Neutral Citation Number: [2024] EWHC 217 (Admin)

Case No: AC-2023-LON-001334

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 05/02/2024

Before :

Neil Cameron KC
sitting as a Deputy High Court Judge

Between :

THE KING
ON THE APPLICATION OF

BW FARMS LIMITED — **Claimant**

- and –

SECRETARY OF STATE FOR LEVELLING UP, HOUSING AND COMMUNITIES — **Defendant**

-and-

(1) WEST LINDSEY DISTRICT COUNCIL
(2) NICK BOWEN — **Interested Parties**

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Sioned Davies (instructed by **Birketts LLP**) for the **Claimant**
Ryan S Kohli (instructed by **the Government Legal Department**) for the **Defendant**
The Interested Parties did not appear and were not represented

Hearing date: 16th and 17th January 2024
- -

APPROVED JUDGMENT

The Deputy Judge (Neil Cameron KC):

Introduction

1. In this case BW Farms Limited has applied for an order to quash the decision made by the Secretary of State for Levelling-up, Housing and Communities to make a screening direction to the effect that an application for planning permission to develop land at Beasthorpe Farm, Thornton Road, Thornton Le Moor, Market Rasen, Lincolnshire ("the Site") by "Internal alterations to existing livestock buildings through excavation inside each building to facilitate the construction of a slatted floor system, and the installation of ridge mounted ventilation fans" is EIA development.

2. Permission to proceed with the application for judicial review was granted by Lang J on 17th July 2023.

The Background Facts

3. By a decision notice dated 17th July 1996 the First Interested Party granted planning permission to develop the Site by erecting a turkey rearing shed (W76/670/95) ("the 1996 Planning Permission"). By a decision notice dated 27th August 1999 the First Interested Party granted planning permission to develop the Site by erecting a further turkey rearing shed (99/P/0107) ("the 1999 Planning Permission"). The 1996 and 1999 Planning Permissions contained no condition restricting use of the buildings to the rearing of turkeys.

4. When first built the buildings on the Site were used to rear poultry. About 16,000 birds were accommodated on the Site.

5. The Claimant company acquired the Site on 11th March 2020. In the summer of 2020, Mr Tobin, the sole director of the Claimant company, gave instructions for works to

be carried out to the buildings on the Site. Those works included excavation of the floor and construction of a concrete slurry tank, the installation of a slatted floor, and the installation of 16 roof mounted ventilation fans on each of the buildings.

6. By an application dated 26th August 2020 the Claimant applied to the First Interested Party for a determination as to whether prior approval of the authority would be required for the erection of a grain store. By a letter dated 30th September 2020 the First Interested Party determined that prior approval was not required.

7. In December 2021 the First Interested Party informed Mr Tobin that planning permission was required for the works being carried out to the buildings on the Site.

8. In February 2022 the Claimant made an application for planning permission to develop the Site by

> "Internal alterations to existing livestock buildings through excavation inside each building to facilitate the construction of a slatted floor system, and the installation of ridge mounted ventilation fans (part retrospective)"
>
> Application 144222
>
> ("the 2022 Planning Application")

9. On the application form for the 2022 Planning Application the Claimant stated that the work for which planning permission was sought started on the 1st September 2021. A number of documents were submitted in support of the 2022 Planning Application including:

   i) A letter from Ian Pick Associates Ltd dated 3rd February 2022.

   ii) A Dispersion Modelling Study of the Impact of Odour from the Pig Rearing Houses at Beasthorpe Farm, near Thornton Le Moor in Lincolnshire under

Current Operating Conditions and Fallback Operating Conditions (28th December 2021), prepared by AS Modelling and Data Ltd ("the Odour Report").

iii) A Report on the Modelling of the Dispersion and Deposition of Ammonia from the Pig Rearing Houses at Beasthorpe Farm, near Thornton Le Moor in Lincolnshire under Current Operating Conditions and Fallback Operating Conditions, prepared by AS Modelling and Data Ltd (28th December 2021) ("the Ammonia Report").

10. In the letter dated 3rd February 2022, Ian Pick Associates Ltd placed emphasis on the following points:

i) "It is very important to note that the use of the buildings for pig rearing does not require planning permission."

ii) "The applicant has completed some works to the building, as shown on the attached plan IP/BW/03. These works are all internal and include the excavation and construction of a concrete slurry tank within the buildings, and the installation of a slatted floor; and the installation of 16 No. roof mounted ventilation fans on each building. The roof fans are to be set within the existing vented ridge structure on the roof of the building, and are not externally visible."

iii) "Should this development not be approved, there is a clear fall-back position which would be filling in the slurry tank, and reverting back to a solid floor in the livestock buildings, and reverting to a natural ventilation system rather than high speed roof fans."

iv) "Odour and Ammonia Modelling reports have been provided which show that the proposed development represents a significant improvement, when compared to the fall-back position."

11. The Odour Report and the Ammonia Report both included a comparison between the effects of the use of the two buildings on the Site to accommodate 1,980 finisher pigs with the slatted floors, underfloor storage of slurry, and the ridge mounted ventilation proposed in the 2022 Planning Application (described as the Current Scenario), and

the use of the same buildings to accommodate 1,980 finisher pigs using solid floors, and natural ventilation (described as the Fallback Scenario).

12. The Odour Report included the following in the conclusions section:

"Current Scenario

The predicted odour exposure would be slightly in excess of the Environment Agency's benchmark for moderately offensive odours, which is 3.0 oue/m3 as an annual 98th percentile hourly mean, at Beasthorpe House and Beasthorpe Farm. At other properties in the area, the predicted odour exposures would be below the Environment Agency's benchmark.

Fallback Scenario

At all receptors the predicted odour exposure is higher than under the current scenario. The predicted odour exposure would exceed 10.0 oue/m3 as an annual 98th percentile hourly mean at Beasthorpe House and Beasthorpe Farm. At other properties in the area, the predicted odour exposures would remain below the Environment Agency's benchmark of 3.0 ouE/m3 as an annual 98th percentile hourly mean, but would be 2 to 3 times higher than under the current scenario."

13. The Ammonia Report included the following in the conclusions section:

"Current Scenario

The modelling predicts that:

• At all of the nearby wildlife sites identified, the process contribution to both ammonia concentration and nitrogen deposition is below the Environment Agency's lower threshold percentage of the Critical level/Load (100% for non-statutory sites and 20% for SSSIs).

• At all of the nearby SSSIs, the process contribution is below 1% of the Critical Level/Load.

Fallback Scenario

The modelling predicts that:

• The process contributions to both ammonia concentration and nitrogen deposition would increase at all nearby wildlife sites.

• Although higher than the current scenario, the process contribution would remain below the Environment Agency's lower threshold percentage of the Critical Level/Load (100% for non-statutory sites and 20% for SSSIs).

• Although higher than the current scenario, at all of the nearby SSSIs, the predicted process contribution would remain below 1% of the Critical Level/Load."

14. In a letter dated 17th February 2022 solicitors instructed by the Second Interested Party wrote to the First Interested Party requesting that they undertake a screening assessment of the 2022 Planning Application pursuant to the provisions of regulation 8 of the Town and Country Planning (Environmental Impact Assessment) Regulations 2017 ("the EIA Regulations"). In that letter the Second Interested Party contended that there is no evidence to support the contention that there is a "realistic prospect" of the 'fall back' relied upon by the Claimant being implemented. At paragraph 6 of that letter the Second Interested Party's solicitors stated:

"It is not clear precisely when the sheds were erected or when turkeys were first housed in them, but from August 2006, when our clients first moved in to their property, through to May 2018, the livestock sheds were in situ and were housing free range chickens. In May 2018, the sheds were emptied of livestock. Since that date they have remained unoccupied."

15. The Second Interested Party commissioned a report from Michael Bull and Associates Limited ("MBAL"). That report has the title "Mr and Mrs Bowen, Beasthorpe Farm House. Proposed Pig Rearing Houses, Thornton Le Moor. Review of Odour and Ammonia Assessments" and is dated 24th February 2022 ("the MBAL Report").

i) In responding to the 'fall back' position referred to in the Odour Report and in the Ammonia Report MBAL state:

"However, it is understood by MBAL that the building was previously used for free range poultry rearing with around 16,000 birds and there is no established use for pig rearing. If this is the case then an appropriate baseline comparison would be with the use of the buildings for poultry.

Advice from an agricultural engineer has suggested that the use of the building to house pigs using a straw based solid base would be unrealistic as there may be insufficient opening in the walls to allow for suitable ventilation. In addition, it is possible that the headroom is not sufficient for use of the

equipment normally used for litter/manure clearance. This further suggests that an appropriate comparison would be with a scenario where the buildings were used for poultry rearing."

ii) MBAL used SCAIL modelling to assess likely emissions. In their conclusions MBAL state:

"The results of the odour modelling provided by the applicant demonstrate that odour concentrations considered by the Environment Agency to represent "unacceptable pollution" would exist at Beasthorpe House for both the proposed and the fall back option. This is confirmed using screening approach with the SCAIL model that predicts odour concentrations well in excess of Environment Agency thresholds. The odour assessment has not followed the advice in the IAQM guidance that more than one assessment method is used. In this case, the use of sniff testing would have been very valuable to assessment the resulting odour environment. The IAQM guidance suggests that "considerable weight" should be given to such sensory methods.

The outcome of the ammonia assessment is that thresholds detailed in IAQM guidance and the new JNCC guidance are exceeded. When this occurs, a more detailed assessment is required usually including an in combination assessment. Screening modelling using the SCAIL model also suggests that the predicted concentrations at a local SINC and the nearest SSSI would exceed the 1% threshold of critical loads and levels and the new JNCC Decision Making Thresholds. Where this occurs, then a more detailed assessment is required usually including an in-combination assessment. This has not been provided."

16. On the 6th September 2022 the First Interested Party adopted a screening opinion in which they determined that the development proposed in the 2022 Planning Application was not EIA development.

17. In a letter dated 30th September 2022 the solicitors acting for the Second Interested Party requested that the Defendant make a screening direction.

18. The Defendant consulted Natural England on the screening issue. In a letter dated 6th February 2023 ("the NE Letter") Natural England stated:

"The detailed modelling indicates there will be less than 1% of the site relevant Critical Load / Level contribution from the development alone. However no

cumulative assessment has been provided, therefore it cannot be concluded with certainty that the development will not have an impact when considered in combination with other developments[1].

As such, Natural England considers that this proposal may have potentially significant effects on the natural environment but requires further information in order to determine the significance of these.

An assessment of the potential cumulative impacts of the development is therefore required.

1 NPPF Paragraph 180b"

19. On 17th March 2023 the Defendant made a screening direction which stated that the development proposed in the 2022 Planning Application is EIA development. The reasons for making the screening direction were set out in a written statement ("the Written Statement") and in a screening analysis ("the Screening Analysis").

20. At paragraph 6 of the Screening Analysis the officer who prepared the screening direction on behalf of the Defendant referred (inter alia) to the Odour Report, the Ammonia Report, the MBAL Report, and the NE Letter, and concluded:

"Overall, in light of these findings notwithstanding the consideration of the LPA and the Environment Agency, based on the available information it is not possible to rule out conclusively the possibility of significant impact from the development in terms of odour and waste management issues and also ammonia deposition. It has therefore has (sic) been concluded that while there will be likely significant environmental effects. This is due to the resulting odours as a consequence of the development for two particular receptors, together with contested ammonia dispersal and deposition findings in respect of a SSS. Taken together with the unassessed effects of land spreading and potential and in relation to cumulative impact in relation other nearby agricultural activity significant environmental effect cannot be ruled out (see also Question 21)."

21. At paragraph 21 of the Screening Analysis the officer who prepared the screening direction on behalf of the Defendant stated:

"The development will be a change to the previous livestock use involving poultry for two unoccupied buildings, in a rural setting. However, although the business is already practiced in the handling of animal waste and its other effects, these will increase and there is some evidence of existing environmental concerns with regards to local amenity on a number of issues, particularly odour associated with Brandy Wharf facility. A number of assessments have been carried out to support the application, however, these focus on the direct impacts from the expanded building and do not consider the potential for cumulative effects. For example, the Odour Study provided does not assess indirect impacts away from the piggery such as from the spreading of slurry across the farm. These wider activities form part of the project for EIA purposes. Overall based on the available information it is not possible to rule out conclusively the possibility of significant impact from the development in terms of odour dispersal and waste management issues and also ammonia deposition to the Kingerby Beck Meadows SSSI."

22. The following was included in the Written Statement:

"The unit was purchased in 2020 with the intention of implementing the proposed piggery use and the building concerned were previously used for free range poultry rearing with around16,000 birds present. It is also acknowledged the odours impacts are likely to be greater should the piggery use be implemented using a straw based system on a reinstated solid floor. However, the buildings have been unoccupied since 2018 and the agricultural unit lacks a reliable environmental baseline to inform the assessment of impacts.

…

Notwithstanding the analysis provided with the application the available information indicates there may be cumulative impacts associated with the effects of land spreading and additionally those arising from the existing piggery located at Brandy Wharf Farm. It is noted that a number of objections lodged in respect of the proposal reference local amenity impact issues concerning odour from this facility. Furthermore, in its consultation response Natural England state the assessments undertaken do not make a cumulative assessment of likely effects. Overall while for some properties there will be localised amenity impacts largely from odour, based on the available information for the closest properties, particularly Beasthorpe House and Beasthorpe Farm it is not possible to rule out conclusively the possibility of significant environmental effect on those receptors.

…

Conclusion

The foregoing consideration of the potential for significant odour and ammonia impacts on various nearby receptors and protected site in the locality is sufficient to indicate to the Secretary of State that the development proposed is likely to have significant effects on the environment. Although the area affected is geographically large the population affected is relatively small, there is potential for significant

localised impacts on individual receptors in respect of odour (e.g. individual dwellings) in addition to nationally protected sites through the deposition of ammonia, to the extent they are considered likely to be significant. There are no other issues (e.g. transport, noise, flood risk but also land contamination, visual, heritage and ecological impacts) that indicate a likelihood of there being significant environmental effects from this proposal.

This outcome is therefore, based largely in considering the odour and ammonia issues due in part to the uncertainty over the cumulative impact of those effects beyond that directly arising from the project development and other similar activity in the locality. As a result of this uncertainty, it is not possible for the Secretary of State to reasonably conclude that there is no likelihood of significant effects. EIA is therefore required."

The Grounds of Claim

23. The Claimant relies upon the following three grounds of claim:

i) The Defendant misdirected himself on the application of Schedule 2 of the EIA Regulations. The Defendant was wrong to consider the change in the agricultural use of the livestock buildings as the 2022 Planning Application was for operational development not for a change of use. The use of land for agricultural purposes is excluded from the definition of 'development' in the Town and Country Planning Act 1990 ("TCPA 1990").

ii) When making the screening direction, the Defendant failed to take into account a material consideration, namely the baseline use of the Site.

iii) The Defendant gave inadequate reasons as to why a change of use was relevant when considering and determining the request that a screening direction be made.

The Legal Framework

EIA Screening

24. Regulation 3 of the EIA Regulations provides:

> "3. **Prohibition on granting planning permission or subsequent consent for EIA development**
>
> The relevant planning authority, the Secretary of State or an inspector must not grant planning permission or subsequent consent for EIA development unless an EIA has been carried out in respect of that development."

25. The term 'EIA development' is defined in regulation 2(1) of the EIA Regulations:

> "EIA development" means development which is either—
>
> (a) Schedule 1 development; or
>
> (b) Schedule 2 development likely to have significant effects on the environment by virtue of factors such as its nature, size or location;"

26. The term 'Schedule 2 development' is defined in regulation 2(1) of the EIA Regulations as:

> " "Schedule 2 development" means development, other than exempt development, of a description mentioned in column 1 of the table in Schedule 2 where—
>
> (a) …
>
> (b) any applicable threshold or criterion in the corresponding part of column 2 of that table is respectively exceeded or met in relation to that development;"

27. A direction of the Secretary of State shall determine whether development is or is not EIA development (Regulation 5(3) of the EIA Regulations).

28. The Secretary of State may make a screening direction if requested to do so in writing by any person (Regulation 5(6)(b) of the EIA Regulations).

29. Regulation 7(5) of the EIA Regulations provides:

> "(5) The Secretary of State must make a screening direction following a request under regulation 5(6)(b) or 6(10) within—
>
> (a) 3 weeks beginning with the date of receipt of the request; or
>
> (b) where the Secretary of State gives notice under paragraph (3), such longer period not exceeding 90 days beginning with the date on which the person making the request for a screening direction submits the information required under paragraph (3) as may be reasonably required,
>
> but this is subject to paragraph (6)"

30. Regulation 5(4) and (5) of the EIA Regulations provide:

> "(4) Where a relevant planning authority or the Secretary of State has to decide under these Regulations whether Schedule 2 development is EIA development, the relevant planning authority or Secretary of State must take into account in making that decision—
> (a) any information provided by the applicant;
> (b) …..; and
> (c) such of the selection criteria set out in Schedule 3 as are relevant to the development.
>
> (5) Where a relevant planning authority adopts a screening opinion under regulation 6(6), or the Secretary of State makes a screening direction under regulation 7(5), the authority or the Secretary of State, as the case may be, must—
> (a) state the main reasons for their conclusion with reference to the relevant criteria listed in Schedule 3;
> (b) if it is determined that proposed development is not EIA development, state any features of the proposed development and measures envisaged to avoid, or prevent what might otherwise have been, significant adverse effects on the environment; and
> (c) send a copy of the opinion or direction to the person who proposes to carry out, or who has carried out, the development in question."

31. Schedule 2 of the EIA Regulations includes the following:

> "The carrying out of development to provide any of the following—
>
> ***Column 1 Description of development Column 2 Applicable thresholds and criteria***

1 Agriculture and aquaculture	
(c) intensive livestock installations (unless in Schedule 1)	The area of new floorspace exceeds 500 square metres.
….	
13 Changes and extensions	
(b) Any change to or extension of development of a description listed in of column 1 of this table, where that development is executed or in the process of being executed.	Either— (i) The development as paragraphs 1 to 12 changed or extended may have significant adverse already authorised, effects on the environment; or"

.

32. Schedule 3 of the EIA Regulations sets out a number of factors under the headings: "Characteristics of development", "Location of development" and "Types and characteristics of the potential impact". Under the "Characteristics of development" Paragraph 1 provides,

"The characteristics of development must be considered with particular regard to –

(a)…

(b) cumulation with other existing development and/or approved development

…"

33. Further, Paragraph 3 of Schedule 3 to the EIA Regulations under the heading "Types and characteristics of the potential impact" provides,

"The likely significant effects of the development on the environment must be considered in relation to criteria set out in paragraphs 1 and 2 above, with regard to

the impact of the development on the factors specified in regulation 4(2), taking into account –

…

…

(g) the cumulation of the impact with the impact of other existing and/or approved development;

…"

34. The EIA Regulations were made pursuant to the power conferred on the Secretary of State by section 71A of the TCPA 1990. Regulation 2(2) of the EIA Regulations provides:

"(2) Subject to paragraph (3), expressions used both in these Regulations and in the Act have the same meaning for the purposes of these Regulations as they have for the purposes of the Act."

The Act, as referred to in Regulation 2(2) is the TCPA 1990 (see regulation 2(1) of the EIA Regulations).

35. Section 55(1) of the TCPA 1990 provides:

"(1) Subject to the following provisions of this section, in this Act, except where the context otherwise requires, "development," means the carrying out of building, engineering, mining or other operations in, on, over or under land, or the making of any material change in the use of any buildings or other land."

36. Section 55(2) TCPA 1990 provides:

"(2) The following operations or uses of land shall not be taken for the purposes of this Act to involve development of the land—

…

(e) the use of any land for the purposes of agriculture or forestry (including afforestation) and the use for any of those purposes of any building occupied together with land so used;"

37. In ***R (on the application of Bateman) v. South Cambridgeshire DC*** [2011] EWCA Civ 157 Moore-Bick LJ explained the nature and scope of the local planning authority's role when making a screening opinion:

> "20. Having dealt with those points I can return to the substance of the argument, which is that the planning officer failed to demonstrate that she had considered the likely effect of the development in relation to traffic movements, the landscape and noise or, if she had, to explain why an EIA was not required in this case. When considering a submission of this kind I think it important to bear in mind the nature of what is involved in giving a screening opinion. It is not intended to involve a detailed assessment of factors relevant to the grant of planning permission; that comes later and will ordinarily include an assessment of environmental factors, among others. Nor does it involve a full assessment of any identifiable environmental effects. It involves only a decision, almost inevitably on the basis of less than complete information, whether an EIA needs to be undertaken at all. I think it important, therefore, that the court should not impose too high a burden on planning authorities in relation to what is no more than a procedure intended to identify the relatively small number of cases in which the development is likely to have significant effects on the environment, hence the term "screening opinion".
>
> 21. Having said that, it is clear from *Mellor* that when adopting a screening opinion the planning authority must provide sufficient information to enable anyone interested in the decision to see that proper consideration has been given to the possible environmental effects of the development and to understand the reasons for the decision. Such information may be contained in the screening opinion itself or in separate reasons, if necessary combined with additional material provided on request."

38. Those principles, as set out in ***Bateman***, are equally applicable when considering screening directions made by the Secretary of State.

39. The approach to be taken when there is a degree of uncertainty was considered by Pill LJ at paragraph 43 in ***R (on the application of Loader) v. The Secretary of State for Communities and Local Government*** [2012] EWCA Civ 869:

> "The decision maker must have regard to the precautionary principle and to the degree of uncertainty, as to environmental impact, at the date of the decision. Depending on the information available, the decision maker may or may not be able to make a judgment as to the likelihood of significant effects on the environment. There may be cases where the uncertainties are such that a negative decision cannot

be taken. Subject to that, proposals for ameliorative or remedial measures may be taken into account by the decision maker."

40. The court's role in considering a challenge to screening decision is to review the judgment of the decision taker on *Wednesbury* grounds (***R (Hockley) v. Essex County Council*** [2013] EWHC 4051 (Admin) at paragraph 103).

41. When considering likely significant effects in a case falling within the description set out in paragraph 13(b) of Schedule 2 to the EIA Regulations the approach set out by Collins J at paragraphs 44 and 45 in ***R (on the application of Baker) v. Bath and North East Somerset Council*** [2009] EWHC 595 (Admin) is to be followed.

"44. It seems to me that that is clearly not only consistent with but applies the approach that it is necessary to look at the effect of any modification or modifications on the project, or on the development, and to see whether the whole, as modified, has or is likely to have other significant effects which need to be taken into account and may require an environmental impact assessment, albeit they do not fall themselves within the criteria which have been adopted by the Member State.

45. That approach has been supported by a more recent case, *Ecologistas en Accion-CODA v Ayuntamiento de Madrid* (C-142/07), judgment delivered on July 25, 2008. That was a case involving the construction of a ring road round Madrid and there had been a number of different applications or development proposals which split the project into, as it were, small amounts. Paragraph 44of the judgment in that case said this:

> ''Lastly, as the Court has already noted with regard to Directive 85/227, the purpose of the amended directive cannot be circumvented by the splitting of projects and the failure to take account of the cumulative effect of several projects must not mean in practice that they all escape the obligation to carry out an assessment when, taken together, they are likely to have significant effects on the environment within the meaning of Article 2(1). . .
>
> 46. Therefore, the answer to the first three questions must be that the amended directive must be interpreted as meaning that it provides for environmental impact assessment of refurbishment and improvement projects for urban roads, either where they are projects covered by [relevant points in the] Annex I to the directive, or where they are projects covered by the first . . . indent of point 13 thereof, which are likely, by virtue of their nature, size or location and, if appropriate, having regard to their interaction with other projects, to have significant effects on the environment."

The obvious interaction is the effect on the existing project which is to be modified. It seems to me that it is plain beyond any peradventure that it is not appropriate, in the light of the jurisprudence of the court and the purpose behind the Directive, to regard only the modification itself and not the effect on the development as a whole of any such modification to it."

Fall Back

42. The ability of a landowner to use land or buildings for some alternative purpose to that proposed in the planning application under consideration by a planning authority is a well-established type or category of material consideration to which a decision maker may have regard.

43. In ***Mansell v. Tonbridge and Malling BC*** [2017] EWCA Civ 1314, at paragraph 27, Lindblom LJ stated:

"27. The status of a fallback development as a material consideration in a planning decision is not a novel concept. It is very familiar. Three things can be said about it:

(1) Here, as in other aspects of the law of planning, the court must resist a prescriptive or formulaic approach, and must keep in mind the scope for a lawful exercise of planning judgment by a decision-maker.

(2) The relevant law as to a "real prospect" of a fallback development being implemented was applied by this court in *Samuel Smith Old Brewery* (see, in particular, paragraphs 17 to 30 of Sullivan L.J.'s judgment, with which the Master of the Rolls and Toulson L.J. agreed; and the judgment of Supperstone J. in *R. (on the application of Kverndal) v London Borough of Hounslow Council* [2015] EWHC 3084 (Admin), at paragraphs 17 and 42 to 53). As Sullivan L.J. said in his judgment in *Samuel Smith Old Brewery*, in this context a "real" prospect is the antithesis of one that is "merely theoretical" (paragraph 20). The basic principle is that "… for a prospect to be a real prospect, it does not have to be probable or likely: a possibility will suffice" (paragraph 21). Previous decisions at first instance, including *Ahern* and *Brentwood Borough Council v Secretary of State for the Environment* [1996] 72 P. & C.R. 61 must be read with care in the light of that statement of the law, and bearing in mind, as Sullivan L.J. emphasized, "… "fall back" cases tend to be very fact-specific" (ibid.). The role of planning judgment is vital. And "[it] is important … not to constrain what is, or should be, in each case the exercise of a broad planning discretion, based on the individual circumstances of that case, by seeking to constrain appeal decisions within judicial formulations that are not

enactments of general application but are themselves simply the judge's response to the facts of the case before the court" (paragraph 22).

(3) Therefore, when the court is considering whether a decision-maker has properly identified a "real prospect" of a fallback development being carried out should planning permission for the proposed development be refused, there is no rule of law that, in every case, the "real prospect" will depend, for example, on the site having been allocated for the alternative development in the development plan or planning permission having been granted for that development, or on there being a firm design for the alternative scheme, or on the landowner or developer having said precisely how he would make use of any permitted development rights available to him under the GPDO. In some cases that degree of clarity and commitment may be necessary; in others, not. This will always be a matter for the decision-maker's planning judgment in the particular circumstances of the case in hand."

44. As with any 'other material consideration' the weight to be given to a fall back is a matter of planning judgment for the decision maker, subject to not lapsing into *Wednesbury* irrationality (***Tesco Stores Ltd. v. Secretary of State for the Environment*** [1995] 1 WLR 759 at page 780 F-G).

Ground 1

45. Ms Davies, for the Claimant, submits:

i) The word 'development' when used in the EIA Regulations has the same meaning as that provided for by section 55 TCPA 1990.

ii) The Defendant erred, when making the screening direction, by not restricting his consideration to the development for which planning permission was sought, namely the operational development described in the application. Ms Davies submitted that use of land for the purpose of agriculture is not development as defined in section 55 TCPA 1990, as it falls within the exception set out at section 55(2)(e). She further submitted that change of the

use of the buildings on the Site from use for rearing poultry to use for rearing pigs does not constitute development. The Defendant erred in focussing on the change of species occupying the building.

iii) The Defendant erred in finding that the proposed development may have significant adverse effects on the environment as the effect of the operational development proposed was to reduce environmental effects (when compared with use of the buildings for pig rearing without the operational development proposed in the 2022 Planning Application).

iv) This case can be distinguished from the case of ***R (on the application of Squire) v. Shropshire Council*** [2019] EWCA Civ 888. In ***Squire*** the local planning authority was held to have erred by failing to take into account the environmental effects of the storage and spreading of manure as an indirect effect of the proposed development of an intensive poultry rearing facility. Ms Davies submits that this case can be distinguished as the development proposed in the 2022 Planning Application is restricted to operational development consisting of changes to an existing livestock building.

46. Mr Kohli, for the Defendant, submits that the following questions fell to be considered by the Defendant:

i) Does the development for which planning permission was sought in the 2022 Planning Application constitute a change to development of a description listed paragraphs 1-12 of column 1 of Schedule 2 to the EIA Regulations.

ii) If the development does fall within the ambit of paragraph 13(b) of column 1 of Schedule 2 to the EIA Regulations, might the development as changed or

extended have significant adverse effects on the environment.

47. Mr Kohli submits, the Defendant was required to take into account the likely significant effects arising from the development as changed.

Discussion

48. Ms Davies, rightly, accepts that paragraph 13(b)(i) of Schedule 2 of the EIA Regulations was the correct provision for the Defendant to consider when undertaking the screening assessment in this case. The 2022 Planning Application was a proposal for a change to development of a description listed in paragraph 1(c) (intensive livestock installations) where the development is already authorised and executed.

49. In carrying out the screening exercise the essential questions for the Defendant were whether the development proposed was schedule 2 development, and if it was, whether it was likely to have significant effects on the environment by virtue of factors such as its nature, size or location. In considering whether the development is likely to have significant effects on the environment, the decision maker is to consider the overall effect of the project (***Baker*** at paragraph 23) and to consider whether the whole as modified is likely to have significant effects on the environment (***Baker*** at paragraph 44).

50. In answering those questions the Defendant was exercising a judgment. This court can only interfere with that judgment on *Wednesbury* grounds (***Hockley*** at paragraph 103).

51. In exercising his judgment the Defendant was obliged to have regard to the precautionary principle (***Loader*** at paragraph 43).

52. The Defendant's reasoning and decision are set out in the Screening Analysis and Written Statement.

53. The Defendant considered and applied the correct paragraph in Column 1 of Schedule 2 of the EIA Regulations, namely paragraph 13(b).

54. Once the Defendant had identified the appropriate paragraph in Column 1 of Schedule 2, in order to determine whether the development proposed in the 2022 Planning Application was Schedule 2 development, the Defendant was required to consider whether the intensive agricultural unit as proposed to be changed may have significant adverse effects on the environment. In order to consider whether the development proposed was EIA development, the Defendant was required to consider whether any Schedule 2 development was likely to have significant effects on the environment. In considering that latter question the Defendant was required to take into account such of the selection criteria set out in Schedule 3 as are relevant to the development (regulation 5(4)(b) EIA Regulations). The criteria in Schedule 3 include:

"The characteristics of development must be considered with particular regard to—
(a) the size and design of the whole development;
(b) cumulation with other existing development and/or approved development;
…"

55. The Defendant had before him technical reports prepared on behalf of the Claimant and a response prepared on behalf of the Second Interested Party. The Defendant also had before him the advice of Natural England that an assessment of potential cumulative effects was required.

56. The Defendant acknowledged that the odour impacts are likely to be greater should the piggery use be implemented using a straw based system on a reinstated solid floor. The Defendant noted that planning permission was not required in order to use the buildings for pig rearing (paragraph 5 of the Screening Analysis). In so doing the Defendant took account of the 'fall back'.

57. The Defendant's statement (in the third paragraph on the first page of the Written Statement) that "… there is no such current use." was accurate as a matter of fact; the building was not in actual use at the time of the decision.

58. The Defendant noted that the Odour Study did not assess indirect impacts, such as spreading slurry, and stated that these wider activities form part of the project for EIA purposes (Written Statement 3rd page). As the Defendant was required to consider whether the development as changed would be likely to have significant effects on the environment, it was legitimate for him to consider both direct and indirect impacts of the development as a whole. As the development as changed, and as a whole was to be considered, this case cannot be distinguished from ***Squire*** on the ground that development considered in ***Squire*** was for a new livestock unit, whereas the development under consideration in this case was for a change to an existing livestock unit.

59. The essence of the Defendant's findings were:

i) Given the evidence from the experts instructed by the Claimant and by the Second Interested Party, it is not possible to rule out conclusively the possibility of significant impact arising from the development in terms of odour and waste management issues and also ammonia disposition.

ii) It is not possible to rule out the possibility that significant impact will arise as a result of cumulative effects arising as a result of odour dispersal and waste management issues, and ammonia deposition to the Kingerby Beck Meadows SSSI. In coming to that view, the Defendant noted the view expressed by Natural England. The Defendant's judgment was that as a result of uncertainty, it was not possible for him to reasonably conclude that there is no likelihood of significant effects (Screening Analysis paragraph 6 and Written Statement conclusion).

60. The focus of the Claimant's attack on the Defendant's decision is that he considered the likely significant effects arising from the development as changed and did not limit his consideration to the effects arising solely from the operational development.

61. In my judgment, the Defendant's approach to the questions he was asked to consider reveals no error of law. The Defendant considered the development as changed or extended. That approach was entirely appropriate for a development falling within the category described at paragraph 13(b) in Column 1 of Schedule 2 to the EIA Regulations as:

i) When considering the threshold set out in Column 2 of Schedule 2 to the EIA Regulations the Defendant was required to consider whether "The development as changed or extended may have significant adverse effects on the environment".

ii) When considering whether the Schedule 2 development identified as falling within the description at paragraph 13(b) of Column 1 of Schedule 2 was likely to have significant effects on the environment, the Defendant was required to consider whether the development as a whole as modified was likely to have significant effects.

iii) The Defendant was not required to limit his consideration to the environmental effects of the operational development specified in the 2022 Planning Application. As the development fell within the category identified at paragraph 13(b) of Column 1 of Schedule 2 he was required to consider the likely significant environmental effects of the development as proposed to be changed.

62. The Defendant found that there was uncertainty as to cumulative effects, and as a result he concluded it was not possible for him to reasonably conclude that there is no likelihood of significant effects. That approach followed the precautionary principle and was consistent with the view expressed by Pill LJ in ***Loader*** that there may be cases the uncertainties are such that a negative decision cannot be taken.

63. As emphasised in ***Bateman*** the screening stage does not involve a full assessment of any identifiable environmental effects, and involves a decision which is likely to be based upon less than complete information. In this case the Defendant had before him reports commissioned by the Claimant and by the Second Interested Party. The Defendant's screening direction was based upon an analysis of the available evidence.

64. For those reasons the judgment exercised by the Defendant, that the development proposed was EIA development reveals no error of law, and the claim fails on Ground 1.

Ground 2

65. Ms Davies submits that when making the screening direction, the Defendant erred by failing to take into account the baseline (or as she put it, adopting a 'zero baseline'). Ms Davies submits that the Defendant erred as the baseline position is, that in the absence of approval of the development proposed in the 2022 Planning Application, the existing buildings on the Site could and would be used for pig rearing.

66. Ms Davies also submits that the decision is vitiated by a material error of fact, being the Defendant's statement that the buildings on the Site had remained unoccupied since 2018. In making that submission Ms Davies relied upon Mr Tobin's witness statement in these proceedings in which he stated that he understood that the buildings on the Site were occupied by 16,000 laying hens until 2019.

67. Mr Kohli submitted that in order to make a determination on an application for a screening direction the Secretary of State does not necessarily have to establish a baseline.

68. Mr Kohli also submitted that the Defendant did turn his mind to the baseline, and came to the conclusion that there was no reliable environmental baseline.

Discussion

69. Ms Davies' submissions are based upon the contention that Defendant erred in assessing the baseline as zero.

70. The matters which must be taken into account when considering a screening direction are set out at regulation 5(4) of the EIA Regulations, those matters include any information provided by the applicant, and such of the selection criteria set out in Schedule 3 as are relevant to the development.

71. I note that Schedule 3 of the EIA Regulations contains no reference to baseline. The absence of reference to baseline in Schedule 3 can be contrasted with the provisions which apply to the preparation of an environmental statement.

72. Regulation 18(3) of the EIA Regulations provides:

> "(3) An environmental statement is a statement which includes at least—
>
> (a) a description of the proposed development comprising information on the site, design, size and other relevant features of the development;
>
> (b) a description of the likely significant effects of the proposed development on the environment;
>
> (c) a description of any features of the proposed development, or measures envisaged in order to avoid, prevent or reduce and, if possible, offset likely significant adverse effects on the environment;
>
> (d) a description of the reasonable alternatives studied by the developer, which are relevant to the proposed development and its specific characteristics, and an indication of the main reasons for the option chosen, taking into account the effects of the development on the environment;
>
> (e) a non-technical summary of the information referred to in sub-paragraphs (a) to (d);
>
> and
>
> (f) any additional information specified in Schedule 4 relevant to the specific characteristics of the particular development or type of development and to the environmental features likely to be significantly affected."

73. Paragraph 3 of Schedule 4 to the EIA Regulations states:

> "3. A description of the relevant aspects of the current state of the environment (baseline scenario) and an outline of the likely evolution thereof without

> implementation of the development as far as natural changes from the baseline scenario can be assessed with reasonable effort on the basis of the availability of environmental information and scientific knowledge."

74. The provisions of the EIA Regulations which apply at the screening stage are considerably less prescriptive, and less detailed than those which apply to the preparation of environmental statements. That is not surprising given the fact that screening stage is a procedure intended to identify those cases where further and more detailed assessment is required.

75. Analysis of the baseline is not identified as a matter which must be taken into account at the screening stage. Analysis of the baseline falls into the third category of consideration referred to by Lord Sales in ***R (Friends of the Earth Ltd) v. Secretary of State for Transport*** [2020] UKSC 52 at paragraphs 116-121, being a matter to which the decision maker may have regard if in their discretion they think it right to do so.

76. In the Written Statement the Defendant stated the buildings have been unoccupied since 2018 and the agricultural unit lacks a reliable environmental baseline. It is clear that the Defendant did consider the question of baseline, and determined, as a matter of judgment, that there was no reliable information relating to environmental baseline. The Defendant did not, as the Claimant contends, find that there was a 'zero baseline'. Given the fact that there had been no active use for approximately five years, and given that there was a conflict of evidence on whether the existing buildings could be used to house pigs using a straw system on a solid base, the judgment that there was no reliable baseline was open to the Defendant.

77. Ms Davies also contends that there was a material mistake of fact. The mistake of fact alleged is that the Defendant was wrong to find that the buildings on the Site had not been in active use for five years, as the use had ceased in 2019 not 2018.

78. In order for a decision to be set aside on grounds of unfairness arising from a mistake of fact the five factors identified at paragraph 63 in ***E v. Secretary of State for the Home Department*** [2002] EWCA Civ 49 must be present. In this case the Defendant had before him evidence from the Second Interested Party that in May 2018 the buildings on the Site were emptied of livestock and had, since that date, remained unoccupied. The evidence provided by Mr Tobin that the buildings were occupied by 16,000 laying hens until 2019 was said to be based upon his 'understanding' and is set out in his witness statement in these proceedings. That witness statement was not before the Defendant when he made his screening direction. The fact relied upon, namely that the buildings on the Site were in active use in 2019, was not established. Further the reference to inactive use for five years, as opposed to four, played no material part in the reasoning.

79. There was no material mistake of fact sufficient to justify setting the screening decision aside. Further the premise on which this ground of claim is based, namely that the Defendant erred by adopting a 'zero baseline' is not made out. The Defendant considered the question of baseline, and formed a judgment that there was no reliable baseline to inform the assessment. That judgment was open to the Defendant and reveals no error of law.

80. The claim fails on ground 2.

Ground 3

81. Ms Davies submits that:

i) In the screening direction no reason was given as to how the development proposed in the 2022 Planning Application fell within the ambit of paragraph 13(b) of Schedule 2 to the EIA Regulations.

ii) Having assessed the baseline as 'zero' there was no explanation or consideration of how the baseline might evolve.

82. Mr Kohli submits:

i) The fact that the development proposed in the 2022 Planning Application fell within the ambit of paragraph 13(b) of Schedule 2 to the EIA Regulations was self-evident and no further explanation was necessary.

ii) The evolution of the baseline was addressed on the first page of the Written Statement and on the third and fourth pages of the Screening Analysis.

Discussion

83. The approach to be taken when considering a reasons challenge is well established. In ***South Buckinghamshire DC v. Porter*** [2004] UKHL 33 at paragraph 36, Lord Brown summarised the law:

"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."

84. A decision on a screening direction must enable anyone interested in the decision to see that proper consideration has been given to the possible environmental effects of the development and to understand the reasons for the decision (***Bateman*** at paragraph 21).

85. Both parties are agreed that the development proposed in the 2022 Planning Application was a change to a development of a description listed in paragraph 1(c) of column 1 of Schedule 2 to the EIA Regulations (an intensive livestock installation) where that development is already authorised and executed. Given that agreement no further explanation as to why the development proposed in the 2022 Planning Application fell into that category was required, and no substantial prejudice arose as a result by the failure to give any further explanation.

86. The second element of this ground is based upon the premise that the Defendant held that the baseline was 'zero'. The Defendant did not so hold. The Defendant did consider potential evolution of the use of the Site, in that he acknowledged that odour impacts are likely to be greater (than the development proposed) if the alternative of a straw based system based on reinstated solid floor was adopted. The Defendant then explained why he took the approach he did, namely that there was a lack of reliable information on the environmental baseline.

87. For those reasons there was no deficiency in the reasoning, and this ground of claim fails.

Discretion

88. In the event that the Claimant succeeds on any of the grounds, Mr Kohli seeks to rely on the provisions of section 31(2A) of the Senior Courts Act 1981 which provides that the High Court must refuse to grant relief on an application for judicial review if it appears to the court to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred.

89. As no ground of claim has been made out, the question of relief does not arise.

90. If I had found that the Claimant had succeeded under any of the grounds, I would have found that it was highly likely that the outcome for the Claimant would not have been substantially different if the conduct complained of had not occurred. The Defendant found that none of the assessments submitted considered cumulative effects, and that as a result of the uncertainty over the cumulative impact it was not possible for him to reasonably conclude that there was no likelihood of significant effects. The conclusion, based upon the lack of assessment of cumulative effects, applied to the development as proposed in the 2022 Planning Application and the (fall back) alternative of using a straw based system on a solid floor. If the Defendant had based his decision on a comparison between the development as proposed and the fall back alternative, there would have been an absence of assessment on cumulative effects and it is highly likely that the Defendant would have concluded that the

development proposed was EIA development and the outcome for the Claimant would not have been substantially different.

Conclusion

91. For the reasons I have given the application for judicial review is dismissed.