Waste Core Strategy – Examination in Public Issues
Note of Advice from Mr Crean QC to Gloucestershire County Council following Conference held on 27 January 2012

Application of the Habitats Directive and Appropriate Assessment issues concerning the Gloucestershire Waste Core Strategy

Gloucestershire County Council explained to Anthony Crean QC that the Inspector had circulated the Agenda for Issue 4 concerning the application and interpretation of the Conservation of Habitats and Species Regulations 2010 ("the Habitats Regulations"). The Inspector asked the County Council to agree that 'unless it can be concluded that there would not be likely to be a significant effect on a European site the next stage, Appropriate Assessment (AA), must be carried out before the plan can be approved'. This is a note of the advice which Anthony Crean QC gave to the County Council on 27 January.

Anthony Crean QC referred to the case of Feeney v Oxford City Council and others [2011] EWHC 2699 Admin, which is attached to this note. He explained the case appeared to be very similar to the County Council's position regarding the application of the Council Directive 92/43/EEC ("the Habitats Directive") in relation to the Waste Core Strategy (WCS) and whether an appropriate assessment was required to be carried out at this stage in the planning framework.

The case concerned Oxford City Council's adoption of its Core Strategy which indicated that the Northern Gateway strategic site will be brought forward by way of an Area Action Plan. The site proposed Class B related activities which were proposed in meeting Oxford's housing and employment needs. The site was in close proximity to Oxford Meadows SAC. Anthony Crean QC referred to several paragraphs within the case which had particular relevance to the Inspector's consideration of the application of the Habitats Directive and Regulations during the EiP

- Paragraph 27 through to 28:

  'Thus, on the one hand, whether or not there is "adverse effect" is a matter of judgment for the competent authority; on the other hand, there is a legal obligation on the authority not to approve the plan or project unless it has concluded that there will be no adverse effect' [Para 28]

- Paragraph 39 explains:

  'The Core Strategy is a development plan document. It is described in outline in paragraph 3 above. It does not provide planning permission or any other specific approval or consent for any possible site referred to in the strategy'.

- Paragraph 58: Anthony Crean QC says that this paragraph will be relevant in the context in relation to the position which Natural England is taking in the GCC case. Paragraph 58 states:

'. . . Mrs Charlotte Frizzell of Natural England wrote in an e-mail dated 29 June 2011 as follows: "We take the position that it is legitimate under the Habitats Regulations to include a caveat in policy which has the effect of requiring subsequent lower tier plans to be subject to its own Habitats Regulations Assessments. In the event that the Habitats Regulations cannot rule out an adverse effect on integrity on the Oxford Meadows SAC then the higher level policy cannot be met and the lower tier plan would not be in accordance with the Core Strategy".' [Paragraph 58]

Anthony Crean QC advised this paragraph is key in the context of the issues raised by the Inspector under Issue 4. He advised it is quite acceptable to have a high level strategy (such as the WCS) with the lower tier carrying out the site specific HRA which concludes negatively (i.e. no impact on the SAC) with the higher policy. If the subsequent HRA concludes that only so many hectares are suitable for development without impacting the site then the site will be so constrained.

Anthony Crean QC specifically confirmed that he felt the County Council had taken the correct approach in its HRA and there was no error.

- Paragraph 65: This paragraph sets out the Inspector's conclusions and he comments:

  '. . an adverse effect on integrity for the proposed levels in the strategic allocations cannot be ruled out at this stage'

  '. . . I recommend the wording be added to the policy, which cover issues of water hydrology and air quality. I have no reason to believe that hydrology and air quality issues are insurmountable, but they will need to be addressed firmly in any master planning work that is carried out'

  Anthony Crean QC explained:

  - This paragraph shows the Inspector deliberately deferring the detailed examination of the SAC to a later stage and approving a plan which has that effect:
  - The Inspector is explaining that the site allocation will succeed if there are further assessments through the Habitats Regulations at the master planning stage. Anthony Crean QC advised that it is acceptable to defer at the core strategy stage because there is a lower tier where a judgement will be made on the HRA assessment. For example, a DPD allocates 55sq metres for a particular use, it will only allocate 55 square metres which does not have an effect on the SAC. If, at the refined stage, it is only possible to build 10 sq metres without impacting the SAC, this will, in effect, limit the development to 10 sq metres.

- Paragraph 74: Anthony Crean QC specifically drew attention to the safeguarding policy which was included in the Oxford City Council case and set out as follows:

'3.4.43 If the results of these further assessments show that part of the Strategy cannot be delivered without adverse impacts on Oxford Meadows, which cannot be fully mitigated, then the plan will only make provision for level and location of development for which it can be concluded that there will be no adverse effect on the integrity of the SAC, even if this level is below that in the strategic allocation'.

Anthony Crean QC suggested that it would be wise for GCC to request a modification to include a safeguarding policy which is similar to the Oxford City Council case because this has already been tested through the High Court. It would be wise to apply this to the whole of the core strategy sites.

- Paragraph 88: This paragraph explains the conclusions drawn by the Judge in relation to the safeguarding policy:

'In my judgement, in adopting the Core Strategy in its final form, the council did ascertain and conclude that the Core Strategy in that form would not cause harm to the Oxford Meadows SAC. The adoption, in the Core Strategy, of the qualifying wording as recommended by the Joint Statement, ensures that no such harm can or will arise. Thus, the proper interpretation of the Core Strategy as adopted is that, with the qualifying wording in place, there is no uncertainty as to harm. On this basis, the Claim under Issue 1 has no real prospect of success'

- Paragraph 92:

'This conclusion is supported by the following further factors. First, a core strategy is a high level strategic document and the detail falls to be worked out at a later stage. Subsequent, appropriate assessment of specific proposals is plainly envisaged by, and indeed necessitated under, the regime'

'. . . Fourthly, following the close of oral argument, the Council provided and the Claimant did not dispute, a number of examples of core strategies having been approved subject to conditions, of which three have been made expressly subject to conditions as a "safeguard" to address potential harm to SACs under the Habitats Regulations. . .'.

Here the Judge is explaining that you cannot impose a detailed AA at a higher level when there is a lower tier project which can deal with this issue. Anthony Crean QC explained that the WCS is a strategic level plan. It is not possible to have a view in relation to the detail of the scheme, because the scheme is not available.

Anthony Creen then went through the questions which the Inspector raised on the HRA: Issue 4:

1. Natural England Quotes Regulation 61 of the Conservation of Habitats and Species Regulations 2010 in its response 9CD6.1 p331). NE clearly thinks that the regulation applies to plans as well as planning applications. Is this correct?

Anthony Crean QC advises 'yes we agree'

2. Is it agreed that unless it can be concluded that there would not be likely to be a significant effect on a European site the next stage, Appropriate Assessment (AA), must be carried out before the plan can be approved?

Anthony Crean QC advised that Feeney clearly provides authority that you do not need to do the detailed assessment until the next stage in the planning process (for example, planning application stage)

He suggested that the approach with the Inspector should be as follows;

- Provide the Inspector with the Feeney case.
- Provide examples of other Core Strategies which provide a safeguarding policy. This will show to the Inspector that it is an established practice.
- Explain that the County Council has carried out an HRA and in view of the Feeney case and the safeguarding policy, we submit that the evidential threshold has been passed. Therefore, suggest to the Inspector that he does not need to go into the detailed AA for each site, because it is legally acceptable (following Feeney) to consider this at a later stage.

In summary, the County Council should propose a modification on the basis of Feeney case.

Stockton Core Strategy DPD, adopted March 2010

Core Strategy Policy 10 (CS10) – Environmental Protection and Enhancement

1. In taking forward development in the plan area, particularly along the river corridor, in the North Tees Pools and Seal Sands areas, proposals will need to demonstrate that there will be no adverse impact on the integrity of the Teesmouth and Cleveland Coast SPA and Ramsar site, or other European sites, either alone or in combination with other plans, programmes and projects. Any proposed mitigation measures must meet the requirements of the Habitats Regulations.
2. Development throughout the Borough and particularly in the Billingham, Saltholme and Seal Sands area, will be integrated with the protection and enhancement of biodiversity, geodiversity and landscape.
3. The separation between settlements, together with the quality of the urban environment, will be maintained through the protection and enhancement of the openness and amenity value of:
i) Strategic gaps between the conurbation and the surrounding towns and villages, and between Eaglescliffe and Middleton St George.
ii) Green wedges within the conurbation, including:
- River Tees Valley from Surtees Bridge, Stockton to Yarm;
- Leven Valley between Yarm and Ingleby Barwick;
- Bassleton Beck Valley between Ingleby Barwick and Thornaby;
- Stainsby Beck Valley, Thornaby;
- Billingham Beck Valley;
- Between North Billingham and Cowpen Lane Industrial Estate.

iii)Urban open space and play space.
4. The integrity of designated sites will be protected and enhanced, and the biodiversity and geodiversity of sites of local interest improved in accordance with Planning Policy Statement 9: Biodiversity and Geological Conservation, ODPM Circular 06/2005 (also known as DEFRA Circular 01/2005) and the Habitats Regulations.
5. Habitats will be created and managed in line with objectives of the Tees Valley Biodiversity Action Plan as part of development, and linked to existing wildlife corridors wherever possible.

Tees Valley Joint Minerals & Waste Plan, Core Strategy adopted 2011

Policy MWC1: Minerals Strategy

The sustainable use of minerals resources in the Tees Valley will be delivered through:
a) where appropriate, identifying sources of alternatives to primary mineral resources, including secondary and recycled minerals, and encouraging the development of facilities to process alternative materials either at the point of production or other suitable locations;
b) ensuring new-build developments, in particular those in regeneration and growth point areas, contribute to the efficient use of resources, to increase the proportion of construction and demolition waste recycled per year for use as an alternative mineral from 38% in 2005 to at least 80% from 2016 onwards;
c) the efficient use of permitted reserves of primary minerals to help meet the identified need, whilst continuing to drive minerals supply up the minerals hierarchy;
d) identifying those wharves which can be used for the landing of marine-dredged sand and gravels and safeguarding associated land for the development, extension and continuation of this activity;
e) safeguarding the necessary infrastructure to enable the sustainable transport of minerals, in particular the use of the existing rail and port facilities in the Tees Valley; and
f) identifying minerals resources underlying the Tees Valley and protecting them from unnecessary sterilisation by built development.
In taking forward minerals development in the plan area, and particularly along the river corridor and the Tees Estuary, proposals will need to demonstrate that there will be no adverse impact on the integrity of the Teesmouth and Cleveland Coast Special Protection Area and Ramsar site, and other European sites, either alone or in combination with other plans and programmes. Any proposed mitigation measures must meet the requirements of the Habitat Regulations. All minerals developments must be compatible with their setting and not result in unacceptable impacts on public amenity, environmental, historic or cultural assets from their design, operations, management and restoration.

Policy MWC8: General Locations for Waste Management Sites
Sustainable waste management will be delivered through a combination of large sites, which include clusters of waste management and processing facilities, and small sites for individual waste facilities. Allocations and proposals for large waste management facilities should be located in the following general areas:
a) to the south of the River Tees - the land located around Teesport, Smiths Dock Road and the eastern end of Dockside Road (Middlesbrough and Redcar and Cleveland);
b) to the north of the River Tees - the land located around the Graythorp and Haverton Hill Road areas (Hartlepool and Stockton-on-Tees); and
c) to the north of the River Tees - the land located around the Port Clarence, Cowpen Marsh and Seal Sands areas (Hartlepool and Stockton-on-Tees).
In determining the suitability of a site within these areas, consideration will be given to the potential impact on the protected European species associated with the Teesmouth and Cleveland Coast Special Protection Area and Ramsar Site and any functional land required to support them. Where likely adverse impacts are identified, avoidance or appropriate mitigation measures may be required.
Allocations and proposals will be directed away from areas at risk of flooding. In considering sites, the approach set out in Planning Policy Statement 25 will be applied.
Small waste management sites and any landfill sites required will be provided throughout the plan area and be well-related to the source of waste arisings, or the markets for any materials produced.

Policy SS 9

Holt

Holt is designated as a **Principal Settlement** with a **Small Town Centre**. The following development is proposed:

- Between 2001-2021 a total of between 650 and 700 dwellings will be built. This will include 250-300 dwellings on newly identified greenfield development sites which are well integrated with the established built up area of the town and minimise the impact on the countryside, particular the A.O.N.B and the Glaven Valley Conservation Area.
- Approximately 15 hectares of land will be identified for employment generating development comprising 10 hectares already in use or designated for this purpose and a further 5 hectares with suitable vehicular access onto the A148, focusing on business park style uses.
- Opportunities to improve the pedestrian environment of the town centre will be identified in the Site Specific Proposals document and the provision of additional car parking, with high quality pedestrian links to the town centre will be sought.
- A **Public Realm** designation is defined to co-ordinate the use of areas where pedestrian access, informal recreation and appearance are crucial to the town's attractiveness to residents and visitors.
- All major new development must demonstrate no adverse impact on the hydrology of Norfolk Valley Fens Special Area of Conservation (Holt Lowes), and developments within the groundwater catchment of this site must fully mitigate the impact of all hard surfacing to minimise storm run-off.

Policy SS 10

North Walsham

North Walsham is designated as a **Principal Settlement** with a **Large Town Centre**. The following developments are proposed:

- Between 2001-2021 a total of between 900 and 1,100 dwellings will be built. This will include 400-550 dwellings on newly identified development sites well related to the built up area.
- Development will not be permitted unless it has been demonstrated that there is adequate capacity in sewage treatment works (upgrades programmed for post-2016) and electricity provision.
- Approximately 65 hectares of employment land will be retained, reducing the existing provision by approximately 15 hectares, recognising the railway bridges create access difficulties for HGVs into the town from the Norwich direction.
- Suitable sites for development of new retail floor-space will be allocated in the Site Specific Proposals Development Plan Document in locations in, or close to the town centre, of sufficient size to accommodate approximately 4,000sqm of comparison goods floorspace.

- A suitable site will be identified in the Site Specific Proposal document for the relocation of Paston College.
- A **Public Realm** designation is defined to co-ordinate the use of areas where pedestrian access, informal recreation and appearance are crucial to the town's **attractiveness** to residents and visitors.
- All major new development in North Walsham will address surface water run off and ensure no adverse impact on the Broads Special Area of Conservation (SAC).
- The Site Specific Proposals Document will identify a suitable site for a new primary school.

Policy SS 11

Hoveton

Hoveton is designated as a **Secondary Settlement** with a **Small Town Centre**. Development will be limited in scale to meet locally identified needs. The following development is proposed:

- Between 2001-2021 a total of between 130 and 200 dwellings will be built. This will include 100-150 dwellings on newly identified development sites well related to the built up area.
- Approximately 10 hectares of land will be identified and retained for employment generating development.
- All development must ensure no adverse effects on the Broads Special Area of Conservation (SAC).

Policy SS 12

Sheringham

Sheringham is designated as a **Secondary Settlement** with a **Small Town Centre**. The following development is proposed:

- Between 2001-2021 a total of between 600 and 700 dwellings will be built. This will include 200-250 dwellings on newly identified development sites well related to the built up area where encroachment into the wider countryside setting of the town is minimised.
- Development will not be permitted unless it has been demonstrated that there is adequate capacity in sewage treatment works (upgrades programmed for post-2011).
- Between 500-750 sqm of new comparison goods floor-space will be accommodated, respecting the small-shop nature of the town. Suitable sites for development of new retail floor-space will be allocated in the SSP and a suitable central site for the market will be safeguarded.
- Approximately 6 hectares of land will be identified for employment generating development comprising 6 of the 8 hectares already in use or designated for this purpose.
- A **Public Realm** designation is defined to co-ordinate the use of areas where pedestrian access, informal recreation and appearance are crucial to the town's **attractiveness** to residents and visitors.

- **Important Approach Routes** are designated to protect and enhance the setting and approaches into the town.

- All major new development in Sheringham must demonstrate no adverse impact on the hydrology of Norfolk Valley Fens Special Area of Conservation (Sheringham and Beeston Reegis Common) and developments within the groundwater catchment of this site must fully mitigate the impact of all hard surfacing to minimise storm run-off.

Policy SS 14

Wells-next-the-Sea

Wells is designated as a **Secondary Settlement** with a **Small Town Centre.** The following development is proposed:

- Between 2001-2021 a total of between 200 and 300 dwellings will be built. This will include 100-150 dwellings on newly identified greenfield development sites well related to the built up area.

- Approximately 3 hectares of land will be identified for employment generating development comprising 3 hectares already in use or designated for this purpose.

- A site for a new car park with good access from the main approach roads and to the town centre will be allocated in the Site Specific Proposals document. This allocation should demonstrate no adverse impact on the North Norfolk Coast Special Protection Area.

- A **Public Realm** designation is defined to co-ordinate the use of areas where pedestrian access, informal recreation and appearance are crucial to the town's **attractiveness to** residents and visitors.

- **Important approach routes** are designated to protect and enhance the setting and approaches into the town.

Neutral Citation Number: [2011] EWHC 2699 Admin

Case No: CO/3797/2011

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

Royal Courts of Justice

Date: 24 October 2011

Before :

MR. STEPHEN MORRIS QC
Sitting as a Deputy High Court Judge

- -

Between :

SEAN FEENEY

Claimant

- and –

(1) OXFORD CITY COUNCIL
(2) THE SECRETARY OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT

Defendants

- -
- -

The Claimant in person
Anthony Crean QC (instructed by **Law and Governance Department, Oxford City Council**) for the **First Defendant**
The Second Defendant did not appear

Hearing date: 27 July 2011

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Approved Judgment

Mr Stephen Morris QC :

Introduction

1. By this action, Sean Feeney ("the Claimant") challenges, under s.113(2) of the Planning and Compulsory Purchase Act 2004 ("the 2004 Act"), the decision of the First Defendant, Oxford City Council ("the Council") to adopt a core strategy for Oxford ("the Core Strategy") on the grounds that it may harm Oxford Meadows Special Area of Conservation ("the Oxford Meadows SAC"). The Secretary of State for Communities and Local Government is named as the Second Defendant.

2. By application notice dated 28 June 2011 the Council applied to strike out and/or dismiss the Claimant's claim pursuant to CPR 3.4 and/or CPR 24 on the grounds that the Claimant has no real prospect of success on the claim. This is the Court's judgment on that application.

3. The Core Strategy is a development plan document. It was adopted by the Council on 14 March 2011. As it states, the Core Strategy "sets out the spatial planning framework for the development of Oxford up to 2026 and is the principal document in Oxford's Local Development Framework. The Core Strategy sets out the scale and general location of future development and policies to deliver the Core Strategy vision and objectives for the next 20 years."

4. Natural England is the statutory nature conservation body for England. Its role includes providing advice to "competent authorities" on the scope of appropriate assessments required under the Habitats Directive and Regulations regime (explained below). The Buckinghamshire, Berkshire, and Oxfordshire Wildlife Trust ("BBOWT") is a local voluntary organisation concerned with nature conservation.

The Parties and these proceedings

5. The Claimant is a litigant in person. He commenced these proceedings by claim form issued on 21 April 2011 and applied for a protective costs order ("PCO"). On 23 June 2011, Lindblom J adjourned the application for a PCO to an oral hearing, where directions for the future conduct of case could also be considered. On 8 July 2011 HH Judge Thornton QC gave further directions. At the same time, he granted an interim PCO covering the costs for all stages up to and including the judgment on this application.

6. On this application, the Council has been represented by Mr Anthony Crean QC. The Claimant has presented his own written and oral argument. The Secretary of State has not participated, save to the extent of indicating, in writing, support for the Council's application.

7. In addition to the Council's application, there are certain other matters arising in the proceedings, including in particular the Claimant's application for a PCO. At the outset of the hearing, and in the light of certain concessions made by the Council in relation to the PCO, I decided that the most effective way to proceed is to decide the Council's application for summary judgment first.

The Issues

8. There is a lot of material before the Court. The Claimant himself has put forward grounds in his Claim Form, in a response to the Council's defence, in a detailed witness statement and in at least three sets of written submissions. Within this material, the Claimant has put his challenge in a number of ways. Mr. Crean QC has sought to summarise the Claimant's case by identifying 9 or 10 numbered arguments. The starting point is the Claim Form, where the Claimant puts his case as follows:

    1. The Council's decision to adopt the Core Strategy was not within the power under s.113(3)(a) of the 2004 Act because the Core Strategy would harm the Oxford Meadows SAC, or at least there is uncertainty as to whether it would cause such harm and in those circumstances was contrary to regulations 61(5) and 102-107 of the Conservation of Habitats and Species Regulation 2010 ("the Habitats Regulations").

    2. The Council erred in failing to conduct an "appropriate assessment" (under the Habitats Regulations and the Habitats Directives) and failed to direct itself as to the correct test in the European Court of Justice case of *Waddenzee*, alternatively any "appropriate assessment" was so defective as to vitiate is statutory purpose.

    3. The Council's decision to adopt the Core Strategy was *Wednesbury* unreasonable because delivery of strategic allocation policy CS6 (relating to "the Northern Gateway") is contingent upon there not being a negative appropriate assessment in the future.

9. In subsequent documents, the Claimant has put these claims in a variety of different ways, and has introduced additional arguments. Taking account also of Mr. Crean QC's analysis of the claims, in my judgment, the Claimant's case falls to be considered under four main heads of argument.

    1. The decision was unlawful because there was no sufficient finding that the Core Strategy would not cause harm to the Oxford Meadows SAC. Either the Council wrongly concluded that there was no harm or alternatively the Council did not conclude that there was no harm. This claim is based on breach of regulation 61(5) and/or regulation 102(4) of the Habitats Regulations and, perhaps, failure properly to apply the precautionary principle and the cases of *Waddenzee* and/or *Commission v UK*.

    2. Secondly, the decision to approve the Core Strategy was *Wednesbury* unreasonable in so far as it related to the Northern Gateway CS6 policy, since the very deliverability of that policy was wholly dependent upon a future negative "appropriate assessment".

    3. Thirdly, the Council, as the relevant competent authority, did not carry out its own "appropriate assessment" as required and/or did not adequately record the appropriate assessment that it did make. This contention is based upon the decision of Owen J in *R (Akester) v Department for Environment Food and Rural Affairs* [2010] EWHC 232 (Admin) [2010] Env L R 33 ("the *Akester* case").

4. Fourthly, at various points in the process leading up to the adoption of Core Strategy, the Council and various other persons or bodies involved had acted in bad faith in differing ways.

10. The question for determination now is: does the Claimant have a real prospect of succeeding on his claims under one or more of these heads? I address this question in paragraphs 78 to 123 below.

The Legal Framework

11. The statutory scheme for a "development plan" and the role of a "core strategy" within that scheme is contained in sections 15 to 24 of the 2004 Act and in the Town and Country Planning (Local Development) (England) Regulations 2004 (SI 2004 No 2204) ("the 2004 Regulations").

12. Section 15 of the 2004 Act requires a local planning authority to prepare and maintain a scheme to be known as their "local development scheme". The local development scheme must specify the local development documents which are to be "development plan documents" ("DPDs"). The Core Strategy DPD is specified as a DPD in the local development scheme for Oxford. By s.17(8) a document is a "local development document" only in so far as it (a) is adopted by resolution of the local planning authority as such and (b) is approved by the Secretary of State. By section 20, the local planning authority has a duty to refer every DPD to the Secretary of State for independent examination, to be carried out by a person appointed by the Secretary of State. The purpose of independent examination in respect of a DPD is to determine whether it satisfies specified legal requirements and whether it is "sound": s.20(5)(a) and (b). Any person who makes representations seeking to change a DPD has a right to be heard before the independent inspector: s.20(6). By s.23(2) and (3), the local planning authority has the power to adopt a DPD, with or without modifications, but only as recommended by the inspector. By s.24, local development documents must be in conformity with the regional spatial strategy ("RSS") for the relevant region.

13. The nature, purpose, and place within the statutory scheme, of a core strategy were recently described by Collins J in *Save Historic Newmarket Ltd v Forest Heath DC* [2011] EWHC 606 (Admin) as follows:

> *"4. Under the 2004 Act, a Development Plan comprises a Regional Spatial Strategy (RSS) and a Local Development Framework (LDF). The LDF itself has a number of components. The relevant one is the Core Strategy. This, like all LDF documents, must be in general conformity with the RSS. It is what is described as a Local Development Document (LDD) within the meaning of s.17 of the 2004 Act. By s.17(3) a local planning authority's LDDs 'must (taken as a whole) set out the authority's policies (however expressed) relating to the development and use of land in their area'. The definition of a Core Strategy and its designation as an LDD document is achieved by Regulation 6 of the Town and Country Planning (Local Development)(England) Regulations 2004 (SI 2004 No 2204).*
>
> *Regulation 6(3) provides that a document of the description in paragraph (1)(a) is to be referred to as a Core Strategy. Regulation 6(1)(a) refers to any document containing statements of-*

'(i) the development and use of land which the local planning authority wish to encourage during any specified period;

(ii) objectives relating to design and access which the local planning authority wish to encourage during any specified period;

(iii) any environmental, social and economic objectives which are relevant to the attainment of the development and use of land maintained in paragraph (i);

(iv) The authority's general policies in respect of the matters referred to in paragraphs (i) to (iii).

5. As their title suggests and the definition in Regulation 6(1) indicates, Core Strategies are intended to contain more general policies looking to objectives rather than site specific developments. In PPS12 which discusses local spatial planning, guidance is given in the following terms:-

> *'4.5. It is essential that the Core Strategy makes clear spatial choices about where developments should go in broad terms. This strong direction will mean that the work involved in the preparation of any subsequent DPDs is reduced. It is also means that decisions on planning applications can be given a clear steer immediately.*
>
> *4.6. Core strategies may allocate specific sites for development. These should be those sites considered central to achievement of the strategy. Progress on the Core Strategy should not be held up by inclusion of non strategic sites'.*

In 4.7 the point is made that the Core Strategy looks to the long term and in general will not include site specific detail. It may be preferable for a site area to be delineated in outline rather than detailed terms and the detail can be dealt with in subsequent planning documents which do deal with the particular in the light of the general approach set out in the RSS and the Core Strategy". (emphasis added)

Challenge under s.113

14. A core strategy, as a development plan document, can be challenged as a "relevant document" under s.113(2) of the 2004 Act. S.113(3) of the 2004 Act enables a person aggrieved to make an application to the court in respect of such a "relevant document" on the grounds that (a) the document is not within the appropriate power or (b) a procedural requirement has not been complied with. Section 113(6) provides that the court is empowered to quash the relevant document, wholly or in part and generally or as it affects the property of the applicant, if the Court is satisfied (a) that a relevant document is to any extent outside the appropriate power and (b) that the interests of the applicant have been substantially prejudiced by a failure to comply with a procedural requirement.

15. Section 113 is the statutory successor to ss.284 and 287 Town and Country Planning Act 1990. The approach to ss. 284 and 287 of the 1990 Act was the same as that under s.288 of that Act (dealing with appeals from decisions of the Secretary of State). A

challenge under s.284 (and s.288) of the 1990 Act (and thus under s.113(2)(a)) can be made only on a question of law. Questions of fact, degree, assessment and judgment are not within the scope of the power. Nevertheless a s.288 challenge (and thus a s.113(2) challenge) can be made on the basis of the judicial review test of *Wednesbury* unreasonableness (i.e. irrationality). However the Court will be astute to ensure that questions of fact are not dressed up as questions of law and, further, not to enter upon the "planning merits" of the decision or document in question. see *Newsmith Stainless Ltd v Secretary of State for Environment, Transport and the Regions* [2001] EWHC 74 §§5-8 and *Hammersmatch Properties Limited v. First Secretary of State* [2005] EWCA Civ 1360 at §§ 32-33.

Strike out and summary judgment

16. CPR Part 3.4(2) provides that the court may strike out a statement of case where it appears to the court that it discloses no reasonable grounds for bringing or defending the claim. Further, CPR Part 24.2 provides that the court "may give summary judgment against a claimant ... on the whole of a claim or on a particular issue if (a) it considers that (i) the Claimant has no real prospect of succeeding on the claim or issue.... and (b) there is no other compelling reason why the case or issue should be disposed of at a trial". Paragraph 5.1 of Practice Direction 24 makes provision for the orders the court may make on an application under Part 24, including an order dismissing the claim.

17. I have been referred to *Three Rivers District Council v Governor and Company of the Bank of England (No 3)*[2003] 2 AC 1 at §§87 to 100. As to the standard to be met, a "real" prospect is to be distinguished from a "fanciful" prospect. Further it is a higher standard to meet than a case which is merely "arguable": *International Finance Corp v Utexafrica Sprl* [2001] CLC 1361. The test will not be met where a case is so weak that it has no reasonable prospect of success. In particular it may be clear as a matter of law at the outset that even if a party were to succeed in proving all the facts he offers to prove he will not be entitled to the remedy he seeks.

18. These "summary" procedures, under CPR 3.4 and 24, have been held to be apt for use in validity challenges under Part XII of the 1990 Act (s.284 and s.288): see *Evans v First Secretary of State* [2003] EWCA Civ 1523 and *R (South Gloucestershire) v Secretary of State for Communities and Local Government* [2008] EWHC 1047 (Admin). In my judgment, there are, equally, apt for use in a challenge under s.113(2) of the 2004 Act. Mr Crean QC puts his application before me on the basis of CPR 24.

The Habitats Directive

19. Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ 1992 L 206/7) ("the Habitats Directive") aims to protect the most seriously threatened habitats and species across Europe. Sites designated under the Habitats Directive are designated Special Areas of Conservation (SACs). Article 6 is of particular relevance. Articles 6.1 and 6.2 impose general obligations upon Member States as regards conservation of, and the avoidance of deterioration to, SACs. Article 6.3 and 6.4 deal with the relationship between development issues and SACs in the following terms:

> *"6.3 Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. In the light of the conclusions of the assessment of the implications for the site and subject to the provisions of paragraph 4, the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public.*
>
> *6.4. 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 Nature 2000 is protected...."*

The Conservation of Habitats and Species Regulations 2010

20. The Habitats Regulations are the principal means by which the Habitats Directive is implemented into UK law, for England and Wales. The Habitats Regulations of 2010 consolidate and update the earlier 1994 Regulations ("the 1994 Regulations"). Chapter 8 of Part 6 which deals with land use plans was introduced specifically following the ECJ's judgment in Case C-6/04 *Commission v UK* (see below).

21. Part 6 of the Habitats Regulations is entitled "Assessment of Plans and Projects". Under chapter 1 of Part 6, regulation 61 provides:

> *"61 – **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 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 them to determine whether an appropriate assessment is required.*

(3) The competent authority must for the purpose 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 specify.

(4) They must also, if they consider it appropriate, take the opinion of the general public, and if they do so, they must take such steps for that purpose as they consider appropriate.

(5) In the light of the conclusions of the assessment, and subject to regulation 62 (considerations of overriding public interest), 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 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 they propose that the consent, permission or other authorisation should be given."

22. Regulation 102, under Chapter 8 of Part 6, contains similar provisions relating to a "land use plan". It provides:

*"**102.— Assessment of implications for European sites and European offshore marine sites***

Where a land use plan—

(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 the site,

the plan-making authority for that plan must, before the plan is given effect, make an appropriate assessment of the implications for the site in view of that site's conservation objectives.

(2) The plan-making 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 specify.

(3) They must also, if they consider it appropriate, take the opinion of the general public, and if they do so, they must take such steps for that purpose as they consider appropriate.

(4) In the light of the conclusions of the assessment, and subject to regulation 103 (considerations of overriding public interest), the plan-making authority or, in the case of a regional strategy, the Secretary of State must give effect to the land use plan 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).*
>
> *(5) A plan-making authority must provide such information as the appropriate authority may reasonably require for the purposes of the discharge of the obligations of the appropriate authority under this Chapter."*

23. A core strategy is a "land use plan": see s.107(1)(c); accordingly it must comply with regulation 102 of the Habitats Regulations. Both parties have proceeded on the assumption that regulation 61 also applies to a core strategy. However, whilst it seems from *Commission v UK,* that it may well also be a "plan or project", it is not clear to me that regulation 61 does so apply: see the limited scope, in the Habitats Regulations, of the application of the "assessment provisions" (as defined in regulation 59) in Chapters 2 to 7 of Part 6 of the Regulations. Since regulation 102 is in materially similar terms to regulation 61, I consider that nothing turns on this point. Oxford Meadows SAC is a "European Site" within the definition of regulation 8 of the Habitats Regulations.

Waddenzee and Commission v UK

24. I have also been referred, in some detail, to two decisions of the European Court of Justice relating to the Habitats Directive: Case C-127/02 *Landelijke Verenigung Tot Behoud Van De Waddenzee, Nederlandse Verenigung Tot Bescherming Van Vogels v. Statssecretaris Van Landbouw, Natuurbeheer En Visserij* ("Waddenzee") [2004] ECR I-7405 and Case C-6/04 *Commission v United Kingdom* [2005] ECR I-9017 ECJ and the opinion of Adv. Gen. Kokott. In *Waddenzee*, the ECJ held as follows. *First*, the test for whether an appropriate assessment under Article 6.3 of the Habitats Directive is required to be carried out in the first place is where "it cannot be excluded on the basis of objective information that it will have a significant effect on that site, either individually or in combination with other plans or projects". A "risk" of significant effects triggers the requirement for an appropriate assessment (ECJ judgment, §§39 to 45 and §3 operative part). *Secondly*, in an appropriate assessment it is necessary to identify all aspects of the plan (in combination with other plans) which can affect the site in the light of the best scientific knowledge in the field (ECJ judgment, §54 and §4 operative part). *Thirdly*, the competent authorities, taking account of the appropriate assessment, are to authorise activity *"only if they have made certain that it will not adversely affect the integrity of that site"* (ECJ judgment, §§59 and §4 operative part). In this regard, the ECJ held at §§56 to 58:

> *"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.*
>
> *57. So, where doubt remains as to the absence of adverse effects on the integrity of the site linked to the plan or project being considered, the competent authority will have to refuse authorisation.*

> *58. In this respect, it is clear that the authorisation criterion laid down in the second sentence of Article 6(3) of the Habitats Directive integrates the precautionary principle (see Case C-157/96 National Farmers' Union and Others [1998] ECR I2211, paragraph 63) and makes it possible effectively to prevent adverse effects on the integrity of protected sites as the result of the plans or projects being considered. A less stringent authorisation criterion than that in question could not as effectively ensure the fulfilment of the objective of site protection intended under that provision."* (emphasis added)

§§58 and 59 indicate that, in order to satisfy the second sentence of Article 6.3, it is sufficient to ensure *prospectively* that there will be no harm in the future.

25. In *Commission v UK*, the ECJ held that the United Kingdom, by the then 1994 Regulations, had failed properly to implement Article 6.3 and 6.4 of the Habitats Directive in two particular respects. The ECJ held (at §§52 to 56) that land use plans must be subject to an appropriate assessment under Article 6.3 of the Directive because they may have a considerable influence on future later specific development decisions. Advocate General Kokott dealt with the issue at §§39 to 50 of her opinion, setting out why it is necessary to do an appropriate assessment in advance, even at the stage of a land use plan. The Claimant places particular reliance on these paragraphs; §§43 to 48 are the most pertinent:

> *"43. Those statements on the necessary degree of probability related to scientific uncertainty regarding the effects of measures whose implementation was certain. In the case of the plans at issue here, which require further permissions, there is, on the other hand, already uncertainty as to whether they will be implemented at all. It is appropriate, however, to apply comparable criteria in this regard too. Accordingly, the decisive test is whether it cannot be excluded on the basis of objective information that a plan which still requires further permissions in order to be put into effect will have significant effects on the site concerned. That is in any event so if - as laid down in United Kingdom law for the plans at issue here - subsequent decisions are in principle to be in accordance with the plans.*
>
> *44. It is true that United Kingdom law provides in principle, following a negative assessment of implications, for refusal of permission in the face of the plan or for implementation of the procedure for exceptional cases under Article 6(4). However, the objectives of the Habitats Directive would be jeopardised if the requirements of site protection could in principle prevail over an opposing plan only at the last moment as an exception to the normal course of procedure. Where there are procedural arrangements of that kind, it would have to be feared that an assessment of implications subsequent to the plan formulation would no longer be carried out with the outcome being open but with the objective of putting the plan into effect.*

45. Narrowing the perspective to the final permission furthermore fails to take into account that plans whose implementation presupposes further permissions can have indirect effects on sites. Plans regularly determine, through the coordination of various individual proposals, the implementation of those proposals. This affects in particular the assessment of alternatives, which is sometimes necessary.

46. In this connection, the blocking of potential alternatives - to which regard has not, however, been had in formulating the plan in the absence of an assessment of implications - by other components of the plan is to be mentioned first of all. If adverse effects cannot yet be taken into account at the stage of formulating the plan, the implementation of parts of the plan, which do not themselves have any direct effects on the site, can thwart possible alternatives for components of the plan which do have adverse effects. For example, a plan could envisage a residential development that does not harm areas of conservation and simultaneously an urgently required by-pass which, in the location envisaged, would adversely affect the integrity of areas of conservation, whereas it could also be built instead of the housing without adversely affecting areas of conservation. If the housing is constructed first, there is a lack of an alternative when making the subsequent decision concerning the road. Site protection under the Habitats Directive demands, on the other hand, that account already be taken in formulating the plan of the fact that the putting into effect of both subproposals would necessarily have an adverse effect on the area of conservation and would therefore require justification.

47. Furthermore, particularly in the case of proposals for sections of highway or railway, but in principle also in the case of all proposals under which extensions are intended to be constructed, the first stages of a proposal regularly determine the realisation of the subsequent stages. If the effects of the entire proposal on areas of conservation not at issue until later are examined neither within the framework of the plan nor at the time of the first stages, each stage restricts the number of possible alternatives for subsequent stages, without an appropriate assessment of alternatives being carried out. Such a course of action is often derogatorily described as salami tactics.

48. In addition, the early taking into account of the interests of site protection prevents faulty planning that may have to be remedied, if it does not become apparent until the time of the specific permission that the proposal cannot be implemented in that form because areas of conservation are adversely affected. Therefore, the idea developed in respect of Directive 85/337 on

> *the assessment of environmental effects that an impact assessment should be carried out at the earliest possible stage (24) also applies in the context of the Habitats Directive."*

In this way *Commission v UK* establishes, in the context of appropriate assessment and approval under the Habitats Directive, the link between a general land use plan and later more specific plans, on the basis that the latter will necessarily be influenced by the former; thus giving rise to the need for an appropriate assessment for the former.

26. However at §49 of her opinion, the Advocate General expressly accepted that an appropriate assessment at the "land use stage" will necessarily be more general and less precise and that sequential appropriate assessments, of increasing specificity over time, are proper and to be expected.

> *"49. The United Kingdom Government is admittedly right in raising the objection that an assessment of the implications of the preceding plans cannot take account of all the effects of a measure. Many details are regularly not settled until the time of the final permission. It would also hardly be proper to require a greater level of detail in preceding plans or the abolition of multi-stage planning and approval procedures so that the assessment of implications can be concentrated on one point in the procedure. Rather, adverse effects on areas of conservation must be assessed at every relevant stage of the procedure to the extent possible on the basis of the precision of the plan. This assessment is to be updated with increasing specificity in subsequent stages of the procedure."* (emphasis added)

Summary

27. Once an appropriate assessment has been made, in my judgment, the true construction of regulations 61(5) and 102(4), Article 6.3 2nd sentence and the two ECJ cases is as follows:

(1) The competent authority is required to *take account* of the conclusions in that appropriate assessment.

(2) It is *then* required to *ascertain* whether or not the plan or project will "adversely affect the integrity" of the relevant Site; this is a matter for its judgment/assessment. Strictly, in my judgment, this is a stage distinct from the stage of "appropriate assessment": see the words "in the light of the conclusions in the appropriate assessment in Article 6.3 and regulation 61(5). So, for example, the competent authority's appropriate assessment might find that there will or might be harm, but yet the authority could subsequently ascertain, as result of measures or action taken after the appropriate assessment, that there would be no harm; this is plainly envisaged by the reference, in Article 6.4, to "alternative solutions".

(3) The competent authority may only agree to the plan or project if the competent authority concludes (or ascertains) that it *will not* adversely affect the integrity

of the relevant Site; if it does so conclude, then the competent authority has a discretion whether or not to agree to the plan.

28. Thus, on the one hand, whether or not there is "adverse effect" is a matter of judgment for the competent authority; on the other hand, there is a legal obligation on the authority *not* to approve the plan or project unless it has concluded that there will be no adverse effect

Three English authorities

29. The Claimant has also referred in particular to three domestic cases in the course of his various arguments. I summarise each of these at this stage.

The Lewis case

30. *R (on the application of Lewis) v Redcar and Cleveland Borough Council* [2008] EWCA Civ 746 [2009] 1 WLR 83 concerned the grant of planning permission to a developer for a mixed use redevelopment of open land providing leisure and linked housing. The claimant opposed the redevelopment and applied for judicial review on the ground that there had been the appearance of bias or predetermination on part of the members of the local authority's planning committee on the basis that they had considered the application with closed minds. The judge upheld this challenge. The Court of Appeal allowed the developer's appeal, holding that councillors were entitled to be "predisposed" to determine the application in accordance with their political views and policies, provided that they had had regard to all material considerations. What was not allowed was "predetermination"; the relevant test for which is whether the committee members made their decision with closed minds or the circumstances gave rise to such a real risk of closed minds that the decision ought not to be upheld. On the facts, neither the imminence of local elections nor the unanimity of the majority group members of the committee nor any other evidence demonstrated that any of those who had voted had minds closed to the planning merits of the proposal.

31. The claimant had advanced a second ground of challenge: that the decision had been taken in breach of regulation 48 of the 1994 Regulations. This was rejected by the judge and by the Court of Appeal (at §§73 to 87 of Pill LJ's judgment). The claimant contended, first, that the council as the competent authority had failed to make the appropriate assessment required and, secondly, had failed to ascertain that there would be no relevant "adverse effect". The council delegated to its own development control manager the task of making the appropriate assessment. She consulted Natural England and the RSPB. The developer employed an ecological consultancy, E3, who produced an assessment report. The development control manager adopted E3's report as her appropriate assessment. After much to-ing and fro-ing between these various bodies, the report was revised and Natural England and RSPB withdrew previously stated objections, subject to a number of safeguarding conditions being attached to any approval of the proposal. The claimant argued that it was for the council itself to make the appropriate assessment and not Natural England, the RSPB or the council's own officer; and that, despite the fact that the position of Natural England and the RSPB had been placed before the council's planning committee in the officers' report, there was no evidence that members of the planning committee had made the assessment themselves. The Court of Appeal unanimously rejected this argument, holding, first, that the planning committee was entitled to rely on Natural

England and RSPB's recommendations, which they had seen. The conditions which these bodies had recommended were included in the report submitted to the committee. The grant of permission made specific reference to no adverse effect. Here, the council's officer, rather than the council itself, had been responsible for the appropriate assessment; and the assessment report itself was carried out by a third party expert. Neither of these facts was regarded by the Court of Appeal as constituting breach of the Regulations or the Habitats Directive.

The Akester case

32. The *Akester* case concerned the decision of a ferry operator, Wightlink Limited, to introduce a new larger ferry on the route between Lymington Pier and the Isle of Wight. Owen J held that that decision was unlawful as being in breach of Wightlink's duties as a competent authority under Article 6.3 of the Habitats Directive and under the 1994 Regulations. In particular Owen J held that no reasonable harbour authority could have concluded that no doubt remained as to whether or not there would be significant adverse effects on the integrity of the SAC in question by the introduction of the new ferries: ie Wightlink's final conclusion of "no harm" was *Wednesbury* unreasonable.

33. The background to this conclusion was that, at the time of the decision, Wightlink, the competent authority, had before it two, conflicting, expert reports as to whether the new ferries would have an adverse effect on the relevant SAC: a report from ABPmer which it had commissioned concluding "no harm"; and formal advice from Natural England (itself based on a report from its own independent expert) that it could not be ascertained that there would be no adverse effect (see §§40, 45, 49, 54, 98 to 102). Wightlink had rejected the latter in favour of the former. (A prior issue was whether Wightlink had been correct in its conclusion that there was no "project" within Art 6.3 of the Habitats Directive and thus that it was not required to make an appropriate assessment under regulation 48 (§§53, 54). So, as a matter of fact, there had been no formal appropriate assessment undertaken for this reason).

34. The judge's reasoning on his conclusion, at §§109 to 117 can be summarised as follows. The claimant argued that Wightlink could not reasonably have concluded that there could be *no doubt* that there would be no adverse effect, because Natural England's contrary view must have given rise to, at least, a doubt in this regard. The judge held that Wightlink was bound to accord considerable weight to Natural England's advice and that it had to have had compelling reasons to depart from it (§112). Counsel for one of the intervening parties, supporting the claimant, argued (§§113, 114) that the findings of the appropriate assessment were not recorded or properly reasoned, contrary to guidance from the European Commission. That guidance required a reasoned record of the appropriate assessment, particularly where, as in that case, there was a potential conflict between Wightlink's public and commercial duties. The guidance suggests that [if] "the record of the *assessment* does not disclose the reasoned basis for subsequent decision, the *assessment* does not fulfil its purpose and cannot be considered appropriate" (emphasis added). I observe in this regard that this might suggest that the final decision in question was the appropriate assessment or, at the least, that the appropriate assessment and the decision of "no harm" were effectively one and the same thing, at least as far as concerns the issue of adverse effect on the SAC. In *Akester,* no clear distinction was drawn between the appropriate assessment and the "ascertainment of no harm". It seems to me that the

guidance does not necessarily mean that the appropriate assessment itself must record the reasoned basis for the subsequent decision as taken. It can be interpreted as referring to "a reasoned basis upon which a subsequent decision can be taken."

35. At §114, the judge rejected Wightlink's argument that it had in effect adopted the ABPmer report as *its* own appropriate assessment. The board resolution did not say that and no reasons were given for rejecting Natural England's advice, and there was no evidence that the board engaged with the issue between the two experts. He concluded (§115):

> *"In the absence of a reasoned decision by the board, I cannot be satisfied that it gave the formal advice from Natural England the weight that it deserved, and in consequence that it could properly have come to the conclusion that no doubt remained as to whether the introduction of the new ferries would have adverse effects on the protected sites. [then after citing Young (see below)] .... It was important that the decision making process by which the board arrived at what it relies upon as amounting to its appropriate assessment, should have been made clear in the record of its decision. It was not."*

36. At §116, the judge concluded further, on the facts, that it was for Wightlink itself to carry out the appropriate assessment and that it was insufficient to rely upon the report of one of the experts (see also §97). Then, at §120, the judge upheld a second ground of challenge that Wightlink's decision was improperly influenced by Wightlink's own commercial considerations, namely that by that time it would not have been able to continue to operate the ferry service if the new ferries had not been introduced. He went on to hold (§121) that this further conclusion added further weight to his prior conclusion of *Wednesbury* unreasonableness.

The Young case

37. *R (on the application of Young) v. Oxford City Council* [2002] EWCA Civ 990 concerned the grant of planning permission by the planning committee of Oxford City Council for the change of use and conversion of a listed building. The issue was the particular basis upon which the planning committee had in fact granted permission (see §5 of judgment of Pill LJ). There were two possible bases for the decision; if the true basis was the second, then the decision was wrong for failure to take account of a relevant policy statement. Ouseley J at first instance found that the decision had been made on the first basis. On appeal, the claimant submitted witness statements from the councillor members of the planning committee, which stated, effectively, that planning permission had been granted on the second basis. With this fresh evidence, the Court of Appeal allowed the appeal and quashed the planning permission. In the course of his judgment, Pill LJ commented on the dangers inherent in admitting subsequent explanatory statements from members of a planning authority, and said at §20:

> *"It is therefore important that the decision-making process is made clear in the recorded decisions of the committee, together with the officers' report to committee and any record of the*

> *committee's decisions. Decisions recorded in the minutes should speak for themselves."*

Pill LJ went on to decide that the committee should have approached the issue before it in a particular way and concluded "There would have been no difficulty in recording in the minutes the basis upon which permission was granted".

38. *Young* has to be considered in its own particular context. First, the central and only issue in that case was a "binary" question: upon which of *two* possible bases was permission granted? Secondly, this was a very different context: planning permission for one specific project for one building and with effectively limited and narrow issues. Pill LJ does not say that everything must be recorded in the minutes themselves, as long the reasoning is clear from the minutes together with other related documents - in that case the officers' report. Thirdly, in my judgment, *Young* is not authority for the proposition that in every case where a council makes a decision in the planning field the full debate within the council, and the debate and decision on each and every aspect of the issues arising, must recorded.

Factual Background

The Core Strategy, including the Northern Gateway

39. The Core Strategy is a development plan document. It is described in outline in paragraph 3 above. It does not provide planning permission or any other specific approval or consent for any possible site referred to in the strategy. It identifies certain strategic locations for development, for the purpose of meeting Oxford's housing and employment needs. One of three such strategic locations is the "Northern Gateway". It is land situated immediately east of the A34 and bisected by the A44 and the A40. Policy CS6 of the Core Strategy states as follows:

> *"Northern Gateway*
> *The Northern Gateway is allocated as a strategic location to provide a modern employment-led site with supporting infrastructure and complementary amenities. Planning permission will be granted for principally Class B-related activities (55,000m2), which must satisfy at least one of the following criteria:*
>
> *a. directly relate to Oxford's key sectors of employment of science and technology research, education, biotech and spin-off companies from the two universities and hospitals;*
> *b. provide additional research and development facilities;*
> *c. build on Oxford's established and emerging 'clusters';*
> *d. comprise spin-off companies from the universities or hospitals; or*
> *e. provide an essential service for Oxford, or the knowledge-based infrastructure.*
>
> *Development for Class-B uses will be brought forward in two phases:*
>
> *• a maximum of 20,000 m2 to be occupied by 31st March 2016;*
> *• a maximum of 55,000m2 to be occupied by 31st March 2026."*

Oxford Meadows SAC

40. Oxford Meadows SAC is a "European Site" designated under Article 4(4) of the Habitats Directive as it hosts a habitat listed within Annex I, namely lowland hay meadows and a species listed in Annex II, namely creeping marshwort. It lies within 20 km of the boundary of the Oxford City Council and is described as being lowland hay meadows in the Thames Valley centre of distribution.

Chronology

41. Before its adoption, the Core Strategy was put out to extensive consultation and was fully considered by the Planning Inspectorate, culminating in it being held to be "sound", in accordance with s.20(5) of the 2004 Act. A full account of the evidence gathering and consultation with stakeholders and the wider community is given in the witness statement of Adrian Roche, the Council's Planning Policy Team Leader involved in the Council's local development framework. In large part, Mr. Roche's evidence is not seriously disputed by the Claimant.

42. Work commenced on preparing the Core Strategy in the early months of 2006, and consideration of its impact upon Oxford Meadows SAC was begun from October 2006. The screening stage of the Habitats Regulation Assessment ("HRA") was carried out by the Council in the summer of 2007 and an "appropriate assessment" was carried out by September 2008.

43. The proposed "Submission Version" of the Core Strategy ("the Submission Core Strategy") was approved by the full Council on 5 August 2008, and published for consultation in September 2008

The First Habitats Regulations Assessment of the Council: September 2008

44. At the same time as publishing the Submission Core Strategy, the Council published its "Oxford Core Strategy Habitats Regulation Assessment". By its own terms, this is the "appropriate assessment" made by the Council. Relevant parts of this first version of the HRA are as follows.

> *"1. INTRODUCTION*
>
> *Oxford City Council have undertaken this Habitats Regulations Assessment "in-house", with auditing undertaken by' Levett-Therivel Sustainability Consultants. This report discusses Stage 1 (screening) and Stage 2 (appropriate assessment).*
>
> ***1.1 Requirements of the Habitats Directive***
>
> *Appropriate assessment of plans that could affect Special Areas of Conservation (SACs), Special Protection Areas (SPAs) and Ramsar sites jointly called 'European sites') is required by article 6(3) of the European Habitats Directive ...*

...

The Habitats Directive applies the precautionary principle to European sites. Plans and projects can only be permitted if it can be shown that they will have no significant adverse effect on the integrity of any European site, or if there are no alternatives to them and there are imperative reasons of overriding public interest as to why they should go ahead.....

1.2 Methodology Used for this Habitats Regulations Assessment

Habitats Regulations Assessment can involve up to a four stage process: .

1. ***Screening.*** *Determining whether a plan 'in combination' is likely to have a significant effect on a European site.*

2. ***Appropriate Assessment.*** *Determining whether, in view of the site's conservation objectives, the plan 'in combination' would have an adverse effect (or risk of this) on the integrity of the site. If not, the plan can proceed.*

3. ***Assessment of alternative solutions.*** *Where the plan is assessed as having an adverse effect (or risk of this) on the integrity of a site, there should be an examination of alternatives.*

4. ***Assessment where no alternative solutions remain and where adverse impacts remain.***

This HRA covers Stages 1 and 2 of this process. The two stages were carried out between July 2007 until September 2008.

...

This report discusses stage 1 (screening), and stage 2 (appropriate assessment)."

45. Section 2 of the HRA dealt with stage 1 screening. Section 3 continued as follows:

"3. APPROPRIATE ASSESSMENT

The following sections deal with each of the possible environmental requirements of the Oxford Core Strategy on the Oxford Meadows SAC, and the likelihood of 'in-combination' significant effects. Each of the environmental requirements is dealt with in turn:

- *Air pollution*
- *Water quality*
- *Water levels*
- *Recreational pressure*

In compliance with Article 6(3) of the Habitats Directive, the City Council must consider the implications of the Oxford Core Strategy for relevant sites 'in combination' with other plans or projects' that might have significant impacts on these sites. [There is then set out a list of other plans and projects; Chiltern Railways is not included].

Conclusions

> *The Oxford Meadows SAC is currently judged by Natural England to be in a favourable condition. This screening opinion has concluded that none of the policies in the Oxford 2026 Core Strategy Proposed Submission Document are likely to have significant effects on the Oxford Meadows SAC with regard to the following environmental requirements of the site:*
>
> - *Maintenance of traditional hay cut and light aftermath grazing*
> - *Absence of direct fertilisation*
> - *Minimal Air Pollution*
> - *Absence of nutrient enrichment of waters; good water quality*
> - *Balanced Hydrological Regime*
> - *Recreational pressures"* (emphasis added)

Whilst these conclusions refer to a "screening" opinion, it is clear from the whole structure and content of the HRA that the Council concluded at stage 1 that an appropriate assessment *was* required for Oxford Meadows SAC and then went on, at stage 2, to make such an appropriate assessment.

Submission to the Secretary of State

46. On 21 November 2008 the Core Strategy was formally submitted to the Secretary of State. The Claimant made no representations at all up to this time. The Secretary of State appointed Mr. David Fenton to be the Planning Inspector ("the Inspector") to conduct the examination to determine whether the Core Strategy was "sound" under the statutory provisions. As a result of some concerns raised by the Inspector in December 2008, the Council produced a set of Proposed Changes to the Submission Core Strategy, which were published for consultation in April 2009. It was at this stage that the Claimant first became involved. The Claimant submitted a representation on 15 May 2009. This raised no issues specifically concerning Oxford Meadows SAC.

The Second Habits Regulations Assessment: July 2009

47. On 22 June 2009, BBOWT made a written submission on the HRA, expressing serious concerns with leaving the water quality and quantity issues until project or Area Action Plan ("AAP") level. BBOWT stated that, as currently drafted, the Core Strategy did not give adequate protection and raised concerns about the matter being dealt with by qualifying wording, which would defer consideration until a later stage.

48. Following a formal response from Natural England and meetings between the Council officers and Natural England, the Council produced a second, updated, HRA in July 2009. This was submitted to the examination as a core document. This second HRA included additional evidence, in particular amendments dealing with groundwater and the balanced hydrological regime, and further passages in the section concerning "Possible 'in combination' effects" identifying three further distinct proposals in this connection. The Conclusions, in this updated HRA, remained, as before, that none of the policies in the Core Strategy "are likely to have significant effects on the Oxford Meadows SAC".

First set of hearings: July to September 2009

49. The examination hearings before the Inspector commenced on 14 July 2009; hearings took place on eight days in July and two further days in September 2009. The Claimant attended all the hearing sessions. He was allowed to appear and make representations, despite the fact that, strictly under s.20(6) of the 2004 Act, he was not so entitled, as he had not made representations at the Proposed Submission stage.

The HRA, the Northern Gateway and Natural England

50. According to both the Claimant's and Mr Roche's witness statements, at the examination hearing on 24 July 2009, the Claimant read from the second HRA and complained that his representations had been prejudiced because that updated HRA had only been published and circulated earlier the same week. In fact the Inspector adjourned consideration of the HRA and the Northern Gateway until September 2009. The Inspector subsequently issued a revised agenda for the Northern Gateway hearing sessions to be held on 10 and 11 September 2009. That agenda raised the issue of whether there was likely to be any harm to the Oxford Meadows SAC arising from the Northern Gateway policy and, if so, whether this could be acceptably mitigated.

51. Meanwhile, in the summer of 2009, discussions took place between the Council and Natural England in relation to that site. Further studies were undertaken and these were added to the core documents in advance of the resumed September hearings. Prior to the resumed September 2009 hearings, Natural England submitted an additional statement, indicating that an adverse effect from the proposed levels in the strategic allocations could not be ruled out at this stage. Natural England therefore suggested wording to strengthen the Core Strategy to make specific reference to the issues to be addressed at the AAP stage, and to give a commitment not to pursue an option that could not be fully mitigated (wording at paragraph 3.1 of additional statement of Natural England of September 2009). In the event, this wording was in fact superseded in the adopted Core Strategy by the wording suggested in the Joint Statement of September 2010 (see paragraphs 57 and 74 below).

52. At the resumed hearings on 10 and 11 September 2009, the Council indicated that it had no objection to Natural England's suggestions. In his evidence to this Court, the Claimant says that, at those hearings, there was a dispute between Natural England and BBOWT as to whether the appropriate assessment of the impact of the Northern Gateway should be at the Core Strategy stage or at the later AAP stage. The Claimant says that he supported BBOWT's adoption of the former position, which relied on §§53 to 56 of the ECJ's judgment in *Commission v UK*. He says that, at that hearing, BBOWT asked for the HRA to be updated before adoption of the Core Strategy.

Suspension of the hearings: October 2009

53. In October 2009, as a result of legal challenges to the adopted South East Plan RSS, the Inspector decided to suspend the Core Strategy examination hearings. At the end of October 2009, Inspector Fenton retired and a new Inspector, Mr. Stephen Pratt was appointed. The new Inspector then sought to see whether progress could be made pending the resolution of the challenges to the South East Plan

54. There was a procedural meeting on 9 February 2010, at which the Claimant attended. The Claimant says that at this time BBOWT requested a review of the HRA to reflect a change to CS6 to include 200 dwellings.

Further Proposed Changes to the Submission Core Strategy: April to July 2010

55. The Council produced a set of Further Proposed Changes to the Submission Core Strategy. These were published for consultation in April 2010. An addendum to the HRA, addressing recreational impacts on Oxford Meadows SAC, was produced and included in these Further Proposed Changes. At end of the consultation period, Mr Roche became aware that the HRA addendum contained an error about access points to the Port Meadow. This is something which, Mr Roche believes, would have come to the attention of the Inspectors during the course of representations made between April and June 2010.

56. The hearings, scheduled to resume in July 2010, were further postponed pending government announcements on regional strategies. Regional strategies were revoked on 6 July; both the Inspector and the Council considered the implications, for the Core Strategy, of the revocation of the South East Plan. At a meeting on 10 September 2010 the full Council approved a combined changes version of the Core Strategy and confirmed that it would like the Inspector to conclude his examination.

Joint Statement of Oxford City Council, Natural England and BBOWT: September 2010

57. Meanwhile in June 2010 officers of the Council had met with officers of Natural England, and the BBOWT to discuss potential recreational impacts on the Oxford Meadows SAC. There was also a meeting with the Northern Gateway developers in August 2010. Then in September 2010, the Council, Natural England and BBOWT prepared, and submitted to the examination, a Joint Statement. This included agreed wording to be inserted into the Core Strategy to ensure that there would be no adverse effects on the integrity of the SAC from development at the Northern Gateway. This was submitted as a core document and in order formally to propose the new wording as an examination change. The Joint Statement stated as follows:

> *"the northern gateway policy CS6 as currently worded does not provide certainty that adverse impacts on the integrity of the Oxford Meadows SAC will be avoided ...*
>
> *The Council has recognised that the concerns of the environmental bodies are valid and the following wording is jointly suggested in order to ensure that the plan is compliant with the Habitats Regulations and can therefore legally be adopted if sound."*
>
> (emphasis added)

The Joint Statement then set out its proposed additional wording. This was incorporated into the Core Strategy as finally adopted (at §§3.4.40 to 3.4.43). It is set out in paragraph 74 below; I refer to it as "the qualifying wording".

58. More recently, Natural England and BBOWT have explained their thinking behind their support for the Joint Statement. Mrs Charlotte Frizzell of Natural England wrote in an email dated 29 June 2011 as follows: "We take the position that it is legitimate

under the Habitats Regulations to include a caveat in policy which has the effect of requiring subsequent lower tier plans to be subject to its own Habitats Regulations Assessment. In the event that the Habitats Regulations Assessment cannot rule out an adverse effect on integrity on the Oxford Meadows SAC then the higher level policy cannot be met and the lower tier plan would not be in accordance with the Core Strategy". Similarly, BBOWT issued a position statement dated June 2011, stating that the Council will ensure that no development will take place that would lead to harm to the Oxford Meadows SAC.

The resumed examination hearings: September 2010

59. The second set of hearings before the Inspectors took place between 14 and 17 September 2010. The Claimant again took a full part. The Northern Gateway strategic site was discussed again in some detail. Mr. Roche read out the proposed wording from the Joint Statement, which was suggested as an examination change. The Claimant in his evidence says that the Joint Statement was not raised until towards the end of the hearings, probably on 16 September, and that he did not pay much attention to it. He says he cannot recall it being discussed in its own right and, correctly, that this issue did not have its own agenda item. But he accepts that he believes that the changes to the Northern Gateway policy that the Joint Statement proposed *were* discussed. He accepts that, on the last day 17 September 2010, the qualifying wording from the Joint Statement was introduced as one of the "examination changes", number EC23. The Claimant further alleges that, at these hearings, the Inspector Pratt's conduct towards him was biased and oppressive. Further details of the allegations are set out in paragraph 110 below.

60. On 10 November 2010, following a successful legal challenge to the Secretary of State's decision to revoke it, the South East Plan RSS was reinstated as part of the statutory development plan.

Chiltern Railways Transport and Works Act (TWA) Inquiry

61. As a separate matter, between November 2010 and January 2011, a TWA inquiry took place into a proposal by Chiltern Railways in relation to the rail link from Oxford to London Marylebone. The scheme proposes double-tracking the line (and increasing train frequency) along the border of Port Meadow, which is part of the Oxford Meadows SAC. The Claimant appeared at that inquiry. The Council and Natural England raised issues about Oxford Meadows SAC and the Habitats Directive and Regulations in the course of that TWA inquiry. According to the Claimant's evidence, on 5 August 2010 the Council (as an affected landowner) had made a formal objection to the Chiltern Railways TWA inquiry, arguing that the creation of vehicular rights would prejudice the status of Port Meadow as an SSSI. Natural England's statement of case of 6 August 2010 concluded that there was insufficient evidence to rule out harm to Oxford Meadows SAC from the TWA scheme alone. The Claimant participated but says he did not at that time understand the Habitats Directive or the nature of an "appropriate assessment" by a competent authority.

Inspectors' Final Report: December 2010

62. On 21 December 2010 the Inspectors issued to the Council their final report on the Core Strategy. The Inspectors found the Core Strategy (in its final form) to be sound,

pursuant to s.20(5). They recorded the fact that the examination had been one of the longest running of a core strategy in the country. They referred (at page 6) to "robust debate, strong arguments and heated exchanges" and to "distrust, mis-information, confusion and uncertainty at the hearings".

63. The Report is in two parts, reflecting the different stages of the examination process. Part One comprises Inspector Fenton's assessment and conclusions as at October 2009. The assessment of the revised Core Strategy after October 2009 is in Part Two.

64. As regards the HRA process, in Part One, under the heading, Legal Requirements, (as required by s.20(5)(a) of the 2004 Act), Inspector Fenton stated (at para 3.12):

> *"In accordance with the Habitats Directive, the Council undertook a* ***Habitats Regulations Assessment*** *(HRA) (CD4/4) which identified that the Core Strategy could have significant impacts upon the Oxford Meadows Special Area of Conservation (SAC). That HRA, therefore, goes on to carry out an Appropriate Assessment of the possible impacts on that area. This Assessment was updated in July 2009 (CD4/5), responding to comments from Natural England. Both Assessments consider in detail impacts relating to air pollution, water quality, the hydrological regime and increased recreational pressure. They both go on to conclude that none of the policies in the Core Strategy are likely to have significant impacts, individually or cumulatively on the SAC. In order to clarify that further, confirmatory work needs to be undertaken at a more detailed planning stage for the Northern Gateway and Summertown strategic areas. I recommend some additional wording for those sections, later."* (emphasis added)

65. In respect of the Northern Gateway site the Inspectors concluded:

> *"4.148* ***Habitat impact*** *None of the land within the indicative boundary has intrinsic ecological merits that would prevent development being considered here (CDs 14/23 and 14/26). Natural England has indicated that it is satisfied that the HRA shows that some development could go ahead without an adverse effect on integrity of the Oxford Meadows SAC, but an adverse effect on integrity from the proposed levels in the strategic allocations cannot be ruled out at this stage. It is seeking a strengthening of the Core Strategy to make specific reference to the issues to be addressed at the AAP stage and the Council's commitment not to pursue an option that would give rise to significant impacts on the SAC that could not be fully mitigated. That reflects the detailed studies undertaken (CD15/13 to 15/15) and I recommend the wording be added to the policy, which cover issues of water hydrology and air quality. I have no reason to believe that hydrology and air quality issues are insurmountable, but they will need to be addressed firmly in any masterplanning work that is carried out.*
>
> .... .
>
> *4.150* ***Conclusions*** *In conclusion on Northern Gateway, I consider that there are very strong reasons to support, in principle, an employment-led strategic development in this area. The*