the proposed development could be considered under structure plan policy H7 which allows sites outside settlement boundaries to be considered for development if they are otherwise suitable (IR1:15.9, 15.17). However, he disagrees with the Inspector on the application of policy H7 as he considers that, because of the overriding nature conservation objection to this site, it is not suitable in planning terms for housing development and thus that policy is not applicable in this case." (A/20/20)

22. The Secretary of State's decision to dismiss the appeal is to be found in paragraph 24 of the decision letter.

> "The Secretary of State has given careful consideration to all the issues arising in this case and has taken into account the written representations which were made when the Environmental Impact Assessment statement was submitted. He has concluded that there are no other issues which outweigh the serious nature conservation objections and that there are no material considerations which would justify allowing the development contrary to the development plan. Therefore, he disagrees with the first Inspector's recommendation but accepts the second Inspector's recommendation and hereby dismisses your clients' appeal." (A/21/24)

The Secretary of State had also noted that at the reopened inquiry the parties had been given the opportunity to make representations on the findings contained in the claimant's environmental assessment (A/17/5).

23. Mr Elvin's submissions were more narrowly focused than the criticisms made in his skeleton argument. Even so, some of his submissions were really variations on a single theme. He accepts that he cannot challenge the Secretary of State's decision save through an attack on the conduct of the reopened inquiry, on what he submits was the impermissible approach of the second Inspector to his task in conducting it and in reporting upon it to the Secretary of State and on the decision making process of the Secretary of State himself.

24. Although the parties at the reopened inquiry did not have a copy of the first Inspector's report the second Inspector did. Mr Elvin submits that the basis upon which the inquiry was reopened precluded him from reopening the evidence and reporting upon the environmental issues save to the extent of considering by references to the first Inspector's report whether there was anything in the facts and opinions set out in the environmental assessment prepared by Mr Goodwin materially different from the evidence and opinions presented to the first Inspector or any new matters raised by it or anything in it which contradicted the conclusions on the environmental issues reached by the first Inspector. In fact there was not and therefore it was not open to the second Inspector to make a fresh assessment of the environmental issues and to report on it to the Secretary of State, since to do so went beyond his remit.

25. Mr Elvin submits that the claimant had a legitimate expectation generated by correspondence with the Government Office for the South East (GOSE) and the Planning Inspectorate that this would not happen. What happened, therefore, as well as being unlawful, as being outwith the second Inspector's remit, was procedurally unfair since it failed to give effect to the claimant's legitimate expectation. There was only one way in which the Secretary of State could have redeemed this situation and that would have been to have informed the claimant and other interested parties of the second Inspector's conclusions and give them an opportunity to make representations which he should then have considered before making his decision. He did not do this. Mr Elvin accepts that unless he makes good his first point he cannot argue that there was an unlawful or unfair situation which the Secretary of State had to redeem.

26. Mr Elvin accepts that if there had been any other material change in circumstances since the previous inquiry it would have been necessary for the second Inspector to consider and report on such change to the Secretary of State but he submits that there was none.

27. The notice reconvening the inquiry stated:

> "The inquiry will consider the information contained in the Environmental Impact Assessment and any material change in circumstances since the previous inquiry was held in 1996." (B/1/227)

It is not, in my judgment, to be construed as though one were construing an Act of Parliament. It is necessary to construe it in its regulatory and factual context and to bear in mind to what audience it was addressed.

28. Rule 16(5) of the Town and Country Planning (Inquiries Procedure) Rules 1992 empowered the Secretary of State to reopen the inquiry and required him, if he did, to send to the parties entitled to appear at it a written statement of the matters with respect to which further evidence was invited. I have referred in the preceding paragraph to the statement. The decision to reopen the inquiry (which it is accepted the Secretary of State was entitled to make) arose from the provision by the claimant of an environmental assessment. The Town and Country Planning (Assessment of Environmental Effects) Regulations 1988 deal with environmental assessments. Regulation 11(1) empowers the Secretary of State, if he considers the planning application which is the subject of an appeal to him is a Schedule 2 application to require the appellant to produce an environmental assessment. The

Secretary of State was of the view that the proposed development fell within paragraph 10(B) of Schedule 2 to the Regulations, being an urban development project falling within the class of infrastructure projects. The claimant accepts he was entitled to take this view and that the planning application, therefore, was properly treated by him as a Schedule 2 application. This being so, the Secretary of State was precluded by regulation 4(2) from granting planning permission without first taking into consideration the environmental information of which the environmental assessment formed part. Environmental information is defined by regulation 2(1) as meaning an environmental assessment and any representation made by any person about the likely environmental effects of the proposed development. Regulation 13(1) and (2) requires the person applying for planning permission who has furnished an environmental assessment to advertise this fact in a local newspaper circulating in the locality of the appeal site informing members of the public, inter alia, of their rights to make representations in writing to the Secretary of State about the planning application. This was done and I have referred already to the advertisement.

29. In the present case the conservation (Natural Habitats etc.) Regulations 1994 were also relevant to the reopening of the inquiry. The conservation site was only a proposed SPA and not yet classified for the purpose of these regulations. However, planning policy guideline (PPG9) provides by paragraph 13 and Annex C7 that a proposed SPA is to be treated in the same way as a classified SPA. This aspect of ministerial policy has not been challenged in this appeal. Accordingly, it is appropriate, when relevant, to consider the environmental issues which were central to the appeal in the light of these regulations. An SPA is a European site within the meaning of regulation 10(1)(d). Paragraph 1 of regulation 48 provides that the Secretary of State may not give planning permission for a

development which is likely to have a significant effect on a European site (either alone or in combination with other plans or projects) unless he has made an appropriate assessment of the implications for the site in view of the site's conservation objectives. Paragraph 3 requires the Secretary of State to consult English Nature and to have regard to any representations it makes. Paragraph 4 empowers the Secretary of State, if he considers it appropriate, to take the opinion of the general public and, if he does, to take such steps for that purpose as he considers appropriate. It is apparent that the provisions of the 1988 and 1994 Regulations are in harmony with one another. It is also clear, in the light of the increasing awareness in contemporary society of environmental considerations and the legitimate interest which members of the public have in conservation that the Secretary of State was entitled to conclude that it was appropriate to take the opinion of the general public and that it was appropriate to do so by the reopening of the inquiry. GOSE made this point in its letter of 9 February 1998 to the claimant's solicitors. (B1/219)

30. It is difficult to see how any useful examination of the environmental issues would have been possible at the reopened inquiry if the restricted approach to the second Inspector's remit contended for by Mr Elvin were correct. It is equally difficult to understand why whether or not the Secretary of State would be helped by the reopening of the inquiry should have been made to depend on whether or not the environmental assessment furnished by the applicant was considered by the second Inspector to add anything to what had gone before at the original hearing.

31. Mr Elvin was, I think, conscious of this when I suggested to him that on the claimant's approach it was otiose to reopen the inquiry. He did not accept this was so and made a

number of submissions. Fairness, he said, required the Secretary of State to give other parties the opportunity to make representations. He accepted that it was the duty of the second Inspector to make up his own mind about the material in the environmental assessment and assess the opinions contained in it. I confess I do not understand how, consistently with this, he could have restricted himself in the way suggested by Mr Elvin and which I have set out in paragraph 28 above. In his closing address Mr Elvin submitted that once the inquiry had been reopened the second Inspector could not with propriety have refused to receive representations on the environmental issues. What he could have done, Mr Elvin argued, was to hear those representations de bene esse. This, it seems to me, would have made the second Inspector nothing more than a letterbox for the Secretary of State.

32. Does the correspondence throw light on what the claimant was led to understand was the second Inspector's remit? I have already referred to the letter of 18 December 1997 from GOSE to the claimant's solicitors which spoke of the reopening of the inquiry to consider representations on the environmental assessment. In the letter of 9 February 1998, to which I have referred in passing, GOSE wrote:

> "I note your view that there is no need to reopen the inquiry. The Secretary of State has decided that the appeal needs to be considered further in the light of the Environmental Impact Assessment Statement and that this should be done in the context of a public inquiry. A number of representations have been made about the Environmental Statement and in view of the level of public concern it has been decided that the issues should be considered at a reopened inquiry rather than rely upon written representations. In addition the number of parties involved makes it impractical for the further material to be considered by the written representations procedure." (B/1/219)

33. Next, I refer to the letter of 18 August 1998 written by the claimant's solicitors to the Planning Inspectorate. After setting out the terms of reference for the reopened inquiry the writer said:

> "It is these two grounds, therefore, which are being dealt with at the inquiry. There are no serious material change of circumstances and therefore the inquiry will revolve around the Environmental Impact Assessment.
>
> The whole of the appellant's case, therefore, has been based upon the premise that it will not be necessary to introduce all the issues all over again. The previous Inspector had all the background and has made his recommendations on all these issues, and in the interests of natural justice the same Inspector ought to be dealing with the case. Any new Inspector cannot be expected to simply look at the issue in the abstract without all the knowledge which lies behind the previous Inspector's report." (B/1/231)

34. There is no suggestion in this letter that the second Inspector's remit should be as narrowly confined as Mr Elvin submits it was by the terms of the notice convening the reopened inquiry. The contrary view appears, in my view, in these paragraphs and is underlined by the final sentence of the second paragraph. In its reply to this letter the Planning Inspectorate confirmed that the reopened inquiry would only discuss matters raised by the environmental assessment. (B/1/236)

35. Does the preparation for and conduct of the appellant's case at the reopened inquiry give any indication of the claimant's understanding of the scope of the second Inspector's remit? Mr Goodwin's proof of evidence, which was before him, dealt in depth with the environmental issues. In his opening address the claimant's advocate referred to the terms of the convening notice and said:

"It is on these two matters and these two matters alone that I intend to bring additional evidence today.

In fact the Planning Inspectorate, by letter of 19 August confirmed:

I confirm that you are correct in you assumption that the inquiry will only discuss matters raised by the Environmental Impact Assessment.

The previous Inspector has already complied his report on the other evidence which stands as given. That evidence is not to be reopened.

The appellants wrote to Hart District Council to clarify what other matters they considered to be new material matters. The Council responded by letter of 7 August and raised progress with the review of the Structure Plan and Local Plan. I have taken this to relate to an update of the latest housing land supply figures.

The scope of this reopened inquiry is thus abundantly clear and I would ask you, Sir, not to take account of any additional or repetitive evidence given in respect of matters not clearly falling under either of these two heads.

Therefore I will be calling on the evidence of Tim Goodman, which will deal with the conclusions to be drawn from the ES and other matters raised by English Nature or RSPB and Fred Young to provide an update of the housing land supply figures." (B1/274-5)"

36. Mr Elvin accepted that in the hearing before the second Inspector all the parties repeated the cases they had already laid before the first Inspector, saying that the cases they had put forward then had been right but that they were not, however, calling all the evidence which had been called earlier. He submitted that the second Inspector should have been alerted to the fact that he was being invited to re-decide matters already decided by the first Inspector.

37. In my judgment it is quite clear that the claimant did not speak or act either in preparing for or presenting its case at the reopened inquiry as though it had the expectation contended for on its behalf and that its understanding of the ambit of the further hearing was

in accordance with the way it was conducted. The complaints made on behalf of the claimant were not directed to the second Inspector's remit or any fear that he would go beyond it but were about the decision to reopen the inquiry, the fact that it would not be conducted by the first Inspector and the difficulties which would confront the second Inspector because he had not conducted the original hearing.

38. Nor, in my view, are the terms of reference for the reopened inquiry, when considered in their proper context, to be read in the restricted way contended for by Mr Elvin. They draw a clear distinction between the environmental issues and those matters which only become relevant at the reopened inquiry should there have been a material change in circumstances since the earlier hearing. On a common-sense reading of the reference to the environmental assessment it is clear that the environmental issues are to be reconsidered in the light of it. The reference is not to be read as precluding any controversy or evidence relating to it which deal with matters already debated before the first Inspector and reported upon by him to the Secretary of State. A few moments thought are sufficient to show the impossible task which such a restriction would have placed upon those preparing evidence to be presented at the reopened hearing. Some may not have been of aware of whether the evidence they were intending to present went to an issue canvassed before the first Inspector since they may not have been present at the hearing before him. Further, no party would have the means of knowing whether or what he had reported upon it to the Secretary of State, not being privy to his report (and no challenge is made to the fact that it was not disclosed - nor could it be). Moreover, having lawfully concluded that the forum for a consideration of the environmental assessment was to be at a reopened inquiry it would not have been lawful for the Secretary of State to inhibit himself by its terms of reference from

receiving representations from English Nature and from members of the general public: see Regulation 48(3) and (4) of the 1994 Regulations.

39. Accordingly, I reject the challenge based on the alleged irregularity of the conduct of the reopened inquiry and the suggestion that in his report to the Secretary of State the second Inspector went beyond his remit. Nor was there any legitimate expectation held out, as contended for by the claimant. These are different facets of what is essentially a single challenge. It follows that the criticism made of the Secretary of State's failure to consult after he received the report of the second Inspector must also be rejected.

40. In developing the challenge which I have rejected Mr Elvin was critical of the fact that the second Inspector had not heard all the evidence on the environmental issues which was heard by the first Inspector. It must not be forgotten, though, that neither Inspector was the decision maker. The second Inspector had seen the first Inspector's report and whether and to what extent his conclusions were weakened by the fact that he had not conducted the first hearing was a matter for the Secretary of State. He of course, when he appoints an Inspector to hear an appeal but reserves the decision to himself, always makes his decision without having seen or heard the witnesses give their evidence. It is not suggested, though, that he is prevented by this from making a proper decision or that his decision making process is somehow flawed by it. In fact, the greater the public interest in an appeal the more likely it is that the decision maker will be the Secretary of State himself and not his Inspector.

41. I deal next with a minor challenge to the Secretary of State's decision. In his decision letter he referred to what the second Inspector had seen in his visits to the relevant area and he said that these observations, two years after the first Inspector's visit, must provide a more up to date picture of the situation. (A/18/10-11) Mr Elvin submits that the second Inspector had seen nothing new. His visits to the area had merely confirmed that what the first Inspector had seen was happening continued to happen. Arising out of this he makes two points.

42. First, the Secretary of State should not have paid attention to what the second Inspector saw because this was not fresh evidence and it was therefore outside his remit to report any conclusions about what he had seen. This point must fall with the rejection of the challenge based on the argument about his limited remit.

43. Mr Elvin' second point is that since what the second Inspector saw was merely a continuation of the state of affairs seen by the first Inspector the Secretary of State was wrong to regard what the second Inspector reported about what he had seen as adding to the overall picture of what was happening in the area. I reject this point also. It is clear the second Inspector was able to provide a more up to date picture of the situation, if only to the extent that there had been no abatement to what the first Inspector had seen. However, the second Inspector was entitled to comment on what he saw as the significance and potential for the future in relation to the conservation site of what he had seen and the Secretary of State was entitled to accept his view. He was entitled to accept that there were problems caused by the dumping of rubbish and the starting of fires whose continuance was likely to

lead to their increase, that the introduction of further housing would increase the risk and that these activities were:

> "causing harm to the habitats leading to the gradual deterioration of the proposed SPA" (A/18/11)

44. Next Mr Elvin submits that the Secretary of State acted unfairly and with Wednesbury unreasonableness in failing to take into account in making his decision the difference between the two reports and the fact that the first report was based on evidence not heard by the second Inspector. Moreover, despite the requirement in Rule 17(1) of the Procedure Rules he failed to give any reasons to show whether or not he had taken this into account and, if he had, what significance he attached to it. There was a further failure by the Secretary of State to give reasons for preferring the views of the second Inspector to those of the first Inspector.

45. I find no substance in these criticisms. The Secretary of State knew the terms of reference for the reopened inquiry. It would have been obvious to him that the first Inspector heard evidence bearing upon the environmental issues which had not been heard by the second Inspector. That this would be the case had been made clear in the correspondence to which I have referred. It was apparent, as well, from the two reports and the lists attached to each of them of the parties who had appeared and what evidence and documents were placed before each Inspector. In his decision letter the Secretary of State referred to the points of difference between the two reports in relation to the environmental issues and said which he preferred. Reasons do not always have to be explicitly stated. They may be apparent from the acceptance of one piece of evidence or

conclusion in preference to another piece of evidence or conclusion. For example, paragraphs 10 and 11 of the decision letter, to which I have already referred, make it clear why the Secretary of State took the view he did on the all important issue of the effect of the proposed development on the proposed SPA and why, therefore, he did not accept the view of the first Inspector that the case that the proposed development would adversely affect it had not been made out. A careful reading of the two reports and the decision letter leaves me quite unpersuaded by Mr Elvin's submission that the Secretary of State acted unfairly or with Wednesbury unreasonableness or failed to give adequate reasons for his decision.

46. Mr Elvin makes a specific challenge to the Secretary of State's acceptance of the need for an emergency access to the proposed development called for by Hampshire County Council's policy, the first Inspector having concluded that the lack of an emergency access should not be a ground for refusing planning permission. The relevance of the emergency access was that, following the conclusion of the second Inspector (A/97/12.17), the Secretary of State concluded, as I have already mentioned, that it posed a threat to the conservation site. (A/19/14) The first Inspector noted there was a dispute as to whether one was needed and said that Design Bulletin 32 did not require that there should be one but that the County Council's more detailed criteria required one as the proposal was for a cul-de-sac development with dwellings further than 200 metres beyond the open end of the cul-de-sac. He accepted, though, that were an emergency access to be provided it would increase safety. Part of the route of the emergency access offered by the claimant at the original hearing, without conceding the need for one, was along a bridleway, part utilised a public footpath, part utilised an abandoned airfield taxi-way and part of it crossed a strip of the conservation site. (A/72/15.31 and A/43/6.1)

47. Mr Elvin submitted that as the County Council's policy requiring an access was in conflict with the Secretary of State's own Design Bulletin the Secretary of State was required to give reasons why he accepted the County Council's view and failed to prefer his own policy and did not do so. He reminded me of the foreword to Design Bulletin 32:

> "We expect local planning and highway authorities to take the advice contained in this edition into account when preparing local plans and when specifying their requirements for adoption." (B/2/278)

Mr Elvin submitted that this challenge raises an important issue, although no specific reference is made to it in the grounds of appeal.

48. Design Bulletin 32 provides the following guidance at paragraph 2.22:

> "A road serving up to 50 dwellings may be either a loop or a through road, a cul-de-sac with a footpath link that can be made available for use by vehicles in an emergency or a cul-de-sac without a footpath link."

I asked Mr Elvin to identify the conflict between the County Council standard and the guidance in the Design Bulletin. His answer was that the conflict is to be found in the fact that the County Council's policy requires more than the minimum standard suggested by the Design Bulletin. This seems to me to be tantamount to saying that if guidance refers to a minimum standard and also to a more exacting standard a planning authority which adopts the more exacting standard has failed to follow the guidance in the Design Bulletin. I do not accept this. It may be that the County Council's policy in this instance went further than the guidance in that the emergency access, as proposed, would not have utilised a

footpath or footpaths throughout its length. However, the guidance does recognise that there may be cases where an emergency access can properly be considered to be required. The status of the Design Bulletin has also to be remembered, as giving advice which has to be taken into account. It is not a direction which has to be followed to the letter by a local authority. Such conflict as there is between the County Council's policy and the Design Bulletin is not in my judgment significant. This may explain why this challenge receives no specific mention in the grounds of appeal. In my judgment the Secretary of State was entitled to accept that there needed to be an emergency access. He was aware of both his own guidance and the County Council's policy and of the fact that the provision of an emergency access would increase safety. It is not suggested that the County Council's policy was unlawful, or that the Secretary of State was not entitled to say it should be applied in this case. The challenge is simply to a failure to give reasons. However, the Secretary of State would no doubt have been aware of the desirability of a County Council policy, which was not unlawful, being applied consistently so that would-be developers may know how they stand in relation to its application.

49. The final aspect of Mr Elvin's reasons challenge with which I have to deal relates to two earlier planning appeal decisions in relation to the appeal site, one in 1989 and the second in 1993.

50. In 1989 the Inspector considered a proposal to build houses on the appeal site and what would be the environmental effects of such development on the conservation site, which at that time was an SSSI but was not also a proposed SPA. This is of significance because of Regulation 48(5) of the Conservation (Natural Habitats) etc. Regulations 1994 to

which I shall refer later. The Inspector considered the pressures on the conservation site from various activities already occurring and the further pressures which would be produced if the proposed development went ahead. The activities referred to were comparable with those which were considered in the appeal leading to the decision by the Secretary of State which is the subject of the appeal before me. (B/1/244/15) The Inspector said:

> "There is a balance to be drawn between protecting SSSIs and other areas of nature conservation interest and permitting access for educational and recreational purposes. Your clients [the appellants] point out the problems of control over such a large area to which there is generally unhindered access because of its open nature and public rights of way; that much of the land in question, such as Yately Common Country Park, is common land to which people are positively attracted by publicity; that they would be prepared fully to fence the appeal site if necessary; that only few people might wish to visit the SSSI; that there is no proof that it is nearby residents who create the problems, particularly as there is a Sunday market on the airfield to the south which is visited by up to 20,000 people in one day; and that the main consequences of the proposal would be that the few prospective residents, who would form a tiny proportion of those existing, could reasonably and lawfully visit the areas of nature conservation interest, and that there would be scope for a condition to restrict unauthorised vehicular access which would reduce tipping and disturbance. I share their view that against this background, there is insufficient evidence that demonstrable harm would be caused to nature conservation interests from the erection of 42 dwellings on the appeal site, to result in material conflict with the policies mentioned or to constitute a sound reason for refusing permission." (B/1/244/16)

In other words, the Inspector concluded that the environmental case sought to be made out against the proposed development had not been proved. However, the Inspector, to whom the task of decision was entrusted by the Secretary of State, dismissed the appeal on other grounds which are not material for present purposes.

51. The 1993 appeal decision concerned a further proposal to develop the appeal site for housing. Similar environmental issues were canvassed. By this time there was a proposal to create an SPA in the Thames basin but its boundaries had not yet been defined.

However, although at this appeal the impact upon it of the proposed development had to be considered, this was before the 1994 Regulations were made. In his report to the Secretary of State the Inspector said:

> "The draft PPG on nature conservation gives a clear indication of current thinking on the need for careful consideration of proposals, both within and outside SSSIs, if there might be a significant effect on birds in declared and potential SPAs." (B/1/261/14.61)

A little later in his report the Inspector said:

> "However, while I believe that new residents would contribute to increased use of the airfield, [part of the proposed SPA] bearing in mind the present level of use, I cannot draw the firm conclusion that the potential for additional harm to be caused to the nature conservation interest within the potential SPA and present SSSIs as a direct result of the development and occupation of 42 dwellings would be an overriding consideration. .....
> In qualitative terms, I believe that the [appeal] site has the potential to provide housing in an attractive setting that could relate well to Yately without causing unacceptable harm to its character or the nature conservation interest of its surroundings, as presently understood." (B/1/262/14.69 and 264/14.74)

As in the 1989 decision, therefore, the Inspector concluded that the conservation objection could not be established. However he recommended that the appeal be dismissed on grounds which, again, are not material for present purposes. The Secretary of State adopted his Inspector's recommendation in his decision letter and dismissed the appeal. (B/1/248)

52. The first Inspector in the present case referred several times to the earlier decisions on the conservation issue. He noted that, while not accepting their correctness, Hart District

Council conceded their materiality in the appeal before him. (A/49/9.9) He referred to the 1993 decision on the conservation issue as providing support for his own conclusions. (A/72/15.27) Earlier in his report he had noted the claimant's submission that PPG9 clarified that there was no barrier to the grant of planning permission for projects unlikely to have significant effects on an SSSI/SPA. (A/52/10.1) He said, and I have referred to this already, that the evidence was simply not persuasive enough to support the argument that the proposed development would have a significant adverse effect. (A/72/15.27) Mr Elvin submitted that the two earlier decisions were material and, if the Secretary of State proposed not to follow them he was required to give his reasons for not doing so. I was referred to the judgment of Mann L.J. in North Wiltshire DC v Secretary of State for the Environment [1992] 3PLR113 at page 122:

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

These can on occasions be short, for example in the case of disagreement on aesthetics. On other occasions they may have to be elaborate."

53. Mr Elvin submits that the two earlier decisions are material. They refer to the same appeal site and to the same development. The environmental issue in the two earlier cases was broadly the same as in the present case. He points to the acceptance by Hart DC of their materiality and to the first Inspector's references to them and to the fact that he prayed in aid the 1993 decision. He says, though, that the second Inspector never referred to them and neither did the Secretary of State. As it was the latter who made the decision Mr Elvin accepts that failure by the second Inspector to refer to these earlier decisions would not matter if the Secretary of State had shown that he had considered them and had given his reasons for not following them. It is worth noting that Mr Elvin does not suggest that it would have been unlawful or Wednesbury unreasonable for the Secretary of State not to follow them. His complaint is about lack of reasons.

54. Mr Corner, for the Secretary of State, and Mr Katkowski, QC, for Hart DC, accepts that if the earlier decisions were material and had a significant bearing upon the decision which the Secretary of State had to make then it would have been necessary for him to give his reasons for not following them. They submit, though, that neither of the earlier decisions was material and in any event made no significant impact on the decision which the Secretary of State had to make. At this point it seems to me to be relevant to return to the 1994 Regulations and to consider also the relevant part of PPG9. By virtue of Regulation 10 an SPA is a European site to which Regulation 47 applies Regulations 48 and 49. Mr Elvin accepts this. Turning to Regulation 48 paragraph (1) prevents the Secretary of State from giving planning permission for development which is likely to have

a significant effect on a European site (either alone or in combination with other plans or projects) unless he has made an appropriate assessment of the implications for the site in view of its conservation objectives. Paragraph (5) provides:

> "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." (My emphasis).

55. Regulation 49 provides a dispensation from Regulation 48(5) in certain cases, of which this was not one and is not suggested to have been. There is thus a two stage process when Regulation 48 is engaged. Given a proposed development's likelihood to have a significant effect on a European site there has to be an appropriate assessment of the implications for the site. Once, though, this assessment has been considered planning permission has to be refused unless the proposed development will not adversely affect the integrity of the site. Given the threshold in paragraph (1) it seems appropriate to understand "adversely" in paragraph (5) as requiring something which has a significant effect on a European site's integrity. Paragraphs (13) and Annex C7 of PPG9 provide that proposed SPAs are to be treated in the same way as classified SPAs. Annex C10 reflects the two stage procedure but the second stage and the flowchart do not, in my judgment, fully set out the approach required by Regulation 48(5) that permission should not be granted unless the decision maker has ascertained that there will be no adverse effect on the integrity of the site. The approach required by paragraph (5) is relevant both when the decision maker is satisfied the proposed development will adversely affect the site's integrity and when he is undecided whether it will or not. In either case paragraph (5) requires

permission to be withheld. This approach reflects the importance attached to safeguarding the integrity of an SPA.

56. Mr Corner and Mr Katkowski both submit that the 1989 and 1993 decisions are distinguishable in a way which means they were not material to the decision which the Secretary of State had to make. At the time of the 1989 decision there was no proposed SPA. At the time of the 1993 decision, although there was, the 1994 Regulations had yet to be made. The approach to the conservation issue in these two appeals, that a case had not been made out that the development would adversely affect the conservation site, is not the approach required by Regulation 48(5) in the case of an SPA. Therefore, they argue that on a proper consideration of the hurdle set by Regulation 48(5) as compared with the approach in the earlier cases the decisions in them can be seen not to have been material. I agree and I reject this challenge.

57. Mr Corner and Mr Katkowski submit further that in applying the same test as in the earlier appeals the first Inspector applied a test which was wrong in law. The second Inspector, they argue, applied the correct test in his summing up of the planning issues when he said,

> "..... in nature conservation terms there are too many factors associated with the proposed development which would pose a real or potential threat to the integrity of the Annex 1 Bird Habitats on the pSPA to warrant permission being granted." (A/98/12.19)

They argue that the Secretary of State was entitled to accept this conclusion, as he did, and that he was therefore required by Regulation 48(5) to dismiss the appeal. I agree.

58. Mr Katkowski argues that it is apparent from the decision letter why the Secretary of State did not accept the first Inspector's conclusions and why he has not followed the two earlier decisions. I think he is right in what he says. Mr Corner draws attention to the fact that in his decision letter the Secretary of State shows by referring to the paragraph number in which the first Inspector's report refers to the 1993 decision for support of his view that he was aware of that decision. (A/17/9 and A/72/15.27)

59. Mr Corner and Mr Katkowski reminded me in relation to the issue of the sufficiency of reasons to the speech of Lord Lloyd in Bolton MDC v Secretary of State for the Environment 71 P&CR 309 at page 313, with which the other Law Lords agreed:

> "Before dealing with each of these challenges, I should first make some preliminary observations on the correct approach to decision letters in planning appeals, with which alone we are concerned in this case. This can be done very briefly, since the question was fully covered in the recent speech of Lord Bridge of Harwich in Save Britain's Heritage v Number 1 Poultry Ltd.
>
> Under section 70(2) of the Act of 1990, read with section 77(4), it was the duty of the Secretary of State to have regard "to the provisions of the development plan.....and to any other material considerations". Under Rule 17(1) of the Town and Country Planning (Inquiries Procedures) Rules 1988 (SI1988 Number 944), it was the duty of the Secretary of State to "notify his decision.....and his reasons for it in writing to all persons entitled to appear at the inquiry who did appear.....:" So the Secretary of State had to have regard to all material considerations before reaching a decision, and then state the reasons for his decision to grant or withhold planning consent. There is nothing in the statutory language which requires him, in stating his reasons, to deal specifically with every material consideration. Otherwise his task would never be done. The decision letter would be as long as the Inspector's report. He was to have *regard* to every material consideration; but he need not mention them all.
>
> What then must be mentioned? The classic exposition was given by Megaw J. In re Poyser and Mills' Arbitration approved by this House in Westminster City Council v Great Portland Estates Plc.:

> Parliament provided that reasons shall be given, and in my view that must be read as meaning that proper, adequate reasons must be given. The reasons that are set out must be reasons which will not only be intelligible, but which deal with the substantial points that have been raised.

Ten years later, in Hope v Secretary of State for the Environment, Phillips J. said:

> It seems to me that the decision must be such that it enables the appellant to understand on what grounds the appeal has been decided and be in sufficient detail to enable him to know what conclusions the Inspector has reached on the principal important controversial issues.

Lord Bridge in Save Britain's Heritage v Number 1 Poultry Ltd, described this statement as being "particularly well expressed". .....

What the Secretary of State must do is to state his reasons in sufficient detail to enable the reader to know what conclusion he has reached on the "principal important controversial issues". To require him to refer to every material consideration, however insignificant, and to deal with every argument, however peripheral, would be to impose an unjustifiable burden."

Applying that to the decision letter in the present appeal it seems to me that on a proper reading it is clear what the Secretary of State decided and why he decided as he did and that it cannot be faulted for lack of reasoning.

60. Mr Katkowski urged upon me a further point based on section 54A of the Town and Country Planning Act 1990 which provides:

> "Where, in making any determination under the Planning Acts, regard is to be had to the development plan, the determination shall be made in accordance with the plan unless material considerations indicate otherwise."

He draws my attention to a passage near the end of the decision letter which states that the Secretary of State has concluded there are no other issues which outweigh the serious nature conservation objections and that there are no material considerations which would justify allowing the development contrary to the development plan. (A/21/24) He links this with his disagreement with the Inspector on the application of policy H7, to which I have referred

already. (A/20/20) As I understand Mr Katkowski his argument is that these two conclusions were fatal to the appeal, regardless of the conservation issue. I do not accept this submission. It ignores the interplay between the insufficiency of housing land to meet a five year need and the environmental issue. Given the first Inspector's conclusion on the latter issue it can be seen how, invoking policy H7, he was able to say (though not in terms) that section 54A did not bite. Once, though, the claimant failed on the environmental issue policy H7 could not be invoked.

61. I do not regard this point raised by Mr Katkowski as providing a further reason for dismissing this appeal. However, for the other reasons I have given it is dismissed.

62. Costs.

Mr Katkowski submitted that in the event the appeal was dismissed this was a proper case in which the claimant should be ordered to pay two sets of costs. I have reminded myself of the guidance given to judges on this point in Bolton MDC v Secretary of State for the Environment [1995]1WLR 1176. Hart DC had no interest in this appeal which raised a case which was different from that advanced by the Secretary of State or was in conflict with it. This is not in my judgment a case in which I should depart from the general approach that an unsuccessful appellant should have to pay two sets of costs. The claimant will therefore pay the Secretary of State's costs but otherwise there will be no order as to costs.

63. The volume of paper.

I think it is appropriate to conclude this judgment by referring to the very substantial number of documents copied and provided for this hearing. They ran to well over one thousand pages, of which it has been unnecessary to look at more than a small fraction. This case is not alone in that respect but the use of the photocopier as a substitute for thought and judgment in the preparation of case papers needlessly adds to the cost of case preparation while contributing nothing to the issues which have to be tried. I suspect that all too often some unfortunate litigant is called upon to foot the bill for this extravagant exercise.