



Neutral Citation Number: [2021] EWHC 555 (Admin)

Case No: CO/2455/2020

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11 March 2021

Before :

MRS JUSTICE LANG DBE

Between :

ABBOTSKERSWELL PARISH COUNCIL

Claimant

- and -

**(1) SECRETARY OF STATE FOR HOUSING,
COMMUNITIES AND LOCAL GOVERNMENT**

(2) TEIGNBRIDGE DISTRICT COUNCIL

**(3) ANTONY REW, STEVEN REW
AND JILL REW**

**(4) TORBAY AND SOUTH DEVON
NHS FOUNDATION TRUST**

Defendants

Estelle Dehon and Paul Stookes (instructed by Richard Buxton Solicitors) for the Claimant
Guy Williams (instructed by the Government Legal Department) for the First Defendant
Charles Banner QC and Matthew Henderson (instructed by Clarke Willmott LLP) for the
Third Defendants

The **Second and Fourth Defendants** did not appear and were not represented

Hearing dates: 2 & 3 February 2021

Approved Judgment

Mrs Justice Lang :

1. The Claimant applies for a statutory review pursuant to section 288 of the Town and Country Planning Act 1990 (“TCPA 1990”) of the decision of the First Defendant (“the Secretary of State”), made on 3 June 2020, to allow an appeal by the Third Defendant (“the Rew family”) and grant outline planning permission for a major mixed use development, and full permission for a change of use of agricultural buildings, on land at Wolborough Barton, Coach Road, Newton Abbot TQ12 1EJ (“the Site”).
2. The grant of planning permission comprised two distinct elements:
 - i) Outline permission for a mixed used development comprising circa 1,210 dwellings, a primary school, up to 12,650 sq. m. of employment floorspace, two care homes, community facilities, retail/local centre floorspace, open space and associated infrastructure. Only the location and access were determined; all other matters were to be approved by the local planning authority as reserved matters, in accordance with a Masterplan and Design Code (also to be approved by the local planning authority), and in accordance with detailed conditions.
 - ii) Full permission for a change of use of existing agricultural buildings to a hotel, restaurant and bar, involving erection of new build structures, an access road and parking.

This claim relates to the grant of outline permission only.

3. The Claimant is the Parish Council for the village and parish of Abbotskerswell which is close to the Site. It objected to the grant of planning permission.
4. The Rew family own the Site and are the applicants for planning permission. The Second Defendant (“the DC”) is the local planning authority, which failed to determine the Rew family’s application for planning permission. On the Rew family’s appeal to the Secretary of State, on 21 June 2018, the DC resisted the grant of planning permission, on the basis of the adverse impact on biodiversity.
5. The issue which concerned the Fourth Defendant (the provider of community health services in the locality) was the subject of a separate claim, which was settled prior to hearing.
6. On 3 July 2018 the Secretary of State recovered the appeal for his own determination. A public local inquiry was held by an Inspector, Frances Mahoney MRTPI IHBC, who sent her Report (“the IR”), dated 4 March 2020, to the Secretary of State. She recommended that planning permission be granted.
7. By a decision letter (“DL”) dated 3 June 2020, the Secretary of State agreed with the Inspector’s conclusions and recommendation, and so allowed the appeal and granted planning permission.
8. Permission to apply for statutory review was refused by Sir Ross Cranston, sitting as a High Court Judge, on 10 September 2020.
9. At an oral renewal hearing on 8 October 2020, Dove J. granted permission on the Claimant’s grounds of challenge numbered 1, 4 and 5. He also ruled that the issues

raised in ground 6(b) could be raised by the Claimant as part of grounds 4 and 5, though not as a freestanding ground of challenge.

Grounds of challenge

10. The Claimant challenged the grant of planning permission on the following grounds:
 - i) **Ground 1:** the Secretary of State erred in law by granting planning permission without having assessed any material environmental information relating to the assessment of greenhouse gas (“GHG”) emissions and climate change, in breach of the requirements of Article 2(1) of Directive 2011/92/EU (“the EIA Directive 2011”) and regulation 3(4) of the Town and Country Planning (Environmental Impact Assessment) Regulations 2011 (“the EIA Regulations 2011”).
 - ii) **Ground 4:** the Secretary of State erred in law by granting planning permission without first obtaining the requisite detailed information required to assess the likely significant effects on biodiversity, in particular, the Greater Horseshoe Bat (“GHB”), and instead relying upon such information to be submitted at reserved matters stage, in breach of the requirements of Article 2(1) of the EIA Directive 2011.
 - iii) **Ground 5:** the Secretary of State erred in law by granting planning permission in breach of regulation 70(3) of the Conservation of Habitats and Species Regulations 2017 (“the Habitats Regulations 2017”) which provides that outline planning permission must not be granted unless the competent authority is satisfied (whether by reason of the conditions and limitations to which the outline planning permission is to be made subject, or otherwise) that no development likely adversely to affect the integrity of a European site could be carried out under the permission, whether before or after obtaining approval for any reserved matters.
 - iv) **Ground 6(b)** (only as part of Grounds 4 and 5): the Secretary of State failed to understand Policy NA3(n) of the Local Plan, and/or acted irrationally, in granting planning permission on the basis of a GHB Mitigation Plan which was generalised rather than bespoke, and did not identify how adverse effects on the integrity of the South Hams Special Area of Conservation (“SAC”) would be avoided.

Planning history

11. The Site lies on the southern fringe of Newton Abbot. It is 66.72 ha in size and comprises undulating agricultural land, woodland, and several farm buildings.
12. The GHB is a European protected species and a significant proportion of the British population is contained within a series of caves in the Teignbridge and South Hams area. In consequence the SAC was established pursuant to Directive 92/43/EEC (“the Habitats Directive”) and the relevant regulations. It includes five Sites of Special Scientific Interest. The bats use the wider countryside of South Devon for commuting, foraging, roosting and mating.

13. The Site is not within the SAC. The Inspector found that the Site is outside the normal foraging range of the GHB population within the SAC (IR53) but it is part of a broader area of land over which the GHB population within the SAC travels from one component part of the SAC to another, occasionally foraging en-route (IR54). The earlier view that they travelled along “strategic flyways” or “critical corridors” had been disproved, and there was a consensus of scientific opinion at the Inquiry that the bats travelled in low numbers, widely dispersed across the landscape (IR56).

The Local Plan

14. The Site was allocated for a mixed use development, including housing, in Policy NA3 of the Teignbridge Local Plan 2013-2033. Policy S4 expresses the District’s future housing needs as an average of 620 dwellings per year. The Local Plan seeks to cluster its main future development needs into its main towns, and Newton Abbot is the largest of the main towns within the district. The Local Plan projects delivery of 1500 dwellings by 2033 from the NA3 allocation, with a target of 20% affordable homes. This development will deliver 1,210 new homes, including 20% affordable homes. A smaller development at Langford Bridge Farm is also proposed for the NA3 Wolborough allocation.
15. Policy NA3 of the Local Plan provides:

“**NA3 Wolborough** A site of approximately 120 hectares is allocated at Wolborough to deliver a sustainable, high quality mixed-use development which shall:

a) include a comprehensive landscape and design led masterplan for the strategic site allocation, produced with meaningful and continued input and engagement from stakeholders;

b) deliver 10 hectares of land for employment development, for office, general industrial or storage and distribution uses as appropriate to the site and its wider context, ensuring that there is also a mix of unit size to enable businesses to start up and expand; support will also be given to employment generating uses provided that they are compatible with the immediate surroundings and do not conflict with town centre uses;

c) deliver at least 1,500 homes with a target of 20% affordable homes;

d) provide social and community infrastructure including a youth centre, local shops, community facilities and a site of 5 hectares for a 420 place primary school including early years provision and a secondary school or other further education facility;

e) provide a vehicular route connecting the A380 South Devon Link Road with the A381;

- f) create a network of green infrastructure that contributes to the overall strategic network;
- g) respect the setting of the parish church of St Mary the Virgin;
- h) provide a green buffer between development and Decoy woods;
- i) protect and enhance the Wolborough Fen Site of Special Scientific Interest and flight routes and foraging areas of greater horseshoe bats (*emphasis added*);
- j) enhance or mitigate any impact on county wildlife sites, cirl bunting territories and barn owl sites;
- k) maximise opportunities for the generation of on-site renewable energy at a domestic scale and investigate opportunities for community scale renewable energy generation (*emphasis added*);
- l) create areas for local food production;
- m) provide formal and informal recreation space; and
- n) a bespoke Greater Horseshoe Bat mitigation plan for Wolborough must be submitted to and approved before planning permission will be granted. The plan must demonstrate how the site will be developed in order to sustain an adequate area of non-developed land as a functional part of the foraging area and strategic flyway used by commuting Greater Horseshoe Bats associated with the South Hams SAC. The plan must demonstrate that there will be no adverse effect on the SAC alone or in combination with other plans or projects (*emphasis added*).”

16. In addition to the express provision for the GHB in criteria (i) and (n) of Policy NA3, the Local Plan provided protection for GHBs in the area, as follows:
 - i) Policy EN8 Biodiversity Protection and Enhancement; EN9 Important Habitats and Features; Policy EN10 European Wildlife Sites and EN11 Legally Protected and Priority Species;
 - ii) Policy WE11 Green Infrastructure and the South Hams SAC Mitigation Strategy Supplementary Planning Document; Policy HT3 Heart of Teignbridge - Green Infrastructure.
17. Following examination by an Inspector (“the Local Plan Inspector”), the DC adopted the Local Plan on 6 May 2014.
18. In 2014, the Claimant applied under section 113 of the Planning and Compulsory Purchase Act 2004 (“PCPA 2004”) to quash parts of the Local Plan, in particular Policy NA3. The Claimant alleged that there had been a failure to comply with the Habitats

Directive and the Conservation of Habitats and Species Regulations 2010 in that more extensive GHB assessments ought to have been undertaken, and GHB mitigation measures put in place, at strategic, settlement and site level, before the Local Plan was adopted. The adopted policies were therefore undeliverable. The Inspector ought not to have approved the proposed Local Plan and the Council ought not to have adopted it.

19. In a judgment handed down on 16 December 2014, I dismissed the claim, for the reasons set out at [35] to [38] in the extract in Appendix 1.
20. The Claimant was refused permission to appeal by Sullivan LJ on the papers, and by Underhill LJ at a renewal hearing (Case No. C1/2015/0076). In this claim, the Claimant placed reliance upon Underhill LJ's judgment, and therefore it is included as Appendix 2 to this judgment.
21. The Abbotskerswell Neighbourhood Plan 2016-2033 was made on 31 October 2017. According to the IR, at [17], it accepts the principle of the NA3 allocation but highlights concerns in respect of the protection of the natural environment and the setting of Abbotskerswell in the landscape. It provides for the establishment of green infrastructure to minimise the impact of the allocation at NA3.

Application for planning permission

22. The Rew family applied for planning permission on 9 June 2017. The application was supported *inter alia* by an Environmental Statement ("ES"), dated June 2017, followed by several addendums. The DC did not determine the appeal, and so the Rew family appealed to the Secretary of State. The appeal was recovered by the Secretary of State because "it involves proposals which would significantly impact on the Government's objective to secure a better balance between housing demand and supply and create high quality, sustainable, mixed and inclusive communities" (Secretary of State's recovery letter dated 3 July 2018, quoted at IR2).

The Inspector's Report

23. The Inquiry sat on 26-28 March 2019 and 11-13 June 2019, with a site visit on 13 June 2019 and closings in writing on 10 July 2019. The Claimant took part as a Rule 6 Party.
24. The Inspector wrote a careful and detailed Report, dated 4 March 2020.
25. The Inspector set out the relevant planning policies supporting the principle of the development at the Site, including in particular Policy NA3 (IR15-18).
26. The Inspector recorded that the DC did not dispute the principle of development at the Site, but rather it disputed whether the Rew family had provided such information as the Secretary of State (as the competent authority) reasonably required for the purposes of undertaking an appropriate assessment (IR19, 32-33, 369). However, the DC subsequently changed its position on receipt of the 2019 Bat Survey, after the conclusion of the hearings, and then accepted that the Secretary of State had sufficient information to be satisfied that no development likely to adversely affect the integrity

of the South Hams SAC could be carried out at the outline stage consistent with the provisions of the Habitats Regulations (IR429).

27. The Inspector recorded that the Claimant did maintain an objection to the principle of development (IR34, 370).
28. The Inspector set out the cases at the Inquiry for the Rew family, the DC and the Claimant at length (IR35-256). This included the positions of the parties on alleged deficiencies in the ES, including on matters of climate change (IR83-95, 207-215), and the impacts on GHBs and the SAC (IR43-65. 102-149, 179-206).
29. The Inspector found that the principle of a mixed-use development on the Site “had been long established through appropriate and thorough planning processes” and that to question this principle “would fundamentally undermine the strategies and objectives of the Development Plan which has already been open to public scrutiny through consultation and examination and final adoption by the Council” (IR372-374).
30. The Inspector recorded that the Local Plan Inspector had described the allocation of the Site as “being a sustainable urban extension to Newton Abbott in a highly sustainable location”, and thus she considered that the amount of traffic generated by the development would be tempered by the number of residents using the new bus service as well as walking or cycling into Newton Abbot (IR396, 443).
31. Contrary to the Claimant’s submissions to the Inquiry, the Inspector reached a judgment that the information contained in the ES and the Addendums was sufficient (IR397).
32. The Inspector set out her findings on GHBs and the impact on the SAC at IR413 to 436.
33. The Inspector recorded at IR432 that the parties agreed an Appropriate Assessment was required, as “the appeal proposal represents a permanent and irreversible change to the functioning of this part of the landscape for the GHBs who commute through it”.
34. The Inspector undertook the Appropriate Assessment and concluded, at IR436:

“... the above measures of mitigation would be sufficient to ensure that the proposed development would not, beyond scientific doubt, have an adverse effect on the integrity of the South Hams SAC, nor would it result in a diminishing of the quality and importance of the SSSI as an ecological habitat. I consider it reasonable to deal with these matters at an outline stage in the knowledge of the various survey work outcomes, the conclusions of the LP Examining Inspector, the terms of the proffered mitigation and securing conditions and obligations, and the opportunity to re-visit the assessment at the reserved matters stage. These measures, to be delivered through conditions and the S106 obligations, would comply with LP Policy NA3 i) and n) which seek to protect the relevant ecologically important habitats, along with Policies EN8, EN9 and EN10, the objective of which is the maintenance and enhancement of biodiversity as a key element of sustainable development.”

35. In addressing the planning balance, the Inspector concluded at IR448:

“448. LP Policy NA3 a) seeks the submission of a comprehensive landscape and design led masterplan for the strategic site allocation, produced with meaningful and continued input and engagement from stakeholders. The submitted Illustrative Masterplan, in the context of an outline planning proposal which, essentially seeks to confirm the LP allocation for mixed use development covering the appeal site, as the largest section of that strategic commitment to growth, enshrined in the Development Plan, has come forward as a result of some pre-application consultation with the Council as well as the community. This appeal, and the consideration of the planning application before that, also gave an opportunity for parties to consider the conceptual development criteria and impacts. By the very evidence to the Inquiry stakeholders have engaged on the basis of the Illustrative Masterplan as an informing resource. The Design and Access Statement presents a direction of travel for the more detailed design of the scheme which, through a process of design evolution in which stakeholders should continue to be involved, would become apparent at the reserved matters stage. I consider that the spirit of LP Policy NA3 a) has been responded to and for this development to be delivered in a timely fashion to make the contribution that the Council anticipates from it in respect of the economic and social well-being of the District, progress forward must be made.”

36. Therefore the Inspector found that the proposed development was in accordance with the development plan, and the presumption in favour of sustainable development in paragraph 11(c) of the National Planning Policy Framework (“the Framework”) applied (IR449, 450).

37. After assessing heritage harm (which is not relevant to this claim), the Inspector decided to recommend that planning permission be granted for both the full and outline proposals.

The Secretary of State’s decision

38. On 3 June 2020 the Secretary of State issued a decision letter, agreeing with his Inspector, allowing the appeal and granting planning permission for the proposed development.

39. The Secretary of State agreed with the Inspector’s findings that the ES, along with other documents, contained sufficient information for him to assess the environmental impact of the proposed development (DL5).

40. He agreed with the Inspector that, in the light of the allocation in Policy NA3 Wolborough for a sustainable extension for Newton Abbot, the determination of this

appeal should not question the principle of a mixed-use development in this location (DL17-18).

41. The Secretary of State undertook an Appropriate Assessment at DL25 – 36. He concluded that there would be no adverse effect on the integrity of the SAC. In reaching this judgment, he took into account, at DL33:

“... the GHB Mitigation Plan, which will establish networks of connected and continuous habitat corridors extending across the appeal site and the wider landscape, preserving permeability across the landscape and allowing GHBs to continue commuting between parts of the SAC and outlying roosts. The corridors within the scheme will include reinforced hedgerows, which provide foraging grounds. There would also be a wetlands SUDS habitat that would provide further foraging habitats. A detailed lighting strategy to be delivered as part of a Reserved Matters applications would ensure minimal disturbance from light spill (IR428). The Secretary of State is content that these would all be secured by planning conditions.”

42. The Secretary of State also recorded at DL35, that he had reconsulted Natural England on the results of the 2019 Bat Survey and “Natural England have now confirmed that it is satisfied that the further and up-to-date GHB survey provides a suitable evidence base to inform a Habitats Regulations Assessment. They consider that the Secretary of State as the competent authority has sufficient information to be satisfied that no development likely to adversely affect the integrity of the South Hams SAC can be carried out under the outline permission consistent with the provisions of the Habitats Regulations”.
43. The Secretary of State agreed with the Inspector that the Site was “highly sustainable” and that the proposed development would provide options for modes of transport other than the car (DL44).
44. Overall, the Secretary of State reached the view that the proposed development was in accordance with the development plan as a whole, and the public benefits of the scheme – 1,210 new homes, including 20% affordable housing, commercial space, a new school and community facilities – outweighed the heritage harm. The material considerations indicated a decision in line with the development plan (DL48-52).
45. Accordingly, the Secretary of State allowed the appeal and granted planning permission, subject to conditions (DL52).

Conditions

46. The justification for the conditions was set out at IR301-321.
47. The conditions attached to the outline planning permission materially included:
- i) **Condition 6** requiring a Masterplan and Design Code to be submitted and approved by the DC, prior to the submission of any reserved matters

applications in relation to any phase. The Masterplan and Design Code shall include an explanation of how the design approach and layout (including landscaping and lighting) will achieve the proposed mitigation in the ES and the GHB Mitigation Plan, and shall include the location and accommodation of existing GHB corridors and the creation of additional GHB habitats and linkages (see Condition 6(e) and (k)).

- ii) **Condition 7** requiring an ecological mitigation strategy, based on the proposed mitigation in Chapter 8 of Volume 2 of the ES and the submitted GHB mitigation plan, to be submitted and approved by the DC, prior to any development taking place within each phase.
- iii) **Condition 8** requiring a Landscape and Ecology Implementation and Management Plan to be submitted and approved by the DC, prior to any development taking place within each phase.
- iv) **Condition 9** requiring a low emissions strategy for mitigating the air quality impacts of the relevant phase, to be submitted and approved by the DC, prior to any development taking place within any phase.
- v) **Condition 12** requiring a lighting strategy to be submitted and approved by the DC for each phase of development, prior to the installation of any external lighting on the site within any phase of the development. This shall include a dark areas/corridor map for lighting levels less than 0.5 lux in GHB commuting routes.
- vi) **Condition 14** requiring a Construction Environment Management Plan to be submitted and approved by the DC, prior to any development taking place within any phase of the development. This shall require low emission construction vehicles and air quality monitoring. An Ecological Construction Method Statement shall include “how GHB identified corridors will be protected during the construction phase as well as minimising light spill (no more than 0.5 lux in GHB corridors)”.

Law

Applications under section 288 TCPA 1990

- 48. Under section 288 TCPA 1990, a person aggrieved may apply to quash a decision on the grounds that (a) it is not within the powers of the Act; or (b) any of the relevant requirements have not been complied with, and in consequence, the interests of the applicant have been substantially prejudiced.
- 49. The general principles of judicial review are applicable to a challenge under section 288 TCPA 1990. Thus, the Claimant must establish that the Secretary of State misdirected himself in law or acted irrationally or failed to have regard to relevant considerations or that there was some procedural impropriety.

50. The Secretary of State referred to the summary of relevant principles set out by Lindblom LJ in *St Modwen Developments Ltd v Secretary of State for Communities and Local Government* [2017] EWCA Civ 1643, [2018] PTSR 746, at [6] – [7].
51. The exercise of planning judgment and the weighing of the various issues are matters for the decision-maker and not for the Court: *Seddon Properties Ltd v Secretary of State for the Environment* (1981) 42 P & CR 26. As Sullivan J. said in *Newsmith v Secretary of State for the Environment, Transport and the Regions* [2001] EWHC Admin 74, at [6]:
- “An application under section 288 is not an opportunity for a review of the planning merits.....”
52. In *Hopkins Homes v Secretary of State for Communities and Local Government* [2017] 1 WLR 1865, Lord Carnwath said, at [26], that claimants should “distinguish clearly between issues of interpretation of policy, appropriate for judicial analysis, and issues of judgment in the application of that policy; and not ... elide the two”.
53. A decision letter must be read (1) fairly and in good faith, and as a whole; (2) in a straightforward down-to-earth manner, without excessive legalism or criticism; (3) as if by a well-informed reader who understands the principal controversial issues in the case: see Lord Bridge in *South Lakeland v Secretary of State for the Environment* [1992] 2 AC 141, at 148G-H; Sir Thomas Bingham MR in *Clarke Homes v Secretary of State for the Environment* (1993) 66 P & CR 263, at 271; *Seddon Properties Ltd v Secretary of State for the Environment* (1981) 42 P & CR 26, at 28; and *South Somerset District Council v Secretary of State for the Environment* (1993) 66 P & CR 83.
54. The reasons in a decision letter are required to meet the standard set out in *South Buckinghamshire District Council v Porter (No 2)* [2004] 1 WLR 1953, per Lord Brown, at [36]:
- “36. The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the ‘principal important controversial issues’, disclosing how any issue of law or fact was resolved. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision. The reasoning must not give rise to a substantial doubt as to whether the decision-maker erred in law, for example by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds. But such adverse inference will not readily be drawn. The reasons need refer only to the main issues in the dispute, not to every material consideration. They should enable disappointed developers to assess their prospects of obtaining some alternative development permission, or, as the case may be, their unsuccessful opponents to understand how the policy or approach underlying the grant of permission may impact upon future such applications. Decision letters must be read in a straightforward manner, recognising that they are addressed to parties well aware of the issues involved and the arguments advanced. A reasons

challenge will only succeed if the party aggrieved can satisfy the court that he has genuinely been substantially prejudiced by the failure to provide an adequately reasoned decision.”

Lord Brown’s classic statement was held to be applicable in all planning decision-making in *R (CPRE Kent) v Dover District Council* [2017] UKSC 79, [2018] 1 WLR 108, per Lord Carnwath, at [35] – [37].

The development plan and material considerations

55. Section 70(2) TCPA 1990 provides that the decision-maker shall have regard to the provisions of the development plan, so far as material to the application. Section 38(6) of the PCPA 2004 provides:

“If regard is to be had to the development plan for the purpose of any determination to be made under the planning Acts, the determination must be made in accordance with the plan unless material considerations indicate otherwise.”

56. In *City of Edinburgh Council v Secretary of State for Scotland* 1998 SC (HL) 33, [1997] 1 WLR 1447, Lord Clyde explained the effect of this provision, beginning at 1458B:

“Section 18A [the parallel provision in Scotland] has introduced a priority to be given to the development plan in the determination of planning matters....

By virtue of section 18A the development plan is no longer simply one of the material considerations. Its provisions, provided that they are relevant to the particular application, are to govern the decision unless there are material considerations which indicate that in the particular case the provisions of the plan should not be followed. If it is thought to be useful to talk of presumptions in this field, it can be said that there is now a presumption that the development plan is to govern the decision on an application for planning permission..... By virtue of section 18A if the application accords with the development plan and there are no material considerations indicating that it should be refused, permission should be granted. If the application does not accord with the development plan it will be refused unless there are material considerations indicating that it should be granted....

Moreover the section has not touched the well-established distinction in principle between those matters which are properly within the jurisdiction of the decision-maker and those matters in which the court can properly intervene. It has introduced a requirement with which the decision-maker must comply, namely the recognition of the priority to be given to the development plan. It has thus introduced a potential ground on which the decision-maker could be faulted were he to fail to give

effect to that requirement. But beyond that it still leaves the assessment of the facts and the weighing of the considerations in the hands of the decision-maker. It is for him to assess the relative weight to be given to all the material considerations. It is for him to decide what weight is to be given to the development plan, recognising the priority to be given to it. As Glidewell L.J. observed in *Loup v. Secretary of State for the Environment* (1995) 71 P. & C.R. 175, 186:

“What section 54A does not do is to tell the decision-maker what weight to accord either to the development plan or to other material considerations.”

Those matters are left to the decision-maker to determine in the light of the whole material before him both in the factual circumstances and in any guidance in policy which is relevant to the particular issues.

.....

In the practical application of section 18A it will obviously be necessary for the decision-maker to consider the development plan, identify any provisions in it which are relevant to the question before him and make a proper interpretation of them. His decision will be open to challenge if he fails to have regard to a policy in the development plan which is relevant to the application or fails properly to interpret it. He will also have to consider whether the development proposed in the application before him does or does not accord with the development plan. There may be some points in the plan which support the proposal but there may be some considerations pointing in the opposite direction. He will require to assess all of these and then decide whether in light of the whole plan the proposal does or does not accord with it. He will also have to identify all the other material considerations which are relevant to the application and to which he should have regard. He will then have to note which of them support the application and which of them do not, and he will have to assess the weight to be given to all of these considerations. He will have to decide whether there are considerations of such weight as to indicate that the development plan should not be accorded the priority which the statute has given to it. And having weighed these considerations and determined these matters he will require to form his opinion on the disposal of the application. If he fails to take account of some material consideration or takes account of some consideration which is irrelevant to the application his decision will be open to challenge. But the assessment of the considerations can only be challenged on the ground that it is irrational or perverse.”

57. This statement of the law was approved by the Supreme Court in *Tesco Stores Limited v Dundee City Council* [2012] UKSC 13, [2012] PTSR 983, per Lord Reed at [17].
58. The requirement to take into account material considerations was recently reviewed by the Supreme Court in *R (Friends of the Earth Ltd & Ors) v Heathrow Airport Ltd* [2020] UKSC 52, in the judgment of the Court delivered jointly by Lord Hodge and Lord Sales, at 116 – 122:

“116. ... A useful summation of the law was given by Simon Brown LJ in *R v Somerset County Council, Ex p Fewings* [1995] 1 WLR 1037, 1049, in which he identified three categories of consideration, as follows:

“... [T]he judge speaks of a 'decision-maker who fails to take account of all and only those considerations material to his task'. It is important to bear in mind, however, ... that there are in fact three categories of consideration. First, those clearly (whether expressly or impliedly) identified by the statute as considerations to which regard must be had. Second, those clearly identified by the statute as considerations to which regard must not be had. Third, those to which the decision-maker may have regard if in his judgment and discretion he thinks it right to do so. There is, in short, a margin of appreciation within which the decision-maker may decide just what considerations should play a part in his reasoning process.”

117. The three categories of consideration were identified by Cooke J in the New Zealand Court of Appeal in *CREEDNZ Inc v Governor General* [1981] NZLR 172, 183:

“What has to be emphasised is that it is only when the statute expressly or impliedly identifies considerations required to be taken into account by the [relevant public authority] as a matter of legal obligation that the court holds a decision invalid on the ground now invoked. It is not enough that a consideration is one that may properly be taken into account, nor even that it is one which many people, including the court itself, would have taken into account if they had to make the decision.”

Cooke J further explained at p 183 in relation to the third category of consideration that, notwithstanding the silence of the statute, “there will be some matters so obviously material to a decision on a particular project that anything short of direct consideration of them by [the public authority] ... would not be in accordance with the intention of the Act.”

118. These passages were approved as a correct statement of principle by the House of Lords in *In re Findlay* [1985] AC 318, 333-334. See also *R (Hurst) v London Northern District Coroner* [2007] UKHL 13; [2007] 2 AC 189, paras 55-59 (Lord Brown of Eaton-under Heywood, with whom a majority of the Appellate Committee agreed); *R (Corner House Research) v Director of the Serious Fraud Office* [2008] UKHL 60; [2009] 1 AC 756, para 40 (Lord Bingham of Cornhill, with whom a majority of the Appellate Committee agreed); and *R (Samuel Smith Old Brewery (Tadcaster)) v North Yorkshire County Council* [2020] UKSC 3; [2020] PTSR 221, paras 29-32 (Lord Carnwath, with whom the other members of the court agreed). In the *Hurst* case, Lord Brown pointed out that it is usually lawful for a decision-maker to have regard to unincorporated treaty obligations in the exercise of a discretion (para 55), but that it is not unlawful to omit to do so (para 56).

119. As the Court of Appeal correctly held in *Baroness Cumberlege of Newick v Secretary of State for Communities and Local Government* [2018] EWCA Civ 1305; [2018] PTSR 2063, paras 20-26, in line with these other authorities, the test whether a consideration falling within the third category is "so obviously material" that it must be taken into account is the familiar *Wednesbury* irrationality test (*Associated Provincial Picture Houses Ltd v Wednesbury Corpn* [1948] 1 KB 223; *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, 410-411 per Lord Diplock).

120. It is possible to subdivide the third category of consideration into two types of case. First, a decision-maker may not advert at all to a particular consideration falling within that category. In such a case, unless the consideration is obviously material according to the *Wednesbury* irrationality test, the decision is not affected by any unlawfulness. Lord Bingham deals with such a case in *Corner House Research* at para 40. There is no obligation on a decision-maker to work through every consideration which might conceivably be regarded as potentially relevant to the decision they have to take and positively decide to discount it in the exercise of their discretion.

121. Secondly, a decision-maker may in fact turn their mind to a particular consideration falling within the third category, but decide to give the consideration no weight. As we explain below, this is what happened in the present case. The question again is whether the decision-maker acts rationally in doing so. Lord Brown deals with a case of this sort in *Hurst* (see para 59). This shades into a cognate principle of public law, that in normal circumstances the weight to be given to a particular consideration is a matter for the decision-maker, and this includes that a decision-maker might (subject to the test of

rationality) lawfully decide to give a consideration no weight: see, in the planning context, *Tesco Stores Ltd v Secretary of State for the Environment* [1995] 1 WLR 759 (HL), 780 (Lord Hoffmann).

122. The Divisional Court (para 648) and the Court of Appeal (para 237) held that the Paris Agreement fell within the third category identified in *Fewings*. In so far as it is an international treaty which has not been incorporated into domestic law, this is correct. In fact, however, as we explain (para 71 above), the UK's obligations under the Paris Agreement are given effect in domestic law, in that the existing carbon target under section 1 of the CCA 2008 and the carbon budgets under section 4 of that Act already meet (and, indeed, go beyond) the UK's obligations under the Paris Agreement to adhere to the NDCs notified on its behalf under that Agreement. The duties under the CCA 2008 clearly were taken into account when the Secretary of State decided to issue the ANPS.”

The EIA Directive 2011 and the EIA Regulations 2011

59. The application for planning permission, and the subsequent appeal, were subject to the EIA Directive 2011 and the EIA Regulations 2011. The EIA Directive 2011 was amended with effect from May 2014 by Directive 2014/52/EU, which required member states to implement the amendments by 16 May 2017. The Town and Country Planning (Environmental Impact Assessment) Regulations 2017 (“the EIA Regulations 2017”), which came into force on 16 May 2017, implemented the amendments into UK law. However, the transitional provisions in regulation 76(2) of the EIA Regulations 2017 were engaged, as the applicant for planning permission had requested an EIA scoping opinion prior to the commencement of the EIA Regulations 2017, and so the EIA Regulations 2011 continued to apply. Although the Claimant sought to rely on the amended Directive 2014/52/EU in its pleadings, Ms Dehon accepted at the hearing that this was incorrect, as the EIA Directive 2011 in its unamended form applied.

60. The recital to the EIA Directive 2011 provides:

“Pursuant to Article 191 of the Treaty on the Functioning of the European Union, Union policy on the environment is based on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should, as a priority, be rectified at source and that the polluter should pay. Effects on the environment should be taken into account at the earliest possible stage in all the technical planning and decision-taking processes” (*emphasis added*).

61. Article 2(1) of the EIA Directive 2011 provides:

“Member states shall adopt all measures necessary to ensure that, before consent is given, projects likely to have significant effect on the environment by virtue, inter alia, of their nature, size or

location are made subject to a requirement for development consent and an assessment with regard to their effects” (*emphasis added*).

62. The EIA Regulations 2011 implemented the EIA Directive 2011 into UK domestic law. The EIA Regulations 2011 use the term “development” in place of the term “projects” which is used throughout the Directive.
63. “EIA development” is defined in regulation 2(1) as “Schedule 1 development; or Schedule 2 development likely to have significant effects on the environment by virtue of factors such as its nature, size or location.”
64. It was common ground that the proposed development was Schedule 2 development.
65. Regulation 3(4) provides:

“(4) The relevant planning authority or the Secretary of State or an inspector shall not grant planning permission or subsequent consent pursuant to an application to which this regulation applies unless they have first taken the environmental information into consideration, and they shall state in their decision that they have done so.”
66. By regulation 2(1), the term “subsequent consent” is defined as “consent granted pursuant to a subsequent application”. A “subsequent application” is defined as:

“an application for approval of a matter where the approval –

 - (a) is required by or under a condition to which a planning permission is subject; and
 - (b) must be obtained before all or part of the development permitted by the planning permission may be begun.”
67. Regulation 8 makes provision for subsequent applications where environmental information has been previously considered. It provides:

“(2) Where it appears to the relevant planning authority that the environmental information already before them is adequate to assess the environmental effects of the development, they shall take that information into consideration in their decision for subsequent consent.

(3) Where it appears to the relevant planning authority that the environmental information already before them is not adequate to assess the environmental effects of the development, they shall serve a notice seeking further information in accordance with regulation 22(1).”
68. Regulation 9 makes provision for subsequent applications where environmental information has not been previously provided.

69. The “environmental information” which must be taken into account before determining an application is defined in regulation 2(1) as:

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

70. Regulation 2(1) further defines an “environmental statement” as a statement:

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

(b) that includes at least the information referred to in Part 2 of Schedule 4.”

71. Thus, the information required under Part 1 is such as is “reasonably required” whereas the information required under Part 2 is a mandatory minimum requirement.

72. Schedule 4 provides as follows:

“Information for inclusion in environmental statements

Part 1

1. Description of the development, including in particular:

(a) a description of the physical characteristics of the whole development and the land-use requirements during the construction and operational phases;

(b) a description of the main characteristics of the production processes, for instance, nature and quantity of the materials used;

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

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

3. A description of the aspects of the environment likely to be significantly affected by the development, including, in particular, population, fauna, flora, soil, water, air, climatic factors, material assets, including the architectural and

archaeological heritage, landscape and the inter-relationship between the above factors.

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

- (a) the existence of the development;
- (b) the use of natural resources;
- (c) the emission of pollutants, the creation of nuisances and the elimination of waste,

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

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

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

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

Part 2

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

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

3. The data required to identify and assess the main effects which the development is likely to have on the environment.

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

5. A non-technical summary of the information provided under paragraphs 1 to 4 of this Part.”

Planning Practice Guidance

73. The Planning Practice Guidance (“PPG”) gives guidance on multi-stage consents, at paragraph 053:

“In cases where a consent procedure involves more than one stage (a multi-stage consent), for example, a first stage involving an outline planning permission and a second stage dealing with reserved matters, the effects of a project on the environment should normally be identified and assessed when determining the outline planning permission.”

Outline planning applications and multi-stage consents

74. The difficulties which arise in the use of outline planning procedures in cases where an EIA is required have been considered extensively by the Courts.
75. In *R v Rochdale MBC ex parte Tew* [2000] Env LR 1, Sullivan J. rejected the submission that the use of outline permissions was inherently inconsistent with the requirements of the EIA Directive, but he recognised that a bare outline application would not comply with those requirements. In *R v Rochdale MBC ex parte Milne* [2001] Env LR 22, which concerned the same proposal, Sullivan J. said:

“93. In my judgment, integrating environmental assessment into the domestic procedure for seeking outline planning permission, which acknowledges this need for flexibility for some kinds of building projects, is not contrary to the objectives of the Directive.... Provided the outline application has acknowledged the need for details of a project to evolve over a number of years, within clearly defined parameters, provided the environmental assessment has taken account of the need for evolution, within those parameters, and reflected the likely significant effects of such a flexible project in the environmental statement, and provided the local planning authority in granting outline planning permission imposes conditions to ensure that the process of evolution keeps within the parameters applied for and assessed, it is not accurate to equate the approval of reserved matters with “modifications” to the project. The project, as it evolves with the benefit of approvals of reserved matters, remains the same as the project which was assessed.”

76. In *R (Wells) v Secretary of State for Transport, Local Government and the Regions* (C-2101/02) [2004] 1 CMLR 31, the ECJ held:

“50. As provided in Art.2(1) of Directive 85/337, the environmental impact assessment must be carried out “before consent is given”.

51. According to the first recital in the preamble to the directive, the competent authority is to take account of the environmental effects of the project in question “at the earliest possible stage” in the decision-making process.

52. Accordingly, where national law provides that the consent procedure is to be carried out in several stages, one involving a principal decision and the other involving an implementing decision which cannot extend beyond the parameters set by the principal decision, the effects which the project may have on the environment must be identified and assessed at the time of the procedure relating to the principal decision. It is only if those effects are not identifiable until the time of the procedure relating to the implementing decision that the assessment should be carried out in the course of that procedure.”

77. In *Commission of the European Communities v United Kingdom* (C-508-03) [2006] QB 764, the ECJ held that a grant of outline planning permission and an approval of reserved matters, taken together, constituted development consent within the meaning of Article 2(1) of EIA Directive 85/337/EEC. The effect of projects that were likely to significantly affect the environment had to be assessed before development consent was given, applying *Wells*. So where national law provided for a two-stage consent procedure consisting of a principal decision and an implementing decision which could not extend beyond the parameters of the principal decision, the project’s likely environmental effects had to be identified and assessed at the time of the procedure relating to the principal decision. However, the assessment could be carried out in the course of the later procedure relating to the implementing decision, but only if those effects were not identifiable until then. The Town and Country Planning (Assessment of Environmental Effects) Regulations 1988, which provided that an environmental impact assessment could only be carried out at the initial outline planning permission stage, and not at the later reserved matters stage, were contrary to Article 2(1) and Article 4(2) of the Council Directive 85/337, as amended. The regulations were subsequently amended.

78. In *R (Barker) v Bromley LBC* [2006] UKHL 52, [2007] 1 AC 470, the House of Lords considered the effect of the ruling in *Commission v UK*, which had been given in response to a preliminary reference in that case. Lord Hope said, at [22] to [25]:

“22. It does not follow however, where planning consent for a development takes this form, that consideration must be given to the need for an EIA at each stage in the multi-consent process. The first recital in the Directive indicates that the competent authority must take account of the effects on the environment of the project in question at the earliest possible stage in all the technical planning and decision-making processes: see also *Wells*, para 51. In the case of a Schedule 2 development the competent authority must decide at the outset whether an EIA is needed because the development is likely to have significant effects on the environment. An application for outline planning permission should be accompanied by sufficient information to enable that question to be answered and an EIA, if needed, to be

obtained and considered before outline planning permission is granted. The need for an EIA at the reserved matters stage will depend on the extent to which the environmental effects have been identified at the earlier stage.

23. If sufficient information is given at the outset it ought to be possible for the authority to determine whether the EIA which is obtained at that stage will take account of all the potential environmental effects that are likely to follow as consideration of the application proceeds through the multi-stage process. Conditions designed to ensure that the project remains strictly within the scope of that assessment will minimise the risk that those effects will not be identifiable until the stage when approval is sought for reserved matters. In cases of that kind it will normally be possible for the competent authority to treat the EIA at the outline stage as sufficient for the purposes of granting a multi-stage consent for the development: *R v Rochdale Metropolitan Borough Council, Ex p Milne* (2001) 81 P & CR 365, para 114, per Sullivan J.

24. As the European Court said in para 48 of its judgment, however, the competent authority may be obliged in some circumstances to carry out an EIA even after outline planning permission has been granted. This is because it is not possible to eliminate entirely the possibility that it will not become apparent until a later stage in the multi-stage consent process that the project is likely to have significant effects on the environment. In that event account will have to be taken of all the aspects of the project which have not yet been assessed or which have been identified for the first time as requiring an assessment. This may be because the need for an EIA was overlooked at the outline stage, or it may be because a detailed description of the proposal to the extent necessary to obtain approval of reserved matters has revealed that the development may have significant effects on the environment that were not anticipated earlier. In that event account will have to be taken of all the aspects of the project that are likely to have significant effects on the environment which have not yet been assessed or which have been identified for the first time as requiring an assessment. The flaw in the 1988 Regulations was that they did not provide for an EIA at the reserved matters stage in any circumstances.

25. In my opinion it is plain that the appellant is entitled to a declaration that by precluding any consideration for the need for an EIA at the stage when, following the grant of outline planning permission for the development, consideration is being given to an application for approval of reserved matters the 1988 Regulations failed fully and properly to implement the Directive.”

79. In *Smith v Secretary of State for the Environment, Transport and the Regions* [2003] EWCA Civ 262, the Court of Appeal confirmed that it is lawful to leave the final details (for example, of a landscaping scheme) to be clarified either in the context of a reserved matter where outline planning consent has been granted, or by virtue of a condition where full planning consent is being given, provided that constraints were placed on the planning permission within which future details could be worked out (per Waller LJ at [32] – [33], [45]).
80. In *R (Squire) v Shropshire Council* [2019] EWCA Civ 888, the Court of Appeal summarised the legal principles at [14] – [15]:

“14. In Case C-2/07 *Abraham v Wallonia* [2008] Env. L.R. 32, the European Court of Justice emphasized (in paragraph 26 of its judgment) that an EIA “must, in principle, be carried out as soon as it is possible to identify and assess all the effects which the project may have on the environment ...”. In her opinion in that case Advocate General Kokott said (at paragraph 75) that “the aim of [EIA] is for the decision on a project to be taken with knowledge of its effects on the environment and on the basis of public participation”; that “[investigation] of the environmental effects makes it possible ... to prevent the creation of pollution or nuisances where possible, rather than subsequently trying to counteract them”; and that “[the] requirement of public participation implies that the participation can still influence the decision on the project”.

15. Domestic case law acknowledges that an environmental statement will not always contain the “full information” about a project, and that the EIA regulations “recognise that an environmental statement may well be deficient, and make provision through the publicity and consultation processes for any deficiencies to be identified so that the resulting ‘environmental information’ provides the local planning authority with as full a picture as possible” (see the judgment of Sullivan J., as he then was, in *R. (on the application of Blewett) v Derbyshire County Council* [2003] EWHC 2775 (Admin), at paragraph 41, citing the speech of Lord Hoffmann in *R. v North Yorkshire County Council, ex p. Brown* [2000] 1 A.C. 397, at p.404).”

81. In the context of paragraph 153 of the Framework and a local plan policy on energy and zero carbon, the High Court in *R (Hewitt) v Oldham Metropolitan Borough Council* [2020] EWHC 3405 (Admin) held that it was permissible to address climate change matters at the reserved matters stage (per Julian Knowles J. at [236], [237], [242]).

Review of the adequacy of an environmental statement

82. The role of the Court in reviewing the adequacy of the assessment in an environmental statement has been recently reviewed by the Supreme Court in *Friends of the Earth* at [142] to [146]:

“142. It is common ground that the effect of article 5(2) and (3) is to confer on the Secretary of State a discretion regarding the information to include in an environmental report. It is also common ground that the approach to be followed in deciding whether the Secretary of State has exercised his discretion unlawfully for the purposes of that provision is that established in relation to the adequacy of an environmental statement when applying the EIA Directive, as set out by Sullivan J in *R (Blewett) v Derbyshire County Council* [2003] EWHC 2775 (Admin); [2004] Env LR 29 (“*Blewett*”). *Blewett* has been consistently followed in relation to judicial review of the adequacy of environmental statements produced for the purposes of environmental assessment under the EIA Directive and endorsed at the highest level. In *Shadwell Estates Ltd v Breckland District Council* [2013] EWHC 12 (Admin) Beatson J held that the *Blewett* approach was also applicable in relation to the adequacy of an environmental report under the SEA Directive. The Divisional Court and the Court of Appeal in the present case endorsed this view (at paras 401-435 and paras 126-144 of their respective judgments). The respondents have not challenged this and we see no reason to question the conclusion of the courts below on this issue.

143. As Sullivan J held in *Blewett* (paras 32-33), where a public authority has the function of deciding whether to grant planning permission for a project calling for an environmental impact assessment under the EIA Directive and the EIA Regulations, it is for that authority to decide whether the information contained in the document presented as an environmental statement is sufficient to meet the requirements of the Directive, and its decision is subject to review on normal *Wednesbury* principles. Sullivan J observed (para 39) that the process of requiring that the environmental statement is publicised and of public consultation “gives those persons who consider that the environmental statement is inaccurate or inadequate or incomplete an opportunity to point out its deficiencies”. The EIA Directive and Regulations do not impose a standard of perfection in relation to the contents of an environmental statement in order for it to fulfil its function in accordance with the Directive and the Regulations that it should provide an adequate basis for public consultation. At para 41 Sullivan J warned against adoption of an “unduly legalistic approach” in relation to assessment of the adequacy of an environmental statement and said:

“... The [EIA] Regulations should be interpreted as a whole and in a common-sense way. The requirement that ‘an [environmental impact assessment] application’ (as defined in the Regulations) must be accompanied by an environmental statement is not

intended to obstruct such development. As Lord Hoffmann said in *R v North Yorkshire County Council, Ex p Brown* [2000] 1 AC 397, at p 404, the purpose is ‘to ensure that planning decisions which may affect the environment are made on the basis of full information’. In an imperfect world it is an unrealistic counsel of perfection to expect that an applicant's environmental statement will always contain the ‘full information’ about the environmental impact of a project. The Regulations are not based upon such an unrealistic expectation. They recognise that an environmental statement may well be deficient, and make provision through the publicity and consultation processes for any deficiencies to be identified so that the resulting ‘environmental information’ provides the local planning authority with as full a picture as possible. There will be cases where the document purporting to be an environmental statement is so deficient that it could not reasonably be described as an environmental statement as defined by the Regulations ..., but they are likely to be few and far between.”

Lord Hoffmann (with whom the other members the Appellate Committee agreed on this issue) approved this statement in *R (Edwards) v Environment Agency* [2008] UKHL 22; [2008] 1 WLR 1587, para 38.

144. As the Divisional Court and the Court of Appeal held in the present case, the discretion of the relevant decision-maker under article 5(2) and (3) of the SEA Directive as to whether the information included in an environmental report is adequate and appropriate for the purposes of providing a sound and sufficient basis for public consultation leading to a final environmental assessment is likewise subject to the conventional *Wednesbury* standard of review. We agree with the Court of Appeal when it said (para 136):

“The court’s role in ensuring that an authority - here the Secretary of State - has complied with the requirements of article 5 and Annex I when preparing an environmental report, must reflect the breadth of the discretion given to it to decide what information ‘may reasonably be required’ when taking into account the considerations referred to - first, ‘current knowledge and methods of assessment’; second, ‘the contents and level of detail in the plan or programme’; third, ‘its stage in the decision-making process’; and fourth ‘the extent to which certain matters are more appropriately assessed at different levels in that

process in order to avoid duplication of the assessment'. These requirements leave the authority with a wide range of autonomous judgment on the adequacy of the information provided. It is not for the court to fix this range of judgment more tightly than is necessary. The authority must be free to form a reasonable view of its own on the nature and amount of information required, with the specified considerations in mind. This, in our view, indicates a conventional 'Wednesbury' standard of review - as adopted, for example, in *Blewett*. A standard more intense than that would risk the court being invited, in effect, to substitute its own view on the nature and amount of information included in environmental reports for that of the decision-maker itself. This would exceed the proper remit of the court."

145. The EIA Directive and the SEA Directive are, of course, EU legislative instruments and their application is governed by EU law. However, as the Court of Appeal observed (paras 134-135), the type of complex assessment required in compiling an environmental report for the purposes of environmental assessment is an area where domestic public law principles have the same effect as the parallel requirements of EU law. As Advocate General Léger stated in his opinion in *Upjohn Ltd v Licensing Authority Established Under Medicines Act 1968* (Case C-120/97) [1999] 1 WLR 927, para 50, "[the] court has always taken the view that when an authority is required, in the exercise of its functions, to undertake complex assessments, a limited judicial review of the action which that authority alone is entitled to perform must be exercised, since otherwise that authority's freedom of action would be definitively paralysed ...".

146. The appropriateness of this approach is reinforced in the present context, having regard to the function which an environmental report is supposed to fulfil under the scheme of the SEA Directive. It is intended that such a report should inform the public by providing an appropriate and comprehensible explanation of the relevant policy context for a proposed strategic plan or project to enable them to provide comments thereon, and in particular to suggest reasonable alternatives by which the public need for development in accordance with the proposed plan or project could be met. As article 6(2) states, the public is to have an early and "effective" opportunity to express their opinion on a proposed plan or programme. It is implicit in this objective that the public authority responsible for promulgating an environmental report should have a significant editorial discretion in compiling the report to ensure that it is properly focused on the key environmental and other factors

which might have a bearing on the proposed plan or project. Absent such a discretion, there would be a risk that public authorities would adopt an excessively defensive approach to drafting environmental reports, leading to the reports being excessively burdened with irrelevant or unfocused information which would undermine their utility in informing the general public in such a way that the public is able to understand the key issues and comment on them. In the sort of complex environmental report required in relation to a major project like the NWR Scheme, there is a real danger that defensive drafting by the Secretary of State to include reference to a wide range of considerations which he did not consider to be helpful or appropriate in the context of the decision to be taken would mean that the public would be drowned in unhelpful detail and would lose sight of the wood for the trees, and their ability to comment effectively during the consultation phase would be undermined.”

83. Ms Dehon submitted that the judgment of the Court of Appeal in *R (Plan B Earth) v Secretary of State for Transport* [2020] EWCA Civ 214, [2020] PTSR 1446, at [137], established that a more intensive standard of review should be applied where there was a “patent defect” in the assessment, such as in the case of *Squire*. Ms Dehon submitted that this conclusion was not disturbed by the Supreme Court when it reversed the Court of Appeal’s decision. She submitted that the failure to make any reference to GHG emissions was a “patent defect” in the ES in this claim.

84. In *Squire*, which concerned the likely environmental effects of spreading manure from the proposed intensive poultry development on to neighbouring fields, the Court of Appeal held, at [69], that the environmental statement was:

“deficient in its lack of a proper assessment of the environmental impacts of the storage and spreading of manure as an indirect effect of the proposed development. In this respect it was not compliant with the requirements of the EIA Directive and the EIA Regulations”.

Although the local planning authority had regard to the control which the Environment Agency would exercise over the farm by means of the environmental permit, it failed to consider what measures would be required in respect of third party land, not covered by the permit.

85. In my judgment, Ms Dehon’s legal analysis is incorrect. Neither *Squire* nor *Plan B* established a separate category of unlawfulness based on “patent defect”. The deficiencies in the assessment in *Squire* demonstrated conventional public law errors (i.e. irrationality and failure to take into account relevant considerations), which resulted in a breach of the requirements of the EIA Directive and regulations. As Holgate J. said in *R (Finch) v Surrey County Council* [2020] EWHC 3559 (Admin), at [120]:

“...the challenge in *Squire* succeeded because of a “patent defect” in the ES and EIA (*Plan B Earth* at [137]). It was plainly irrational for the local authority to have based their decision on

an EIA which had completely failed to address an “obviously material consideration” (*R (Blewett) v Derbyshire County Council* [2004] Env. LR. 29 and *Gathercole v Suffolk County Council* [2020] EWCA Civ 1179 at [53] to [55])....”

86. The adequacy of the ES in this claim falls to be assessed according to conventional *Wednesbury* principles, as set out by the Supreme Court in *Friends of the Earth*.

The Habitats Directive and the Habitats Regulations 2017

87. Directive 92/43/EEC (“the Habitats Directive”) makes provision for the conservation of special areas of conservation, designated by Member States. Article 6 provides, so far as is material:

“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

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 an 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.

4. If, in spite of a negative assessment of the implications for the site and in the absence of alternative solutions, a plan or project must nevertheless be carried out for imperative reasons of overriding public interest, including those of a social or economic nature, the Member State shall take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected. It shall inform the Commission of the compensatory measures adopted.”

88. The Habitat Regulations 2017 give effect to the Habitats Directive in domestic law.

89. Regulation 63 of the Habitats Regulations 2017 provides, so far as is material:

“Assessment of implications for European sites and European offshore marine sites

(1) A competent authority, before deciding to undertake, or give any consent, permission or other authorisation for, a plan or project which—

(a) is likely to have a significant effect on a European site or a European offshore marine site (either alone or in combination with other plans or projects), and
(b) is not directly connected with or necessary to the management of that site,
must make an appropriate assessment of the implications of the plan or project for that site in view of that site's conservation objectives.

(2) A person applying for any such consent, permission or other authorisation must provide such information as the competent authority may reasonably require for the purposes of the assessment or to enable it to determine whether an appropriate assessment is required.

(3) The competent authority must for the purposes of the assessment consult the appropriate nature conservation body and have regard to any representations made by that body within such reasonable time as the authority specifies.

(4) It must also, if it considers it appropriate, take the opinion of the general public, and if it does so, it must take such steps for that purpose as it considers appropriate.

(5) In the light of the conclusions of the assessment, and subject to regulation 64, the competent authority may agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the European site or the European offshore marine site (as the case may be).

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

.....”

90. Pursuant to regulation 70 of the Habitats Regulations 2017, regulation 63 applies to the grant of planning permission on an appeal under section 78 of the TCPA 1990. Regulation 70 provides, so far as is material:

“(1) The assessment provisions apply in relation to—
.....

(c) granting planning permission, or upholding a decision of the local planning authority to grant planning permission... on determining an appeal under section 78 of that Act (right to appeal against planning decisions) in respect of such an application; on an application under Part 3 of the TCPA 1990 (control over development);

...

(2) Where the assessment provisions apply, the competent authority may, if it considers that any adverse effects of the plan or project on the integrity of a European site or a European offshore marine site would be avoided if the planning permission were subject to conditions or limitations, grant planning permission, or, as the case may be, take action which results in planning permission being granted or deemed to be granted, subject to those conditions or limitations.

(3) Where the assessment provisions apply, outline planning permission must not be granted unless the competent authority is satisfied (whether by reason of the conditions and limitations to which the outline planning permission is to be made subject, or otherwise) that no development likely adversely to affect the integrity of a European site or a European offshore marine site could be carried out under the permission, whether before or after obtaining approval of any reserved matters.

(4) In paragraph (3), “outline planning permission” and “reserved matters” have the same meanings as in section 92 of the TCPA 1990 (outline planning permission).”

91. Thus, by regulation 70(3) of the Habitats Regulations 2017, UK domestic law expressly requires an authority to undertake an appropriate assessment before granting outline planning permission, in those applications for planning permission where the assessment criteria in regulation 63 of the Habitats Regulations 2017 are met.
92. Guidance on the content of an appropriate assessment has been given by the CJEU in Case C-127/02 *Landelijke Vereniging tot Behoud van de Waddenzee v Staatsscretaris van Lanbouw (Coöperatieve Producentenorganisatie van de Nedelandse Kokkelvisserij UA interveniend)* [2005] All ER (EC) 353:

“52. As regards the concept of ‘appropriate assessment’ within the meaning of Article 6(3) of the Habitats Directive, it must be pointed out that the provision does not define any particular method for carrying out such an assessment.

53. None the less, according to the wording of that provision, an appropriate assessment of the implications for the site concerned of the plan or project must precede its approval and take into account the cumulative effects which result from the combination of that plan or project with other plans or projects in view of the site's conservation objectives.

54. Such an assessment therefore implies that all the aspects of the plan or project which can, either individually or in combination with other plans or projects, affect those objectives must be identified in the light of the best scientific knowledge in the field...

.....

56. It is therefore apparent that the plan or project in question may be granted authorisation only on the condition that the competent national authorities are convinced that it will not adversely affect the integrity of the site concerned.”

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

“33. Under Article 6(3) of the Habitats Directive, an appropriate assessment of the implications of a plan or project for the site concerned implies that, before the plan or project is approved, all the aspects of the plan or project which can, either individually or in combination with other plans or projects, affect the conservation objectives of that site must be identified, in the light of the best scientific knowledge in the field. The competent national authorities are to authorise an activity on the protected site only if they have made certain that it will not adversely affect the integrity of that site. That is so when there is no reasonable scientific doubt as to the absence of such effects (judgment of 8 November 2016, *Lesoochranárske zoskupenie VLK*, C-243/15, EU:C:2016:838, paragraph 42 and the case-law cited).

34. The assessment carried out under that provision may not have lacunae and must contain complete, precise and definitive findings and conclusions capable of dispelling all reasonable scientific doubt as to the effects of the proposed works on the protected area concerned (judgment of 25 July 2018, *Grace and Sweetman*, C-164/17, EU:C:2018:593, paragraph 39 and the case-law cited).”

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

“41. The process envisaged by article 6(3) should not be over-complicated. As Richards LJ points out, in cases where it is not obvious, the competent authority will consider whether the “trigger” for appropriate assessment is met (and see paras 41-43 of *Waddenzee*). But this informal threshold decision is not to be confused with a formal “screening opinion” in the EIA sense. The operative words are those of the Habitats Directive itself. All that is required is that, in a case where the authority has found there to be a risk of significant adverse effects to a protected site, there should be an “appropriate assessment”. “Appropriate” is not a technical term. It indicates no more than that the assessment should be appropriate to the task in hand: that task being to satisfy the responsible authority that the project “will not

adversely affect the integrity of the site concerned” taking account of the matters set in the article. As the court itself indicated in *Waddenzee* the context implies a high standard of investigation. However, as Advocate General Kokott said in *Waddenzee* [2005] All ER (EC) 353, para 107:

“the necessary certainty cannot be construed as meaning absolute certainty since that is almost impossible to attain. Instead, it is clear from the second sentence of article 6(3) of the Habitats Directive that the competent authorities must take a decision having assessed all the relevant information which is set out in particular in the appropriate assessment. The conclusion of this assessment is, of necessity, subjective in nature. Therefore, the competent authorities can, from their point of view, be certain that there will be no adverse effects even though, from an objective point of view, there is no absolute certainty.”

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

95. The Secretary of State referred me to the summary of principles by Peter Jackson LJ in *Mynnyd y Gwynt Ltd v Secretary of State for Business Energy and Industrial Strategy* [2018] 2 CMLR 34 at [8]:

“8. The proper approach to the Habitats Directive has been considered in a number of cases at European and domestic level, which establish the following propositions:

(1) The environmental protection mechanism in art.6(3) is triggered where the plan or project is likely to have a significant effect on the site’s conservation objectives: *Landelijke Vereniging tot Behoud van de Waddenzee v Staatssecretaris van Landbouw, Natuurbeheer en Visserij* (C-127/02) EU:C:2004:482; [2005] 2 C.M.L.R. 31 at [42] (“*Waddenzee*”).

(2) In the light of the precautionary principle, a project is “likely to have a significant effect” so as to require an appropriate assessment if the risk cannot be excluded on the basis of objective information: *Waddenzee* [2005] 2 C.M.L.R. 31 at [44].

(3) As to the appropriate assessment, “appropriate” indicates no more than that the assessment should be appropriate to the task in hand, that task being to satisfy the responsible authority that the project will not adversely affect the integrity of the site concerned. It requires a high standard of investigation, but the issue ultimately rests on the judgement of the authority: *R. (on*

the application of Champion) v North Norfolk DC [2015] UKSC 52, Lord Carnwath at [41] (“*Champion*”).

(4) The question for the authority carrying out the assessment is: “*What will happen to the site if this plan or project goes ahead; and is that consistent with maintaining or restoring the favourable conservation status of the habitat or species concerned?*”: *Sweetman v An Bord Pleanà la* (C-258/11) EU:C:2013:220; [2013] 3 C.M.L.R. 16, Advocate General at para. 50.

(5) Following assessment, the project in question may only be approved if the authority is convinced that it will not adversely affect the integrity of the site concerned. Where doubt remains, authorisation will have to be refused: *Waddenzee* [2005] 2 C.M.L.R. 31 at [56]–[57].

(6) Absolute certainty is not required. If no certainty can be established, having exhausted all scientific means and sources it will be necessary to work with probabilities and estimates, which must be identified and reasoned: *Waddenzee*, Advocate General at paras 107 and 97, endorsed in *Champion* [2015] UKSC 52 at [41] and by Sales LJ in *Smyth v Secretary of State for Communities and Local Government* [2015] EWCA Civ 174 at [78] (“*Smyth*”).

(7) The decision-maker must consider secured mitigation and evidence about its effectiveness: *European Commission v Germany* (C-142/16) EU:C:2017:30 at [38].

(8) It would require some cogent explanation if the decision-maker had chosen not to give considerable weight to the views of the appropriate nature conservation body: *R. (Hart District Council) v Secretary of State for Communities and Local Government* [2008] EWHC 1204 (Admin) at [49].

(9) The relevant standard of review by the court is the *Wednesbury* rationality standard, and not a more intensive standard of review: *Smyth* [2015] EWCA Civ 174 at [80].”

96. The summary of principles in *Mynnyd y Gwynt Ltd* did not include the decision of the CJEU in *People Over Wind & Anor v Coillte Teoranta* (Case C-323/17 & C-294/17), [2018] PTSR 484, to the effect that, on a proper interpretation of Article 6(3) of the Habitats Directive, it was not appropriate, at the initial screening stage, to take account of mitigation measures. However, mitigation measures are to be taken into account when subsequently undertaking an appropriate assessment.
97. The Claimant relied in particular upon the judgment of the CJEU in the joined cases of *Coöperatie Mobilisation for the Environment UA and Others v College van gedeputeerde staten van Limburg* (C-293/17 & C-294/17) [2019] Env LR 27, (referred to as “Dutch Nitrogen”). The CJEU held that it was for the national courts to conduct

a thorough examination of the scientific soundness of the appropriate assessment (at [101] and [110]). The CJEU also gave guidance in relation to mitigation at the appropriate assessment stage. The Court made it clear that, if the expected benefits or mitigations are “uncertain” at the time of the appropriate assessment, either because the procedures needed to accomplish them have not yet been carried out, or because the level of scientific knowledge does not allow them to be identified and quantified with certainty, then they cannot be taken into account (at [121] – [132]).

98. There are binding domestic authorities to the effect that the relevant standard of review by the Court is *Wednesbury* rationality, and not a more intensive standard of review. In *Smyth v Secretary of State for Communities and Local Government* [2015] EWCA Civ 174, [2015] PTSR 1417, Sales LJ said, at [78] – [80]:

“78. A further issue arising from Mr Jones’s submissions concerns the standard of review by a national court supervising the compliance by a relevant competent authority with the legal requirements in Article 6(3) of the Habitats Directive. Although the legal test under each limb of Article 6(3) is a demanding one, requiring a strict precautionary approach to be followed, it also clearly requires evaluative judgments to be made, having regard to many varied factors and considerations. As AG Kokott explained in para. 107 of her Opinion in *Waddenzee*, the conclusion to be reached under an “appropriate assessment” under the second limb of Article 6(3) cannot realistically require the attainment of absolute certainty that there will be no adverse effects; the assessment required “is, of necessity, subjective in nature”. The same is equally true of the assessment at the screening stage under the first limb of Article 6(3). Under the scheme of the Habitats Directive, the assessment under each limb is primarily one for the relevant competent authority to carry out.

79. Mr Jones submitted that Patterson J erred in treating the assessment by the Inspector of compliance of the proposed development with the requirements of Article 6(3) as being a matter for judicial review according to the *Wednesbury* rationality standard. He said that in applying EU law under the Habitats Directive the national court is required to apply a more intensive standard of review which means, in effect, that they should make their own assessment afresh, as a primary decision-maker.

80. I do not accept these submissions. In the similar context of review of screening assessments for the purposes of the Environmental Impact Assessment (EIA) Directive and Regulations, this Court has held that the relevant standard of review is the *Wednesbury* standard, which is substantially the same as the relevant standard of review of “manifest error of assessment” applied by the CJEU in equivalent contexts: see *R (Evans) v Secretary of State for Communities and Local Government* [2013] EWCA Civ 114; [2013] JPL 1027, [32]-

[43], in which particular reference is made to Case C-508/03, *Commission of the European Communities v United Kingdom* [2006] QB 764, at paras. [88]-[92] of the judgment, as well as to the *Waddenzee* case. Although the requirements of Article 6(3) are different from those in the EIA Directive, the multi-factorial and technical nature of the assessment called for is very similar. There is no material difference in the planning context in which both instruments fall to be applied. There is no sound reason to think that there should be any difference as regards the relevant standard of review to be applied by a national court in reviewing the lawfulness of what the relevant competent authority has done in both contexts. Like this Court in the *Evans* case (see para. [43]), I consider that the position is clear and I can see no proper basis for making a reference to the CJEU on this issue.”

99. These passages in *Smyth* were cited with approval in *Mynnyd y Gwynt Ltd*, at [8], per Peter Jackson LJ.

Ground 1

100. The Claimant submitted that the Secretary of State erred in granting planning permission without having assessed any material environmental information relating to the assessment of GHG emissions and climate change, in breach of Article 2(1) of the EIA Directive 2011 and Regulation 3(4) of the EIA Regulations 2011.
101. The Claimant re-stated the submissions which were made to the Inquiry. It referred to the IEMA (Institute of Environmental Management & Assessment) principles on climate change and GHG emissions for EIAs. The Claimant also referred to the advice given by the DC to the Rew family, on 27 November 2015, to the effect that the ES scoping report should include the effects of the project on GHG emissions. The Claimant contrasted the lack of reference to GHG emissions in the ES for this development with the ES addendum (January 2019) for the Langford Bridge Farm proposal which specifically addressed GHG emissions.
102. I refer to the relevant statutory framework and case law at paragraphs 59 to 86 above.
103. As the Secretary of State correctly submitted, climate change is a matter falling within Part 1 of Schedule 4 to the EIA Regulations 2011. It follows, pursuant to the definition of “environmental statement” in regulation 2 of the EIA Regulations 2011, that the Secretary of State was only required to consider the adequacy of such information on climate change in the ES as “may reasonably be required”. In deciding what information is “reasonably required” in an ES, the Secretary of State had a “wide range of autonomous judgment on the adequacy of the information provided” and “must be free to form a reasonable view of its own on the nature and amount of information required”, subject only to review on *Wednesbury* grounds (*Friends of the Earth*, at [144]). As I have already explained, there is no separate ground of review where there is a “patent defect” in assessment (e.g. the case of *Squire*).
104. In my view, it is apparent from the decision letter that the Secretary of State reached a judgment that the information provided in the ES, and the additional information

provided, was sufficient, and that no further information, including on climate change, was reasonably required. At the Inquiry, the Claimant contended that the information provided on climate change was inadequate (IR207 – 215). The Rew family submitted that the Claimant’s contentions were without merit, unsupported by any evidence, and failed to recognise the allocated status of the Site (IR83 – 95). It seems that the Inspector was not persuaded by the Claimant’s references to the IEMA principles, the Langford Bridge Farm assessment of GHG emissions or the DC’s advice on the scoping opinion (summarised at paragraph 101 above). At IR397, the Inspector concluded:

“397. Given the size of the appeal site, the nature and scale of the proposed development and the potential impact on environmental resources, an Environmental Statement (ES) was produced for the proposed development. It sprang from previous work included in the environmental assessment relevant to the LP, although was more detailed in respect of being site specific. Various inadequacies have been alleged in respect of the content and coverage of the ES. It has been supplemented through this appeal with additional clarification and evidence. A further Addendum was submitted partly dealing with Air Quality and this too has been taken into account in the consideration of this appeal. I am also conscious that this is a site which has already been through a LP Examination and subjected to a raft of environmental testing, at that stage, for the Allocation to be adopted. The ES should not be used as a means of delaying already tested development by tying it up in legal knots. The ES should be a proportionate response to the scale and nature of development, its location, as well as considering what has gone before in respect of environmental assessment and decisions taken. The Council did not allege any deficiency in the generality of the environmental assessments submitted and subsequently supplemented. They were able to come to reasoned conclusions on the environmental effects of the appeal proposal save for the impact upon the GHBs which this Report will come to. I too consider the submitted environmental assessments to be sufficient to appropriately inform this decision.”

105. The Secretary of State expressly agreed with the Inspector, stating at DL5:

“Having taken account of the Inspector’s comments at IR397, the Secretary of State is satisfied that the Environmental Statement and other additional information provided complies with the above Regulations and that sufficient information has been provided for him to assess the environmental impact of the proposal.”

Thus, on my reading of the decision, the Secretary of State considered the Claimant’s criticisms but rejected them.

106. In my view, the Secretary of State was entitled to reach these conclusions, for the reasons which he gave, and by reference to the IR and other material before him.

107. The Site was allocated for development in the Local Plan, and therefore the Secretary of State concluded that the principle of development was already established and should not be questioned (DL17, 18). Thus, on this issue, he accepted the submissions of the Rew family and the DC, and rejected the submissions of the Claimant (IR19; IR34, IR369-375).
108. The Site had “already been through a LP examination and subject to a raft of environmental testing, at that stage, for the Allocation to be adopted” (IR397).
109. The Local Plan Inspector’s Report (April 2014) assessed the soundness of the proposed Local Plan’s provision on climate change:

“Does the LP address issues of climate change satisfactorily? Is Policy EN3 regarding carbon reduction justified and consistent with national policy in the NPPF? Will increased employment lead to more very unclear commuting by car?”

16. The overall strategy would create the most sustainable pattern of development through urban extensions. It would reduce travel by car through encouraging walking and cycling and would enable more effective and efficient public transport services. Policy EN3 is intended to ensure implementation of Policy S7, which seeks to achieve a reduction of carbon emissions in line with the national target in the Climate Change Act 2008 of an 80% reduction between 1990 and 2050... .”

110. In his report at paragraph 75, the Local Plan Inspector concluded “after careful consideration of the many objections to its development, I have come to the same conclusion as the Council that the NA3 development would provide for a sustainable urban extension to Newton Abbot and is sound”.
111. Policy NA3 Wolborough states that the site allocation will deliver a “sustainable” development, and the supporting text at 7.25, refers to the “opportunity to create a sustainable neighbourhood for Newton Abbott”.
112. Policy S6 Resilience provides that the Council will work with communities, developers and infrastructure providers to ensure that the future impact of climate change and fossil fuel scarcity is minimised through adaptations and mitigation. Policy EN4 Flood Risk addresses flood risk at new developments.
113. Policy S7 Carbon Emission Targets sets out the strategy for the reduction of carbon emissions, in accordance with Government statutory targets. The supporting text at 2.34 explains that car mileage per person is higher in smaller settlements because of the need to travel further to access jobs, services and facilities. Since travel is a key emitter of carbon dioxide, the concentration of development in the larger and more sustainable developments forms a key element in the sustainable strategy of the Local Plan.
114. Policy EN3 Carbon Reduction Plans provides that development proposals should seek to minimise their carbon footprint to achieve the carbon emissions target in Policy S7. Major developments will be required to produce a carbon reduction plan. According to the supporting text at 5.12, such plans could include transport assessments, indicating

sustainable transport modes; the design of buildings, going beyond building regulation requirements; renewable energy within the Site and rain water harvesting.

115. Policy NA3 Wolborough provides, at criterion (k), that development shall “maximise opportunities for the generation of on-site renewable energy at a domestic scale and investigate opportunities for community scale renewable energy generation”. See also the supporting text at 7.38.
116. Policy EN6 Air Quality provides that the Council will act to improve air quality, meeting national targets. Major developments will be required to provide sufficient information to assess their impact.
117. Policy S9 Sustainable Transport provides for sustainable transport, helping to deliver a low carbon economy.
118. In her Report, the Inspector referred to the sustainability of the Site, consistently with the Local Plan strategy, at IR15-22, IR369-375, IR396, IR404-412 (air quality and traffic) and at IR443.
119. The sustainability of the Site, in accordance with the strategy in the Local Plan, was identified by the Secretary of State as a public benefit. He said, at DL44:

“As set out at IR443, the appeal site is in a location accessible to services and facilities described as “highly sustainable” and the encouragement of cycling, walking, implementation of the Travel Plan, along with the provision of the new circular bus route, would provide options for other modes of transport other than the car...”

120. The Local Plan was subject to a sustainability appraisal and a Strategic Environmental Assessment (“SEA”) which specifically considered climate change, both generally, and in respect of the allocation under Policy NA3. The sustainability appraisal was supplemented by two addendum appraisals. It was assessed that the shift to housing in sustainable travel locations near to existing towns, and away from the villages and rural areas, would result in “a significant benefit in climate change terms” (Further Addendum to the Sustainability Appraisal at p.80). The appraisals and the SEA were examined and endorsed by the Local Plan Inspector. The Secretary of State was entitled to proceed on the basis that the appraisals and the SEA complied with the requirements of the SEA Directive (see *R (Noble Organisation Ltd) v Thanet DC* [2005] EWCA Civ 782, [2006] Env LR 8, at [37]).
121. As to the evidence in support of the application for planning permission, the assessments in the ES which were relevant to climate change were as follows:
 - i) Chapter 10: Transport & accessibility, with an addendum report;
 - ii) Chapter 11: Water resources, flood risk and drainage;
 - iii) Chapter 12: Air quality, with an addendum report;
 - iv) Chapter 14: Cumulative effects.

122. Pursuant to Policy NA3 criterion (k), an Energy Strategy Statement dated June 2017 was submitted with the application. Consistently with the guidance in the supporting text to Local Plan EN3, the proposed strategy was to reduce energy demand through energy efficiency improvements, such as enhanced insulation and air permeability, which would achieve a carbon reduction of approximately 5% over Building Regulations 2013 levels. The use of renewable technologies would only be appropriate on a plot by plot basis. Solar panels and waste water heat recovery systems would be suitable for houses, and a ground source heat pump for the school and local centre. A Waste Audit Statement covering the principles of recycling was also submitted.
123. The Inspector's Report considered the assessments which were submitted, and reached conclusions on issues relating to air quality (IR404 – 414), flood risk (IR398 - 403), and transport (IR389 - 396). The Secretary of State considered these issues at DL37 – 39, and agreed with the Inspector's conclusions. He found, at DL49, that the proposal would deliver a new link road that would help to improve air quality in the District. He also imposed conditions on the permission, as recommended by the Inspector, including a requirement for a design code (which addresses pedestrian and cycleways and the collection of waste and recycling), a low emissions strategy to address air quality, and a Construction Environment Management Plan (requiring low emission construction vehicles).
124. In the light of the factors set out at paragraphs 107 to 123 above, I consider that the Secretary of State acted rationally in rejecting the Claimant's submission that the environmental information provided was inadequate because it did not address GHG emissions, despite the DC's advice for the scoping opinion, and the IEMA principles, which had been applied in the Langford Bridge Farm ES. GHG emissions had been considered in the context of the Local Plan, the sustainability appraisal and the SEA. After much deliberation, it was decided that the Site should be allocated for a mixed use development, despite the Claimant's objections to the development. The Site was highly sustainable and it accorded with the strategy of reducing car travel, identified as a major contributor to GHG emissions. The application for planning permission accorded with the development plan. It is apparent that the Secretary of State had climate change issues well in mind, in particular, the sustainability of the Site, transport, flood risks, air quality and a low emissions strategy. In my judgment, the Claimant has not surmounted the high hurdle of demonstrating that the Secretary of State exercised his judgment irrationally in concluding that he had the environmental information which was reasonably required to determine the appeal, in accordance with Article 2(1) of the EIA Directive 2011 and regulation 3(4) of the EIA Regulations 2011.
125. Alternatively, even if there was an error of law in determining the appeal without more information about GHG emissions, I would have declined to quash the decision, because it would inevitably have been the same, absent the legal error, applying the test in *Simplex GE (Holdings) v Secretary of State for the Environment* [1989] 57 P & CR 306, at [42], and *Canterbury City Council v Secretary of State for Housing, Communities and Local Government* [2019] EWHC 1211 (Admin), per Dove J. at [78] – [85].
126. In considering what, if any, difference a GHG emission assessment could have made, it is instructive to consider the assessment in the Langford Bridge Farm ES addendum which the Claimant presented as a model which this ES should have followed. It observed (at 15.20) that assessment of GHG emissions was an "emerging practice". It

identified the significant carbon emissions generated by the current agricultural use, as a result of nitrous oxide in fertilisers, methane gas from cows and manure, and fuel used in agricultural machinery (at 15.22). It then assessed GHG emissions at the construction and operational phase of the development, concluding that they would not be significant and did not require mitigation. It went on to identify climate change impacts which did require mitigation at the detailed design stage, including flood risks; protection of site habitat and species from climate change; and risks to construction employees.

127. If a similar assessment had been carried out in this case, it would first have identified the likely extent of GHG emissions from the current agricultural use, and the likely extent of GHG emissions from the building and vehicles at the proposed development. It would then have considered how the emissions could be reduced. I take into account that the Langford site is much smaller, and therefore I assume that the impact of the built development will be less than at this Site.
128. Whatever the outcome of the GHG emission assessment, it is clear from the decision that the Secretary of State would not have re-opened the Local Plan strategy that considerably more homes were needed in the District, and that urban extensions were the most sustainable locations, because of the reduction in travel, and therefore carbon emissions. Indeed, the Local Plan strategy was informed by a strategic assessment of climate change factors, including GHG emissions. Moreover, the Secretary of State expressly rejected a challenge to the principle of development at this Site, pursuant to Policy NA3 Wolborough.
129. The proposed development was in accordance with the development plan, and at DL49, the Secretary of State found that the benefits (housing, a school, commercial space, employment opportunities and economic benefits) attracted significant weight in favour of the proposal. Even if the GHG emissions generated by the proposed development were treated as a material consideration against the proposal (which is far from certain), I have no doubt that the Secretary of State would have concluded that it was outweighed by the benefits of the proposal.
130. For these reasons, Ground 1 does not succeed.

Ground 4

131. Under Ground 4, the Claimant submitted that the Secretary of State erred in law by granting outline planning permission without first obtaining the requisite detailed information required to assess the likely significant effects on biodiversity, in particular, the GHB, and instead relying upon such information to be submitted at reserved matters stage, in breach of the requirements of Article 2(1) of the EIA Directive 2011.
132. The Claimant referred to the need for more detailed information on the GHB “strategic flyway”. At the Inquiry, the Claimant relied on the updated report of Conservation First, Berthinussen A & Altringham J of May 2019: “The likely impact of the proposed NA3 Wolborough development and associated mitigation, with particular reference to greater horseshoe bats of the South Hams Special Area of Conservation” which noted that:

“The mitigation plan provided in the HRA is again vague and lacks important detail. ‘Dark corridors’ are proposed across the site for commuting bats but these are narrow and close to roads, footpaths and buildings and are likely to be subject to light, noise and recreational disturbance. Effective mitigation for light pollution will be essential, but very little information is provided. The corridors will also be severed in multiple places by access roads, which may act as barriers or create a collision mortality risk for bats attempting to cross them. Most of the proposed mitigation measures have not been proven to be effective, such as plantings and raised embankments to guide bats over roads, temporary guides such as Heras fencing or ‘dead hedging’ and new or relocated roosting structures. Where new plantings or habitat are proposed, little consideration is given to the time it will take for them to become established or the need for them to be functional in advance of any impacts (i.e. prior to construction commencing). It is also not clear whether mitigation measures, such as corridors, will be integrated with those in the adjacent NA3 Wolborough development or existing habitats in the wider landscape....”

133. The Claimant criticised mistakes in the statement of Mr Seaton, planning agent for the Rew family, and the evidence of Dr Holloway to the Inquiry that strategic flyways could be as little as 15 – 20 metres in width, based on the case of *R (Devon Wildlife Trust) v Teignbridge DC* [2015] EWHC 2159 (Admin). The Claimant also submitted that the assessment of the cumulative impacts on the GHB was not sufficiently robust.
134. In my judgment, the Claimant’s challenge did not fully reflect the legal framework within which the Secretary of State’s decision was made. Although the EIA Directive 2011 and the EIA Regulations 2011 provide that environmental effects are to be taken into account at the earliest possible stage, and before consent is given (see paragraphs 60 to 65 above), the case law has made it clear that, where national law provides for a multi-stage procedure, and the environmental effects are identified and assessed at outline stage, details of the development (including further assessment of environmental effects, if required) may be finalised at reserved matters stage, within the parameters set by the grant of outline permission and the conditions attached thereto (see paragraphs 74 to 81 above). Regulation 8 of the EIA Regulations 2011 makes provision for the relevant planning authority to seek further environmental information, if required (for example, at reserved matters stage).
135. Biodiversity, in particular the impact on GHBs, is a matter falling within Part 1 of Schedule 4 to the EIA Regulations 2011. It follows, pursuant to the definition of “environmental statement” in regulation 2 of the EIA Regulations 2011, that the Secretary of State was only required to consider the adequacy of such information on GHBs as “may reasonably be required”. In deciding what information is “reasonably required” in an ES, the Secretary of State had a “wide range of autonomous judgment on the adequacy of the information provided” and “must be free to form a reasonable view of its own on the nature and amount of information required”, subject only to review on *Wednesbury* grounds (*Friends of the Earth*, at [144]). There is no separate

ground of review for cases, such as *Squire*, where there has been a “patent defect” in assessment.

136. In this case, the Secretary of State reached a judgment that the information provided in the ES was sufficient, and that no further information, including on matters of biodiversity, was reasonably required (DL15). He agreed with the judgment reached by the Inspector on this issue at IR397.
137. The Secretary of State and the Inspector took full account of the “various inadequacies” that the Claimant alleged as to the content and coverage of the ES (IR397, DL5). This included the Claimant’s evidence and submissions on the lack of sufficient biodiversity information on GHB, which were set out in detail at IR179-206. These submissions have simply been repeated in this claim.
138. However, the Secretary of State and the Inspector also took into account the evidence and submissions of the DC and Natural England (whose views as a statutory consultee should be given considerable weight, and only departed from for cogent reasons: see *Mynydd v Gwynt Ltd*, per Peter Jackson LJ, at [8]). Their views differed from those of the Claimant. Both the DC and Natural England concluded, in the light of the 2019 Bat Survey, that there was sufficient information on the impact on GHBs and the SAC available to the Secretary of State.
139. The Inspector summarised her findings on the evidence at IR420 to 429:

“420. The appellants’ bat surveys indicate that the areas of wooded edge and hedgerow habitats together with areas of grazed pasture are likely to be used on occasion by individual GHBs. However, based on the normal foraging range of some 4 km, the distance between the component SAC parts and the appeal site, and the nature of the GHB actual flight distances, it places any claimed importance of the site as a likely foraging area in doubt²⁶⁵. Therefore, it is reasonable to conclude that the appeal site does not lie within any defined sustenance zone in relation to any European designated site.

421. The concept of Strategic Flyways (SF) was considered by the parties and one was identified running westwards along the southern boundary of the appeal site. However, the identification of this SF was not based on site-specific radiotracking data, but on assumed occurrences. This reduces the reliance which can be placed on any value which could be ascribed to the SF for the GHB population specific to the SAC. More recent guidance identifies that outside of sustenance zones GHBs are dispersed widely and in low numbers using a complex network of commuting routes, rather than just a few key SFs. New draft guidance will replace SF with Landscape Connectivity Zones which coalesces the entire network of flyways in recognition of the need to maintain permeability across the SAC landscape and is based on a better understanding that GHBs are widely dispersed. The appeal site would be outside of the 4 km Sustenance Zone but within the Landscape Connectivity Zone so

would still trigger a detailed assessment. This emerging guidance would further reduce any reliance on SF as a restrictive feature in development terms”

422. It seems to me that currently the value of the appeal site for GHBs is as part of a more extensive network of ‘pathways’ which allows the bats to travel between roost sites across the South Devon countryside which could include journeys to and from the five component parts of the SAC from more distant roosts such as Conitor Copse.

423. One of the main issues for the Council and Natural England in respect of the body of evidence already submitted by the appellants to comply with the Habitats Directive and requirements of the Habitat Regulations, was that the bat survey work dated back to 2013-2014 and was considered insufficient to inform a Habitat Regulation Assessment. However, the Council had commissioned in 2019 their own Bat Survey dated November 2019, which was submitted in evidence and can be considered a reliable and up to date GHB survey based upon best practice. Natural England was consulted on survey scope and methodology.

424. The most recent Bat Survey dated November 2019 concludes that bats were observed to favour substantial hedgerows and tree lines (especially adjacent to pasture), woodland edge and dark lane habitats. Key areas included Stonemans Hill to the west of the appeal site, Priory Road to the south and hedgerow networks linking these with Wolborough Barton and Decoy Brake woodland. The fields and hedgerows between the woodland and the industrial estate off Kingskerswell Road is a current key area and beyond the boundaries of the appeal site. These areas mainly bound the appeal site but are established routes upon which the proposed development would not impact. No GHB roosts were identified on the appeal site in this recent survey and this confirms the outcome in this regard of the 2013-2014 survey. The Illustrative Masterplan has incorporated a route along the southern boundary which would allow for a number of pathways along hedgerows and lanes along which the GHBs can fly and forage. The ability of bats to fly along the identified main route within the Bat Survey 2019 would be retained. Green corridors could also be incorporated to enable GHBs and other bats to access transient foraging areas within Wolborough Fen and the woodland of Decoy Country Park. This would allow bats to continue to move through the landscape unimpeded and with access to impromptu feeding areas.

425. At the time the LP Examining Inspector was considering LP Policy NA3 the concept of the SF was unchallenged. The Examining Inspector reported that whilst a bat flyway ran along

the southern boundary of the site the Council's expert witness indicated that a buffer of green space did not necessarily have to be 500m wide to be effective and that there would be adequate space for the flyway to be properly protected. Natural England at the LP Examination stage stated that the Plan proposals would provide for satisfactory protection of the bats and raised no objection to the allocation.

426. The Examining Inspector's conclusions set out that the network of commuting routes/pathways should be wide enough to allow for sufficient habitat along its path which GHBs can traverse. The 250 metres wide main pathway achievable within the development parameters would serve as an effective bat highway.

427. On the basis of the outcomes of the most recent bat survey the Council is content that in so far as assessing if the competent authority now has sufficient information to be satisfied that no development likely to adversely affect the integrity of the South Hams SAC can be carried out under the outline permission consistent with the provisions of the Habitats Regulations. Natural England's position has been that in the absence of an up to date bat survey there would be insufficient information on which to complete an assessment to conclude that there would be no adverse effect on the integrity of the site. Having evaluated the Bat Survey 2019 Natural England considered some comparison work necessary between the surveys from 2013-2014 and that of 2019 to ascertain whether the mitigation measures proffered in the GHB Mitigation Plan would still stand as being relevant. However, as the Council highlight there are some variations in the survey protocol/analysis between the surveys which make such a comparison of limited value. The overall results of the 2019 survey, in the context of the results from the 2013-2014 survey would be sufficiently robust to inform an AA and mitigation at outline stage.

428. The approach of the GHB Mitigation Plan is to establish networks of connected and continuous habitat corridors extending across the appeal site and to the wider landscape. The retention and enhancement of green space is also key to the strategy. The Plan includes the retention of a green corridor of some 250 metres in width which would preserve the permeability across the landscape for the GHBs allowing commuting between the parts of the SAC and outlying roosts. The corridors within the scheme include reinforced hedgerows which are valuable commuting features for GHBs as well as providing habitats for foraging. The wetland SUDS habitat, including a marshy/meadow grassland and orchard areas, would also provide valuable foraging habitat. The detailed lighting strategy to be included at reserved matters stage would ensure

minimal disturbance to GHB foraging and commuting habitat as a result of light spill.

429. The up to date Bat Survey has allowed the Council to move their position to one of agreeing that matters in respect of the following can be agreed at reserved matters stage with the imposition of conditions on any grant of outline permission to secure those details which would in essence only come about through the detailed design of the scheme: route of the new Spine Road, lighting assessment, identification and retention of GHB corridors and other GHB habitats to be overlaid with the finalised Masterplan. The Council are now content that the competent authority has sufficient information to be satisfied that no development likely to adversely affect the integrity of the South Hams SAC could be carried out at this outline stage consistent with the provisions of the Habitats Regulations.”

140. Although the Inspector recorded the evidence of Dr Holloway, on behalf of the Rew family, on the required width of strategic flyways (at IR60), which I accept appears to have been based on a misreading of the judgment in *R (Devon Wildlife Trust) v Teignbridge DC* [2015] EWHC 2159 (Admin), the Inspector did not adopt Dr Holloway’s approach in her findings.
141. The cumulative effects of the Wolborough NA3 allocation were considered in section 8.8.5 of the ES in June 2017. However, by the date of the Inquiry, the DC had resolved to grant planning permission for a development at Langford Bridge Farm on a site which exceeded its allocation by some 7.53 ha. Therefore an Addendum to the ES was prepared in April 2019 to assess the implications of the extended site, in so far as it had not already been assessed. It considered the Langford Bridge ES, which assessed the impact on GHB and included a suite of mitigation and monitoring measures. The Inspector assessed the cumulative and in-combination effects of the Langford Bridge Farm development at IR430 – 431, on the basis of the environmental information for both sites, and the assessments and conclusions of the DC when considering the application for planning permission. She accepted that there would be permanent and irreversible change to the functioning of the area for the GHBs who commute to and from the SAC. However, she was satisfied that the mitigation measures proposed would be sufficient to ensure that the proposed development would not have an adverse effect on the integrity of the SAC. The Inspector’s assessment was, in my view, sufficiently robust.
142. The Secretary of State assessed the impact on GHBs and the SAC at DL25 to 36. He confirmed at DL35, that he had reconsulted Natural England on the results of the 2019 Bat Survey and that Natural England “consider that the Secretary of State as the competent authority has sufficient information to be satisfied that no development likely to adversely affect the integrity of the South Hams SAC can be carried out under the outline permission consistent with the provisions of the Habitats Regulations”.
143. The Secretary of State, at DL31, agreed with the finding of the Inspector that the Site, which is located between 7 km and 20 km from the Site of Special Scientific Interest (“SSSI”) components of the SAC, did not fall within any defined sustenance zone for

GHBs. Rather, the value of the Site for GHBs was as part of a network of commuting routes, which could include journeys to and from the five component parts of the SAC.

144. On this basis, the Secretary of State and the Inspector found that there was a need to ensure landscape permeability, and that the measures set out in the GHB Mitigation Plan, which will establish networks of habitat corridors across the site and the wider landscape, would preserve permeability and allow GHBs to continue commuting (DL31-36, IR424-436). Weight was also placed on the green corridors in the illustrative masterplan and the light strategy to be included as reserved matters (IR424, DL33). The Secretary of State and the Inspector reached the judgment that these mitigation measures would all be secured by planning conditions and that it was appropriate for these to come about through the detailed design of the development (DL33; IR429, 436). This was reflected in the framework of planning conditions, tying the GHB Mitigation Plan to the Masterplan and Design Code and the ecological mitigation strategy, which would require approval by the local planning authority prior to the submission of reserved matters and/or prior to any development taking place on phases (conditions 6 and 7).
145. I accept that it was reasonable for the Secretary of State to conclude that the identification of the location of GHB corridors and habitat, and “dark areas” in the lighting strategy, was most appropriately and effectively undertaken in conjunction with the proposals for the detailed design and layout of the development.
146. In my judgment, the Secretary of State made a series of rational planning judgments, based on the evidence, which cannot be impugned on *Wednesbury* grounds.
147. Therefore Ground 4 does not succeed.

Ground 5

148. Under Ground 5, the Claimant submitted that the Secretary of State failed to comply with regulation 70(3) of the Habitats Regulations 2017, which provides that outline permission must not be granted unless the competent authority is satisfied (whether by conditions or otherwise) that no development likely adversely to affect the integrity of a European site could be carried on whether before or after approval of any reserved matters. The Claimant alleged that the Secretary of State misunderstood the level of scrutiny and certainty necessary in order to take mitigation measures into account in light of the Dutch Nitrogen cases (see paragraph 97 above).
149. In particular, the Claimant criticised the Secretary of State’s reliance upon an Illustrative Masterplan which did not demonstrate mitigation with any certainty; a lighting strategy about which no details were provided; and the bespoke GHB Mitigation Plan, which was vague and lacked important detail, according to the analysis of Dr Berthinussen and Professor Altringham.
150. Under Ground 6(b) (pleaded in its Reply), the Claimant submitted that the bespoke GHB Mitigation Plan, required by Policy NA3(n), had to be approved before planning permission was granted. It could not be left to reserved matters stage. This was confirmed by Underhill LJ in his judgment refusing permission to appeal against the

dismissal of the Claimant's challenge to the Local Plan (paragraphs 4 and 10, at Appendix 2).

151. At IR304-307, the Inspector explained that the size and extent of the proposal meant that there would be several phases of development, carried out by a number of different developers. Part of the reason that Policy NA3(n) requires a bespoke GHB Mitigation Plan to be submitted and approved before planning permission was granted was to ensure the overall co-ordination of all developers in all phases, so that there would be no adverse effect on the SAC and the GHBs, alone or in combination with other developments.
152. In my judgment, it was apparent from the way in which the Claimant presented its submissions that essentially its case was that all details of matters which could affect site integrity had to be provided at outline stage. I accept the Secretary of State's submission in response that the Claimant has misunderstood regulation 70(3) of the Habitats Regulations 2017 as it expressly provides that the role of conditions and limitations in contributing to the avoidance of adverse effects to integrity can be taken into account when considering applications for outline planning permission. The approach contended for by the Claimant, whereby all details of matters which may affect site integrity have to be assessed at the outline stage, would effectively require an application for a full planning permission. This would render the role of outline planning permissions in relation to development requiring appropriate assessment nugatory and would mean that the wording in regulation 70(3) is meaningless.
153. I note that there is no equivalent provision to regulation 70(3) in the Habitats Directive, and so it is not referenced in the CJEU case law. This is probably because the UK's two-stage consent procedure (outline planning permission followed by approval of reserved matters) does not exist in other EU Member States (see *R (Wingfield) v Canterbury City Council* [2019] EWHC 1974 (Admin), at [49]).
154. In any event, it forms no part of the *ratio* of the Dutch Nitrogen cases that the competent authority may not take into account conditions and limitations in contributing to the avoidance of adverse effects to the integrity of the site.
155. It is the responsibility of the competent authority to undertake an appropriate assessment, and in the course of doing so, to make a judgment as to whether the information available is sufficient to dispel all reasonable scientific doubt. The guidance in the Dutch Nitrogen cases at [101] and [110] concerning national courts undertaking an examination of the scientific soundness of the appropriate assessment does not indicate that the court should deviate from a review of the Secretary of State's conclusions in the appropriate assessment only on *Wednesbury* grounds (see paragraphs 98 and 99 above).
156. The Claimant's approach to regulation 70(3) of the Habitats Regulations 2017, and the Rew family's response to it, were considered at IR43-50, and the Inspector set out her conclusion at IR436. On my reading of the IR, the Inspector rejected the Claimant's approach. The Secretary of State agreed with the Inspector's conclusions at DL25-36.
157. The Inspector undertook a detailed consideration of the GHBs and the impact on the SAC, at IR413 to 432, much of which is quoted at paragraph 139 above. She expressly considered the GHB mitigation plan and the lighting strategy, and the Langford Bridge

Farm proposal. She correctly set out the test to be applied under the Habitats Directive and the Habitats Regulations 2017, at IR433-434. She concluded at IR436:

“... the above measures of mitigation would be sufficient to ensure that the proposed development would not, beyond scientific doubt, have an adverse effect on the integrity of the South Hams SAC, nor would it result in a diminishing of the quality and importance of the SSSI as an ecological habitat. I consider it reasonable to deal with these matters at an outline stage in the knowledge of the various survey work outcomes, the conclusions of the LP Examining Inspector, the terms of the proffered mitigation and securing conditions and obligations, and the opportunity to re-visit the assessment at the reserved matters stage. These measures, to be delivered through conditions and the S106 obligations, would comply with LP Policy NA3 i) and n) which seek to protect the relevant ecologically important habitats, along with Policies EN8, EN9 and EN10, the objective of which is the maintenance and enhancement of biodiversity as a key element of sustainable development.”

158. The Secretary of State undertook an appropriate assessment at DL25 – 36, drawing on the Inspector’s findings in the IR. He expressly had regard to the GHB Mitigation Plan and the lighting strategy, and he was satisfied that these matters would be secured by the planning conditions proposed in Annex B to his decision letter (DL33). At DL34, he placed reliance upon the opinion of Natural England, the statutory consultee, which considered that “the Secretary of State had sufficient evidence to be satisfied that no development likely to adversely affect the integrity of the SAC could be carried out under the outline permission consistent with the provisions of the Habitats Regulations”. He concluded, at DL36, that there would be no adverse effect on the integrity of the SAC.
159. The Secretary of State’s decision imposed a framework of planning conditions relating to GHBs (condition 6 (Masterplan and Design Code), condition 7 (ecological mitigation strategy), and condition 12 (lighting)) which set out clearly defined parameters for the approval of reserved matters, which enabled the Secretary of State to conclude, with sufficient certainty, that the proposed development would not adversely affect the integrity of the SAC. The GHB Mitigation Plan was tied to the Masterplan and Design Code and the ecological mitigation strategy, which would require approval prior to the submission of reserved matters and/or prior to any development taking place. Under condition 6, the Masterplan and Design Code was to be formulated broadly in accordance with the submitted Design and Access Statement and Illustrative Masterplan, and specific requirements were set out at (a) to (k). The careful way in which the conditions were drafted ensured that all developers at all phases would have to comply with the Masterplan and Design Code and the ecological mitigation strategy. Under condition 15, the Construction Environment Management Plan (CEMP) and Ecological Construction Method Statement protected GHB corridors and minimised light spill during the construction phases.
160. As I have already stated under Ground 4, I accept that it was reasonable for the Secretary of State to conclude that the identification of the location of GHB corridors

and habitat, and the “dark areas” for the lighting strategy, was most appropriately and effectively undertaken in conjunction with the proposals for the detailed design and layout of the development.

161. As to Ground 6(b), I do not consider that Underhill LJ’s judgment provides any support for the Claimant’s challenge.
162. In respect of the settlement level plans, Mr Seaton explained in his witness statement, at paragraph 7.2, that at Local Plan stage “there was never any hint of a settlement level plan for Newton Abbot”. That accords with paragraph 76 of my judgment in the Local Plan challenge where I said:

“76. Natural England also recommended provision for bespoke settlement mitigation plans in three areas (excluding the Newton Abbot area which affects the Claimant), and the Council agreed to do this. Paragraph 5.29 of the Plan provided:

“Bespoke mitigation plans will be provided at the settlement level for Chudleigh, Bovey Tracey and Kingsteignton to provide a clear policy basis for developers who bring forward development in these locations, in order to ensure the South Hams SAC is protected with respect to in-combinations impacts from developments proposed in the Plan.”” (*emphasis added*)

163. In respect of the bespoke GHB Mitigation Plan, required by Policy NA3(n), this was duly submitted to, and approved by, the Secretary of State in the course of the planning permission procedure. At the Inquiry, and in this Court, the Claimant challenged the adequacy of the bespoke GHB Mitigation Plan, submitting that all details should be approved at outline stage. The Secretary of State, in the exercise of his planning judgment, took a different view. Underhill LJ’s judgment does not touch on this issue, since the application for planning permission and the GHB Mitigation Plan post-dated the challenge to the Local Plan which he was considering.
164. In conclusion, I do not consider that the Secretary of State failed to comply with regulation 70(3) of the Habitats Regulations 2017. He made a series of legitimate planning judgments, which are not capable of challenge on *Wednesbury* grounds. Therefore Ground 5 does not succeed.

Conclusion

165. For the reasons set out above, the claim is dismissed.

Appendix 1

Extracts from the judgment of Lang J. in *Abbotskerswell PC v Teignbridge DC & Secretary of State for Communities and Local Government* [2014] EWHC 4166 (Admin)

34. The Claimant argued that the final sentence of paragraph 44 of *Sweetman* – “It is for the national court to establish whether the assessment of the implications for the site meets these requirements” – should be interpreted to mean that the Court should conduct a full merits review of the Council’s assessment, rather than applying a *Wednesbury* test.
35. The Defendants agreed that the process of drafting and adoption of the Local Plan triggered the obligations under Regulation 102 of the Habitat Regulations 2010. Thus, prior to adoption, the First Defendant had to ascertain that the Local Plan would not adversely affect the integrity of the Special Area of Conservation, applying the test of no reasonable scientific doubt.
36. I accept the Defendants’ submission that, under Regulation 102(4), this was a judgment for the plan-making authority to make, and so it is only reviewable by the court on conventional judicial review grounds. This is confirmed by the following authorities: *R (Loader) v Secretary of State for Communities and Local Government* [2012] EWCA Civ 869, [2013] PTSR 406 per Pill LJ at [31]; *Feeney v Oxford City Council* [2011] EWHC 2699 (Admin) at [81]; *R (Evans) v. Secretary of State for Communities and Local Government & Ors* [2013] EWCA Civ 114, at [32] – [40]. *Cairngorms Campaign v Cairngorms National Park Authority* [2013] CSIH 65, at [63] to [64]. In my judgment, it is plain from paragraph 46 of the judgment in *Sweetman* that the decision is one for the “competent national authority” to take, not the court. I do not consider that the final sentence of paragraph 44 is a sufficient basis upon which to find that the domestic authorities on the standard of the court’s review should not be followed and applied.
37. Applying the appropriate legal tests, I have not been able to discern any error of law in the steps taken by the Council and its exercise of judgment, pursuant to the Directive and the 2010 Regulations.
38. I consider that the Council acted in accordance with its obligations under the Habitats Directive and Regulations, acted rationally, took into account all relevant considerations and applied the NPPF. It undertook all the assessments which were required at this stage of the planning process. It consulted, and responded constructively to recommendations in the Habitats Regulations Assessments, and to concerns raised by Natural England. This is demonstrated by the iterative process which I summarise below.
39. The draft RSS required that 15,900 homes should be provided across the district from 2006 to 2026, including at least 2,000 in the south west of Exeter and 8,000 in the Newton Abbot area.
40. In 2009, the Council undertook a full Strategic Housing Land Availability Assessment, assessing more than 300 sites. The assessment panel included representatives of Natural England, the Environment Agency and other statutory agencies. Each site was

the subject of detailed appraisal, including the potential impact on the GHB, based on earlier radio-tracking records of bat movement.

41. Following the changes introduced by the Localism Act 2011, including the abolition of regional strategies, the Council had to re-consider the form and content of the proposed Local Plan.
42. In May 2010, Natural England produced the Consultation Zone Planning Guidance for the South Hams SAC with the aim of ensuring “that the relevant planning authorities are in a position to meet the statutory obligations associated with the Greater Horseshoe Bat conservation interest of the South Hams SAC”. The Guidance identified the sustenance zones and strategic flyways used by the GHB. It is apparent from the evidence that the Council followed this Guidance.
43. The Teignbridge Core Strategy: Issues and Alternative Options document was published for consultation in June 2010. Natural England’s response identified environmental constraints to accommodating growth, including the protection of bats.
44. In September 2010, a draft Habitats Regulations Assessment was undertaken. It produced a series of recommendations, which guided further work on the Local Plan. In respect of the South Hams SAC it stated:

“there are a range of impact types including land take, light pollution, severance of flyways and possible changes to management of remaining farmland. Appropriate mitigation will include lighting control, hedge protection and financial or other contribution to habitat enhancement.”
45. In March 2011, Kestrel Wildlife Consultants, acting on behalf of the Council, produced a site screening for the Chudleigh Caves SSSI, the key site within the South Hams SAC. Sites were assessed as green (unlikely to affect the integrity of the SAC); orange (effect would depend upon the details of the proposal and the form of mitigation provided) and red (unlikely that effective mitigation or compensation would be possible). Mr Thornley, the Council’s planning officer with responsibility for preparation of the Local Plan, said in his witness statement that the Kestrel report informed the place-level distributions in the Preferred Options document.
46. The Teignbridge Local Plan Preferred Options document was finalised in November 2011 and consulted upon from January to March 2012. It was accompanied by a Habitats Regulations Assessment dated November 2011. It identified the proposed housing allocations which were within, or adjacent to, bat sustenance zones or strategic flyways and therefore had the potential to negatively impact the GHB and the SAC. It recommended further assessments by a bat expert and advised that “once sites are known, Appropriate Assessments may be needed, and depending on the level of impacts, mitigation may be required or an alternative site may need to be found”.
47. Natural England responded to the consultation by letter dated 16th December 2011, seeking clarification on the stage at which any appropriate assessments would take place, in particular, whether it would be at the level of this plan or “down the line” at lower tier plan or project stage. The letter added:

“14. We accept it may be necessary to rely upon “down the line” assessment for at least some policies and proposals. The draft Natural England guidance sets out the criteria under which lower tier assessment may be acceptable and we would encourage you to check that these apply wherever lower tier assessment is considered.

15. One of the criteria is whether at lower tier stage there would be freedom to change the nature and/or scale and/or location of the proposal in order to avoid adverse effects....”

48. Mr Thornley explained in his witness statement that, in the light of the November 2011 Habitats Regulations Assessment and the consultation responses, the Council gathered additional evidence. Kestrel was commissioned to undertake appraisals of the site at Bovey Tracey, Kingsteignton, Newton Abbot and Kingskerswell. Mr Thornley said that the policy wording and site allocations set out in the Preferred Options document were refined by the Council to take account of the recommendations made following these appraisals, when formulating the Proposed Submission version of the Local Plan.
49. In September 2012, the Proposed Submission Local Plan together with the Sustainability Appraisal and the Strategic Environmental Assessment, were considered and approved by the Council’s Overview and Scrutiny Committee, the Executive, and the full Council. The Claimant objected specifically to the proposed housing allocation in policy NA3 at Wolborough (near Abbotkerswell) and, through its Councillor, put forward an alternative location, Conitor Copse. This site was investigated but had to be rejected as it contained a cave supporting a bat roost and included a strategic flyway.
50. In October 2012 a further Habitats Regulations Assessment was produced, in light of the further evidence and amended proposals. Its conclusions on the South Hams SAC were:

“Those allocations assessed as likely to impact the South Hams SAC were assessed by a suitable expert, who advised on how to avoid harm to the bats. This included redrawing of some boundaries, dropping of one potential additional allocation and specific survey/mitigation measures recommendations for others. Specific reference is made to survey/mitigation requirements in key proposals. Natural England’s South Hams SAC – guidance for planners’ (‘GHB protocol’ in screening table) will be followed. None of the remaining Allocations are assessed as causing impacts that would be impossible to mitigate.”

51. Natural England made its consultation response by letter dated 19th December 2012. It listed the policies it considered to be unsound. The list did not include NA3 In relation to the South Hams SAC it said:

“We have based our response on the Reports commissioned by the Authority... which considered many sites and made one of three observations

- That there would be no impact on the SAC.
- That there were Likely Significant Effects but it was considered impacts on the SAC could be mitigated against.
- That there were Likely Significant Effects but it was considered that impacts on the SAC could not be mitigated against.

Many of the sites were in the second category and Natural England is satisfied that it is appropriate for some sites to be assessed for HRA at a project stage and therefore does not object to the allocation of those sites. However, the report has indicated that for some of the allocated sites, delivery was questioned. In addition, cumulative sites of housing ... adjacent to ... mineral and waste development have not been considered...”

52. Natural England welcomed the inclusion of policies in relation to provision of green infrastructure.
53. Submission of the Local Plan was deferred to allow further work to be undertaken on the Habitats Regulations Assessment (as well as some other issues). The Council commissioned Kestrel to prepare a supplementary report with a review of the evidence relating to bats in the District, the assessment of local plan allocations and the potential impact on the South Hams SAC.
54. A revised Habitats Regulations Assessment was produced in June 2013, which addressed concerns raised by Natural England, among others. It made a number of case specific recommendations. In respect of a number of policies, including NA3, it added a specific requirement:

“A bespoke GHB mitigation plan ... must be submitted to and approved before planning permission will be granted. The plan must demonstrate how the site will be developed in order to sustain an adequate area of non-developed land as a functional part of the local foraging area and as part of a strategic flyway used by commuting GHBs associated with the South Hams SAC. The plan must demonstrate that there will be no adverse effect on the SAC alone or in combination with other plans or projects.”
55. It also recommended that the Council should prepare and publish, a GHB Mitigation Strategy, in collaboration with the other planning authorities with responsibility for the South Hams SAC, as a supplementary planning document. It would identify the requirements and measures necessary to mitigate the likely effects of all types of developments (both alone and in-combination with other projects) in all areas where there could be an adverse effect on the integrity of the South Hams SAC. This Strategy would eventually replace the guidance published by Natural England in 2010.
56. The Assessment concluded:

“With the above measures in place ... it is advised that the Teignbridge Local Plan can be concluded to be in accordance with the requirements of the Habitats Regulations and parent European Directives.”

57. The recommendations in the Habitats Regulations Assessment were added to the Proposed Submission, which already contained requirements to take account of the need for bat mitigation and the strategic requirement in relation to European protected species.
58. In response to further consultation, Natural England confirmed in a letter of 18th June 2013 that the Habitats Regulations Assessment had been satisfactorily concluded.
59. The Local Plan was formally submitted for examination in June 2013, together with the Habitats Regulations Assessment. The examination sessions held by the Inspector included SAC issues. There was debate about the effectiveness of GHB mitigation and whether it was sufficient for the Council to provide for bespoke mitigation plans before planning permission was granted on any individual project.
60. After the examination, a further addendum to the Strategic Environmental Assessment was produced in December 2013. Section 4 contained an assessment of the likely in-combination and cumulative impact on the region. Under the heading “Greater Horseshoe Bat South Hams SAC”, it stated:

“There exists a risk of potential in-combination effects of development in Teignbridge and in neighbouring authorities with responsibilities for the South Hams SAC, on the integrity of bat habitat including roosts, flyways and areas for foraging. Principally this is through severance and light pollution.

The HRA indicates that potential in-combination effects on the South Hams SAC, through development in Teignbridge and in neighbouring planning authorities (Dartmoor National Park, Torbay and South Hams), can be mitigated through the introduction of a landscape scale Greater Horseshoe Mitigation Strategy. This should be prepared and published in collaboration with other planning authorities with responsibilities for the South Hams SAC as a supplementary planning document. The Strategy can replace relevant guidance by Natural England and identify the requirements for a provision of measures necessary to mitigate the likely affects (sic) of all types of developments (both alone and in combination with other projects) in all areas where there could be an adverse effect on the integrity of the South Hams SAC.

The Council has proposed minor changes to the ... submission which make clear the requirement for the Greater Horseshoe Bat Mitigation Strategy and securing bespoke greater horseshoe bat mitigation plans for large-scale development proposals. The Teignbridge Green Infrastructure Strategy (July 2011) has identified a series of green corridors that could support and

enhance the main strategic flyways around Newton Abbot, Kingsteignton, Kingskerswell and Bovey Tracey.”

61. In his Report delivered on 9th April 2014, the Inspector found:

“15. A raft of policies, EN8 – EN12, are directed specifically at protecting biodiversity, important habitats, priority species and flora. Natural England raised no objection to the broad approach of these policies. The detailed policies for site allocations include appropriate criteria to mitigate and/or offset any impact on protected species or habitats, with particular reference to bats, given the proximity of the South Hams SAC ... On balance, subject to provisions relating to some specific sites, I agree the benefits of new housing outweigh the environmental disadvantages at those particular locations.”

62. In relation to specific sites, the Inspector gave careful consideration to the provision for the protection of GHB, and concluded that it was sufficient. He attached considerable weight to the fact that the proposals were not objected to by Natural England. He accepted that the requirement for a bespoke GHB mitigation plan to be approved before planning permission could be granted for a specific project was an appropriate safeguard.

63. Immediately before the Local Plan was adopted, Natural England sought some further changes, and these too were incorporated by the Council. In an email dated 2nd May 2014, Natural England said that settlement level bespoke mitigation plans were needed at Bovey Tracey, Chudleigh and Kingsteignton. It said it would be sufficient if this was set out in the text accompanying the policies. It did not need to be incorporated into the wording of the policies themselves.

64. I return now to the Claimant’s criticisms of the Local Plan.

65. In my judgment, the Council and the Inspector acted lawfully in concluding, in the exercise of their planning judgments, that the Local Plan provided sufficient protection for the GHB. Pursuant to regulation 102(4) of the 2010 Regulations, the Council ascertained that the Local Plan would not adversely affect the integrity of the SAC.

66. It is apparent from the evidence which I have summarised above that the Council did undertake extensive Habitats Regulations assessments, in compliance with the Habitats Directive and Regulations. Those assessments were properly taken into account by the Council in formulating the Local Plan.

67. The Plan’s policies provided effective protection for GHBs. Policy EN10 of the Local Plan expressly stated:

“European Wildlife Sites including...South Hams...will be protected. Development that is likely to have a significant effect on the integrity of a European Wildlife Site will be subject to assessment under the Habitats Regulations 2010 and will not be permitted unless adverse effects can be fully mitigated and/or compensated. Further specific requirements are set out below.

Roosts, strategic flyways and sustenance zones for greater horseshoe bats, which constitute the special interest of the South Hams Special Area for Conservation will be protected, and where possible, enhanced to reflect the specific requirements of that species. In locations within or adjoining such roosts, strategic flyways and sustenance zones, there may be the need to include protection zones or removed certain permitted development rights (particularly lighting and wind turbines) to protect their continued use...

...A Habitat Regulations Assessment (HRA), required under the Habitats Directive, has been undertaken on the policies within the Local Plan to ensure there will not be an adverse effect on any such site. Additionally, it is a requirement under the Habitat Regulations that any development proposals which may have an impact on a European Site are subject to further assessment in order to avoid harm to those sites.”

68. Policy EN11 provided:

“To protect and expand the presence of legally protected and S41 List priority species, development which would be likely to directly or indirectly harm such a species will not be permitted unless:

...

e) for legally protected species favourable conservation status is maintained.”

69. Policy S5 provided:

“...The Council will:

...

f) ensure that the provision of new infrastructure will only be approved where the planning authority has ascertained that it would not adversely affect the integrity of any European sites; and

g) all mitigation for impacts to European sites shall be considered as critical in the Infrastructure Delivery Plan and sufficient contributions, to ensure that provisions remain in the long-term, will be taken from the CIL pot for Habitat Regulations mitigation measures before funding is used for other types of infrastructure.”

70. Policy WE11 provided on Green Infrastructure:

“(g) appropriate suitable alternative natural green spaces required by Habitat Regulations to relieve recreational pressure

on European sites; and strategic and detailed design requirements delivered as part of green infrastructure to mitigate the loss of foraging habitat and linear features used as flyways by Greater Horseshoe Bats will be identified in the proposed South Hams SAC Mitigation Strategy Supplementary Planning Document.” (The accompanying text then cross-referred to paragraph 5.29, set out at paragraph 78 below)

71. Natural England’s 2010 Planning Guidance on GHBs provides detailed advice on the adverse impact of development. It was intended to provide guidelines to ensure that the requirements of the Habitat Regulations 2010 could be met by new developments, including details of survey specifications. In my view, it is a valuable safeguard against harm to the SAC and GHB from ill-considered development.
72. Additionally, the Local Plan provided for mandatory site-specific bespoke mitigation plans, as recommended in the Habitats Regulations Assessment. These would necessarily require an impact assessment. In my view, the Council was entitled to conclude that bespoke GHB mitigation plans in relation to specific development sites would be both more appropriate and effective if undertaken at planning permission stage, when the scope and details of the project would be known to the Council and the developer. The Local Plan was a high-level strategic document, setting out broad allocation policies, but without project detail.
73. I do not consider that this approach was contrary to the general principles expressed in the opinion of A.G. Kokott in *Commission v UK* C-6/04 and in *Hart District Council v The Secretary of State for Communities and Local Government* [2008] EWHC 1204 (Admin), per Sullivan J. at [55] – [56].
74. Importantly, this approach was approved by Natural England, the statutory consultee. The Council was entitled to give “significant”, “great” or “considerable” weight to the views of Natural England: see *Forest of Dean Friends of the Earth v Forest of Dean District Council* [2014] Env LR 3 at [80]; *Shadwell Estates Ltd v Breckland District Council* [2013] EWHC 12 (Admin) at [72].
75. The Council’s recent decision to grant outline planning application for housing at Chudleigh, and to defer the bespoke mitigation plan until the stage of approval of reserved matters, is not the approach expressly set out in the Local Plan, which provides that the plan must be “approved before planning permission is granted”. It would not be appropriate for me to express a view on the lawfulness of the Chudleigh decision, since it is the subject of a separate judicial review claim, but I agree with the Council that it does not provide a reliable basis for assessing the lawfulness and effectiveness of the Local Plan if the decision was contrary to it.
76. Natural England also recommended provision for bespoke settlement mitigation plans in three areas (excluding the Newton Abbot area which affects the Claimant), and the Council agreed to do this. Paragraph 5.29 of the Plan provided:

“Bespoke mitigation plans will be provided at the settlement level for Chudleigh, Bovey Tracey and Kingsteignton to provide a clear policy basis for developers who bring forward development in these locations, in order to ensure the South

Hams SAC is protected with respect to in-combinations impacts from developments proposed in the Plan.”

77. Neither Natural England nor the Council considered it was necessary for this provision to be incorporated into the policies (as opposed to the accompanying text) nor that the settlement plans had to be completed before the Local Plan could be adopted. Natural England recommended that the settlement plans needed to be in place before any development took place whereas the Council did not commit to this. These were judgments for the Council to make; in my view, they do not render the Local Plan unlawful. In this context, it is significant that the Habitats Regulations Assessment did not recommend settlement plans, in addition to the site-specific bespoke mitigation plans. The Council was justified in concluding that, pending completion of the settlement plans, the mandatory obligation to approve a bespoke GHB mitigation plan for each site, which would have to be compliant with the general GHB policies, including consideration of ‘in-combination’ effects of other development, would meet the requirements of the Habitats Directive and Regulations.
78. The Local Plan provided for the preparation of a strategic GHB mitigation strategy. Paragraph 5.29 provided:
- “The greater horseshoe bat is a European protected species ... [The] caves are a designated Special Area of Conservation and have very strong protection (as set out above). This species has particular needs and there are particular roosts, flyways and foraging areas which they use. They are very sensitive to changes in these areas, and therefore it is important that the areas are identified and protected, and if possible their potential enhanced. Further, more detailed, guidance has been prepared by Natural England The Council, in collaboration with the other planning authorities with responsibilities for the South Hams SAC, will prepare and publish, as a supplementary planning document (SPD) a Greater Horseshoe Bat Mitigation Strategy. This will eventually replace the above guidance published by Natural England. The proposed Mitigation Strategy SPD will identify the requirements for and provision of measures necessary to mitigate the likely effects of all types of development (both alone and in combination with other projects) in all areas where there could be an adverse effect on the integrity of the South Hams SAC.”
79. Thus, the Council made provision for a mitigation strategy in the terms recommended in the Habitats Regulations Assessment, which did not require that it be completed before adoption of the Local Plan, nor that there should be a moratorium on development until it was completed.
80. The strategy was intended to be a Supplementary Planning Document to provide further support to the Local Plan. It was not envisaged that it would be prepared in advance of the Local Plan; this would not be realistic as a document prepared jointly between a number of local planning authorities would take time to produce and agree. Paragraph 5.29 (adopting the wording of the Habitats Regulations Assessment) provided that this strategy would “eventually” replace the Planning Guidance by Natural England,

implying that this would not occur immediately. In the meantime, the existing Planning Guidance published by Natural England would remain in place to guide any decisions on planning applications. The Habitats Regulations Assessment expressly recognised in its recommendations and conclusions that “Any applications received in advance of the completion of this work [i.e. the new strategic mitigation strategy] will have to consider the in-combination impacts which are likely to require greater consideration of other plans and projects and greater evidence base” (paragraph 13.6 of the June 2013 assessment).

81. In my judgment, the Council’s approach was a legitimate exercise of judgment by the Council which was not unlawful. Importantly, it was approved by Natural England, the statutory consultee.
82. The Claimant’s complaint that the mitigation provided for by the Plan was neither effective nor enforceable, and so undeliverable, is not supported by the evidence. In reality, it reflects a difference of opinion on the merits of the planning policies adopted by the Council and approved by the Inspector, rather than grounds for a legal challenge.
83. The Inspector gave careful consideration to the provision for the protection of the GHB in the Local Plan, and concluded that it was sufficient, and complied with the requirements of the Habitats Directive and the Regulations. He did not consider that the safeguards proposed in the plan – the strategic mitigation strategy, settlement and site mitigation plans – had to be in place in advance of adoption of the Local Plan. He attached considerable weight to the fact that the proposals were not objected to by Natural England. On the evidence, the Inspector was entitled to conclude that the housing policies were capable of delivery, whilst still according sufficient protection to the GHB. He said, at paragraph 137:

“The discussion of all of the issues throughout this report indicates that the Plan is reasonably robust and has sufficient flexibility to deliver the outcomes intended, particularly with regard to housing and employment growth, together with continued environmental protection.”
84. This was a planning judgment with which the Claimant disagreed but, in my view, cannot successfully challenge in law. For the reasons I have already given, I consider that the Inspector was entitled to conclude that the Local Plan met the statutory requirements and was sound, applying the criteria in the NPPF.

Appendix 2



Case No: C1/2015/0076

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM Queen's Bench Division, High Court
Mrs Justice Lang

Royal Courts of Justice
Strand, London, WC2A 2LL

Before :

LORD JUSTICE UNDERHILL

Between :

ABBOTSKERSWELL PARISH COUNCIL
- and -
TEIGNBRIDGE DISTRICT COUNCIL & ANR

Appellant

Respondents

Ms Jenny Wigley (instructed by **Richard Buxton Environmental & Public Law**) for the
Appellant

Mr Michael Bedford (instructed by **Teignbridge District Council Legal Services**) for the
Respondents

Hearing date : 05 June 2015

Approved Judgment

Lord Justice Underhill :

1. This is a renewed application for permission to appeal against a decision of Lang J dismissing the Applicant’s application under section 113 of the Planning and Compulsory Purchase Act 2004 to quash all or part of the Teignbridge Local Plan. Since it is a permission application I will not rehearse the background to the claim or the Judge’s reasoning. Exceptionally, because of the time pressure created by a following hearing, I have reserved my judgment. The Applicant has been represented by Ms Jenny Wigley of counsel. Also exceptionally, Mr Michael Bedford of counsel has appeared for the Respondent, and I invited his submissions on some particular points.
2. There are three grounds of appeal, which I take in turn.
3. As to ground 1, when I first read the papers, starting with paras. 34-36 of the judgment of Lang J, I understood the issue to be one of general principle about the standard of review to be applied by the Court in considering an appropriate assessment under the first limb of article 6.3 of the Habitats Directive, or of a plan or project adopted in the light of such an assessment under the second limb (or, to put it in domestic terms, under sub-paras. (1) or (4) of reg. 102); and that appears to have been Sullivan LJ’s approach when considering the case on the papers. But Ms Wigley accepts that there is now, even if there may not have been before, binding authority at this level that as regards matters of judgment and evaluation the Court’s role is limited to a *Wednesbury*-type review: see *Smyth v Secretary of State for Communities and Local Government* [2015] EWCA Civ 174, at paras. 78-80. The way that she puts her case is that the specific defects which she alleges in the Plan do not, at least arguably, involve any question of judgment or evaluation, but constitute plain lacunae in the protection afforded: these would appear to engage the jurisdiction of the Court even without reference to the passage in the judgment of the ECJ in *Sweetman* [2014] PTSR 1092 to which she attaches importance. I turn therefore to consider those defects.
4. The starting-point for the Applicant’s case in this regard is that the “appropriate assessment” carried out on behalf of the Respondent by Kestrel Wildlife Ltd recommended three ways in which the integrity of the relevant site, as regards the greater horseshoe bat, should be protected against adverse impact. Taking them in ascending order of generality:
 - (1) The second bullet point under the relevant heading in para. 13.6 of the assessment reads:

“For some proposals, it will be necessary for a bespoke Greater Horseshoe Bat Mitigation Plan to be prepared, submitted and agreed prior to the grant of *any planning permission* [my emphasis]. Such plans will need to demonstrate with very high levels of certainty that there will be no adverse effect on the integrity of the South Hams SAC.”

This is the specific site-level protection.
 - (2) The “Supplementary Report on Greater Horseshoe Bats and the South Hams SAC” recommends “a series of bespoke Greater Horseshoe Bat Mitigation Plans

... to be developed for each of the major settlements” – elsewhere referred to as a “settlement plan”. The description of these plans under para. 2.2.1 of the Supplementary Report identifies five such settlements and says “these plans will need to be prepared and submitted by the developer and agreed with the Council *before planning permission is granted* [again, my emphasis]”. The purpose is to inform mitigation measures over a wider area than the allocated sites, in order to reflect the range over which bats may forage.

(3) The third bullet point in para. 3.16 of the Primary Assessment reads:

“Potential ‘in-combination’ effects on the South Hams SAC will be mitigated through the preparation of a landscape scale Greater Horseshoe Bat Mitigation Strategy. Any applications received in advance of the completion of this work will have to consider the in-combination impacts which are likely to require greater consideration of other plans and projects and greater evidence base.”

5. The question is whether those requirements were adequately incorporated in the Plan.
6. As to (1), there is no dispute. In respect of each site where an allocation is made, the relevant policy contains a provision as follows:

“A bespoke Greater Horseshoe Bat mitigation plan for [the site] must be submitted to and approved before planning permission will be granted. The plan must demonstrate how the site will be developed in order to sustain an adequate area of non-developed land as a functional part of the foraging area within the SAC sustenance zone and as part of a strategic flyway used by commuting Greater Horseshoe Bats associated with the South Hams SAC. The plan must demonstrate that there will be no adverse effect on the SAC alone or in combination with other plans or projects.”

7. As regards (2) and (3), policy EN10 – “European Wildlife Sites” – contains a general policy that “roost strategic flyways and sustenance zones” for Greater Horseshoe Bats “will be protected and, where possible, enhanced to reflect the specific requirements of that species”, with various particular points being made. The policy ends:

“A Habitat Regulations Assessment (HRA), required under the Habitats Directive, has been undertaken on the policies within the Local Plan to ensure that there will not be an adverse impact on any such site. Additionally, it is a requirement under the Habitat Regulations that any development proposals which may have an impact on a European Site are subject to further assessment in order to avoid harm to those sites.”

The supporting text, at para. 5.29, contains the following passage:

“Further, more detailed, guidance has been prepared by Natural England, the ‘South Hams SAC – Greater Horseshoe Bat

Consultation Zone Planning Guidance’ which indicates the location of these zones. The Council, in collaboration with the other planning authorities with responsibilities for the South Hams SAC, will prepare and publish, as a supplementary planning document (SPD), a Greater Horseshoe Bat Mitigation Strategy. This will eventually replace the above guidance published by Natural England. The proposed Mitigation Strategy SPD will identify the requirements for and provision of measures necessary to mitigate the likely affects of all types of developments (both alone and in combination with other projects) in all areas where there could be an adverse affect on the integrity of the South Hams SAC. Bespoke mitigation plans will be produced at the settlement level for Chudleigh, Bovey Tracey and Kingsteignton to provide a clear policy basis for developers who bring forward development in these locations, in order to ensure the South Hams SAC is protected with respect to in-combinations impacts from development proposed in the Plan.”

8. The text, though not explicitly the policy, thus provides for both the settlement level bespoke mitigation plans recommended in the assessment and the “landscape level” Bat Mitigation Strategy – i.e. items (2) and (3). But the Applicant’s point is that no timescale is provided for either measure to be taken and, more specifically, there is no requirement that the plans or strategy be in place before planning permission is granted in respect of any of the allocated sites. That is a frank departure from the recommendations of the appropriate assessment and thus, it is said, constitutes not simply a difference of evaluation on a matter of planning judgment but a failure which makes it impossible, as required by the Directive, to ascertain that the Plan would not adversely affect the integrity of the relevant sites.
9. I am afraid I cannot accept that that is arguable. It is necessary to consider separately the settlement level plans and the landscape mitigation strategy.
10. So far as the settlement level plans are concerned, the absence of a specific requirement in the Plan that these should be completed before any planning application is determined does not compromise the protection of the site. It remains a requirement of the grant of planning permission that the developer can demonstrate that there will be no adverse effect on the site either as a result of his own development or (importantly) “in combination with other plans or projects”: see the quote from the policy at para. 6 above. If he is unable to do so because that is impossible without a settlement-level plan of the type recommended in the supplementary report, then permission must be refused.
11. As for the landscape-level strategy, it is clear that the assessment itself did not anticipate that it would be in place before any permission could be granted in accordance with the allocations in the Plan. That is apparent from the reference in the passage quoted at para. 4 (3) above to “any applications received in advance of the completion of this work”.
12. I turn to ground 2. The main point concerns the Council’s failure to adopt Natural England’s advice, in its email of 2.5.14, that the text of the Plan should explain that

settlement-level mitigation plans should be in place before any development is permitted. I agree with Sullivan LJ that it is not arguable that this was an error of law, for essentially the same reason as I have given at para. 10 above. Generalisations about the weight to be given to Natural England's views, and the involvement of members, have to be read in the context of the particular departure in question. I am not convinced that in observing that there was no such requirement in the original assessment Lang J overlooked what had been said in Kestrel's supplementary report; but even if she did the basic point is unaffected. Ms Wigley's point about the supposed inconsistency in the Council's approach to other aspects of Natural England's advice is, with respect, a debating point: what matters is simply whether its failure to follow its advice in this particular respect was justified.

13. As to ground 3, this was somewhat refined in Ms Wigley's advocate's statement from the point made in the original skeleton, which seemed to me unarguable in the light of the fact that the assessment itself did not require the landscape-level strategy to be in place before any development was permitted (and nor did Natural England). But the reformulated submission that the Plan involved "putting off indefinitely" the completion of the landscape-level strategy and the settlement-level plans seems to me equally unsustainable. It is true that no deadline was specified, but that is quite different from a decision to "postpone indefinitely". The Plan is clearly to be understood as requiring them to be got on with with reasonable expedition, and – to repeat – if they are not in place and if absence of risk cannot be shown without them permission cannot be granted. In addition, as regards the landscape-level strategy, it is clear that the Council – like Kestrel – recognised that this would take a little time, because of the need to involve other authorities. I can see nothing arguably unlawful in any of this. Nor is it inconsistent with the principle enunciated by A-G Kokott that assessments should be carried out at the earliest possible stage: it is still necessary to decide what that requires in the circumstances of a particular case.
14. For those reasons, despite Ms Wigley's well-constructed skeleton argument and advocate's statement and her careful development of them in submissions, I would refuse permission to appeal.