Neutral Citation Number: [2015] EWCA Civ 88

Case No: C1/2014/0672

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
Mrs Justice Patterson
[2014] EWHC 223 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Tuesday 17th February 2015

Before :

LORD JUSTICE RICHARDS
LORD JUSTICE UNDERHILL
and
LORD JUSTICE BRIGGS

- - - - - - - - - - - - - - - - - - - -

Between :

No Adastral New Town Limited	**Claimant/ Appellant**
- and -	
(1) Suffolk Coastal District Council	**Defendant/ Respondent**
(2) Secretary of State for Communities and Local Government	**Interested Party/ Respondent**

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

Richard Buxton, Solicitor Advocate (instructed by **Richard Buxton Environmental and Public Law, Cambridge**) for the **Appellant**
Paul Shadarevian and Emma Dring (instructed by **Suffolk Coastal District Council Legal Services**) for the **First Respondent**
The Second Respondent did not appear on the appeal

Hearing dates : 21-22 January 2015

Judgment
As Approved by the Court

Lord Justice Richards :

Introduction

1. This case relates to a planning Core Strategy ("CS") adopted by Suffolk Coastal District Council on 5 July 2013, setting the framework for development within the Council's district until 2027. The focus of attention within the CS is the housing allocation for the Eastern Ipswich Plan Area (also referred to as the Area East of Ipswich). Five locations in that area were identified as options. The location that emerged as the preferred option and became part of the adopted CS is to the east of the A12 at Martlesham, more precisely to the south and east of Adastral Park. It is described in the documentation as Option 4 or Area 4 and is the subject of Strategic Policy SP20 of the adopted CS. The housing allocation on it was originally proposed to be 1050 dwellings but was increased to 2000 dwellings in the course of development of the CS.

2. The appellant, No Adastral New Town Limited ("NANT"), is an action group of local residents opposed to the choice of Area 4 for the allocation of housing under the CS. The concern that gave rise to these proceedings relates to the proximity of the location to the Deben Estuary, which is not only a Site of Special Scientific Interest ("SSSI") but also a Special Protection Area ("SPA"), also known as a Natura 2000 site, enjoying a very high level of protection under European environmental law. At its closest, Area 4 is just over 1 kilometre from the edge of the Deben Estuary SPA. NANT's particular concern is that a large housing development so close to the SPA may result in significant disturbance to the birds on the SPA through an increase in visitor numbers and in dog walking on the site.

3. NANT brought a claim seeking to quash the relevant part of the CS. The claim was based, so far as material, on alleged breaches of the procedural requirements of two EU directives: (1) Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment (the Strategic Environmental Assessment Directive or "the SEA Directive"), implemented in domestic law by The Environmental Assessment of Plans and Programmes Regulations 2004 ("the SEA Regulations"); and (2) Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habits and of wild fauna and flora ("the Habitats Directive"), currently implemented in domestic law by The Conservation of Habitats and Species Regulations 2010 ("the Habitats Regulations").

4. The claim was dismissed by Patterson J, sitting in the Administrative Court. Permission to appeal to this court was refused on the papers by the judge below and by Sullivan LJ on the papers but was granted on an oral renewal by Christopher Clarke LJ.

5. The process leading to the adoption of the CS in 2013 started in 2006 and went through many stages. Patterson J found that in the course of that process there were breaches of the procedural requirements of the SEA Directive with regard to the carrying out of environmental assessments and consultation of the public but that the flaws were remedied before the CS was adopted. By the first ground of appeal, NANT contends that (a) as a matter of law, the earlier deficiencies were not capable of being cured later in the process, and (b) as a matter of fact, they were not so cured.

6. The other issues in the appeal concern the judge's rejection of NANT's case under the Habitats Directive. By ground 2 NANT contends that the Council was in breach of the Directive by failing to carry out an early screening assessment. By ground 3 it contends that there was a breach of the Directive by leaving mitigation measures over to later stages ("lower-tier" plan-making or specific projects) in circumstances where sufficient information was available at the stage of adoption of the CS to enable mitigation to be determined with certainty at that time.

The legal framework

The Planning and Compulsory Purchase Act 2004 Act

7. The statutory framework for the preparation of a CS is contained in the Planning and Compulsory Purchase Act 2004 ("the 2004 Act") and related regulations. The governing regulations for most of the relevant period were the Town and Country Planning (Local Development) (England) Regulations 2004. With effect from 6 April 2012 they were the Town and Country Planning (Local Planning) (England) Regulations 2012.

8. The relevant provisions are described in paragraphs 12-18 of the judgment below. I need only summarise the position here.

9. The 2004 Act requires a local planning authority to maintain a local development scheme involving the preparation of a CS and other local development documents, setting out the policies relating to the development and use of land in the authority's area. The preparation of a development plan document, including a CS, is subject to various procedural requirements. They include the following:

    i) The local planning authority must carry out an appraisal of the sustainability of the proposals in the document (a sustainability appraisal or "SA") and prepare a report on the findings of the appraisal.

    ii) Before submission to the Secretary of State (see below), a development plan document must be published and consulted upon.

    iii) A development plan document must be submitted to the Secretary of State for independent examination, the purpose of which is to determine whether the document satisfies the procedural requirements relating to its preparation and whether it is sound. The independent examination is carried out by an inspector who holds an inquiry and produces a report.

    iv) The decision whether to adopt the development plan document is that of the local planning authority but its powers are constrained by the recommendations in the inspector's report.

10. A person aggrieved by a development plan document may challenge it by an application to the High Court under section 113 of the 2004 Act on the ground, *inter alia*, that a procedural requirement has not been complied with. That is the section under which the present challenge was brought.

The SEA Directive

11. Article 3 of the SEA Directive requires Member States to carry out a strategic environmental assessment of certain plans and programmes, including a CS. Article 4 provides that the assessment shall be carried out "during the preparation of a plan or programme and before its adoption …". Article 5 provides that where an environmental assessment is required, an environmental report shall be prepared in which the likely significant effects on the environment of implementing the plan or programme, and reasonable alternatives, are identified, described and evaluated. Article 6 provides for relevant authorities and the public to be given an early and effective opportunity within appropriate time frames to express their opinion on the draft plan or programme and the accompanying environmental report "before the adoption of the plan or programme …".

12. The SEA Regulations contain more detailed provisions. They include specifics about the information required for environmental reports and about the consultation procedures. They are set out at paragraphs 23-26 of Patterson J's judgment. They echo the Directive in providing that an environmental assessment must be carried out "during the preparation of that plan or programme and before its adoption …" (regulation 5); that the plan or programme "shall not be adopted …" before account has been taken of the environmental report and opinions expressed by the consultation bodies and public upon it (regulation 8); that where an environmental assessment is required, the report "shall identify, describe and evaluate the likely significant effects on the environment of (a) implementing the plan or programme; and (b) reasonable alternatives taking into account the objectives and geographical scope of the plan or programme" (regulation 12); and that every draft plan or programme for which an environmental report has been so prepared, and the report itself, shall be made available for consultation (regulation 13).

13. The SEA process is closely bound up in practice with the procedure under domestic law for preparation of development plan documents. This is also true of the assessments required by the Habitats Directive (see below). Thus, the Government's National Planning Policy Framework states:

> "165. … A sustainability appraisal which meets the requirements of the European Directive on strategic environmental assessment should be an integral part of the plan preparation process, and should consider all the likely significant effects on the environment, economic and social factors.
>
> 166. Local Plans may require a variety of other environmental assessments, including under the Habitats Regulations where there is a likely significant effect on a European wildlife site …. Wherever possible, assessments should share the same evidence base and be conducted over similar timescales, but local authorities should take care to ensure that the purposes and statutory requirements of different assessment processes are respected."

14. In line with that policy guidance, the sustainability appraisals (SAs) in this case were intended to meet not only the requirements of the 2004 Act and related regulations but also the environmental assessment requirements of the SEA Directive and implementing regulations. Some of the SAs also appended assessments carried out to meet the requirements of the Habitats Directive and implementing regulations.

The Habitats Directive

15. The aim of the Habitats Directive, as set out in Article 2, is to contribute towards ensuring biodiversity through the conservation of natural habitats and of wild flora and fauna in the European territory of the Member States. The provisions of direct relevance to this case are Article 6(2) and (3):

> "2. Member States shall take appropriate steps to avoid, in the special areas of conservation, the deterioration of natural habitats and the habitats of species as well as disturbance of the species for which the area have been designated, in so far as such disturbance could be significant to the objectives of this Directive.
>
> 3. Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. In the light of the conclusions of the assessment of the implications for the site and subject to the provisions of paragraph 4 [cases where a plan or project must be carried out for imperative reasons of overriding public interest], 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."

The "appropriate assessment" required by Article 6(3) is generally referred to in the documentation and in the judgment below as an "AA" and I shall adopt that abbreviation.

16. The Habitats Regulations contain more detailed provisions. Paragraphs 28-29 of Patterson J's judgment set out the text of regulation 61 (relating generally to the making of AAs) and regulation 102 (the requirement to make an AA in relation to land use plans). I need only quote regulation 102(1), because of its relevance to the argument concerning the timing of an initial assessment:

> "Where a land use plan –
>
> (a) is likely to have a significant effect on a European 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."

The process leading to the adoption of the CS

17. The factual history occupies a substantial chunk of Patterson J's judgment, at paragraphs 30-91, to which reference can be made for matters of detail not covered here. I will concentrate on the key points.

18. Until 2010 the work was overseen within the Council by its Local Development Framework Task Group ("the LDFTG" or "the Task Group"). The Task Group made recommendations to Cabinet which in turn made recommendations to the full Council, the ultimate decision-maker. From 2010 the role of the Task Group was taken over by the Community, Customers and Partners Scrutiny Committee ("the Scrutiny Committee").

19. Various documents were prepared and published, and consultation exercises carried out, between 2006 and late 2008, by which time Area 4 had emerged as the Task Group's preferred option. The process up to this point was held by the judge not to meet the requirements of the SEA Directive because of the lack of an SA. It is also fair to say that the documentation during this period shows no real appreciation of the potential significance of the Deben Estuary as an SPA.

20. In December 2008, however, there was published for public consultation a document entitled "Core Strategy and Development Control Policies – Preferred Options". This document identified Area 4 as the Council's preferred option and explained its perceived advantages and disadvantages. It also outlined the other options considered and their respective advantages and disadvantages. The allocation proposed on Area 4 was 1050 dwellings. The Preferred Options document was accompanied by an SA which assessed all the options. In addition, one of the appendices to the SA was an AA ("Screening and Scoping Stage") pursuant to the Habitats Regulations. This explained that a series of conclusions had been reached after consideration of possible disturbance factors and the conservation objectives. The results were set out in a table that "becomes the list of key issues upon which consultation with Natural England will take place and will inform the public consultation which is about to commence". For the Area East of Ipswich, the table identified a negative impact and commented:

> "Any development is likely to bring additional pressure to any of the sites of European interest, however the area near Martlesham identified as a 'preferred option' could have particularly negative impacts upon the Deben Estuary SPA/SSSI. Site-specific Appropriate Assessment will reveal further any issues."

21. Those documents and the responses to the consultation on them informed the subsequent decision-making process and were found by the judge to have cured the

earlier deficiencies in the SEA process in respect of the proposals as they stood at that point, that is for a housing allocation of 1050 dwellings on Area 4.

22. The next relevant feature of the process was an increase in the proposed allocation on Area 4 from 1050 to 2000 dwellings. A report for a meeting of the Task Group on 16 June 2009 analysed the results of the consultation on the December 2008 documents and put forward a revised strategy addressing issues raised. The proposal in relation to the Eastern Ipswich Plan Area, as set out in the executive summary, was: "New housing … to be increased in order to create a large development there with an emphasis on it being a community with sufficient supporting infrastructure. The location for such a community remains at Martlesham although the location is specified as to south and east of Adastral Park." An allocation of 2000 new dwellings was proposed to be made at that location. The Task Group resolved to endorse those proposals and to make a recommendation accordingly to Cabinet. The recommendation was endorsed in turn by Cabinet on 7 July 2009.

23. The problem about that was that the SA and consultation on which the decision was based related to 1050 dwellings, not 2000. The judge held that the increase in the proposed allocation was a material change of circumstances requiring consultation on the effect of the additional dwellings on the various options originally considered.

24. A consultation on the proposed increase to 2000 dwellings took place in September 2009 but was limited to Area 4 and therefore did not meet the point.

25. A further SA was prepared in January 2010 which did examine the comparative sustainability of an allocation of 2000 dwellings in relation to each of the original option areas. That document, however, remained internal to the Council until August 2011 when, as explained below, it was published in updated form for consultation. Until then it was not capable of remedying the deficiency in the process.

26. That was the position as at 18 March 2010 when the full Council considered the draft CS for the first time and resolved to approve it for submission to the Secretary of State for examination. In the event, for reasons it is unnecessary to consider, a further decision was taken in summer 2010 not to submit the CS at that stage but to review it. The reviewed CS was then published for consultation in November 2010, together with an updated SA. On 17 February 2011 Cabinet, having considered the consultation responses, endorsed the reviewed CS and recommended that it be submitted for consideration by the full Council. But when the matter came before the full Council on 27 July 2011 it was resolved that the submission of the reviewed CS for examination by an inspector should be subject to yet further updating of, and consultation on, the SA and AA.

27. In consequence, updated versions of the SA and AA, together with the pre-submission draft of the CS, were published for consultation in August 2011. On what appears to have been a precautionary basis, essentially the same material was re-issued for consultation in November 2011. It is sufficient to consider the documents issued in November.

28. Appendix 6 to the November 2011 SA was headed "Iterations of policies under the Core Strategy" and summarised in some detail the evolution of the CS and related policies over the period of plan preparation. It dealt with the options that had been

considered and the reasons for selection of the preferred option, in relation to overall housing requirement, housing distribution and housing areas, including the considerations that led to the preference for Area 4 over the other options for the Area East of Ipswich. Appendix 8 set out the sustainability appraisal of strategic housing areas undertaken in 2008 and 2010. It included the January 2010 update in which the five options for the Area East of Ipswich "are reappraised … to consider the potential impact of 2,000 houses being accommodated on the areas", using the same criteria as for previous SAs. In each case they were appraised against a detailed matrix of objective assessment criteria, including biodiversity and geodiversity.

29. The Council relies on that SA, the consultation on it and the consideration given to it by the full Council in December 2011 (see below) as remedying the previous deficiency in the SEA process.

30. The November 2011 AA contained a detailed assessment of the impact of the Area 4 allocation, alone or in combination with other proposed housing allocations, on the Deben Estuary SPA. It is unnecessary to go into much of the detail because the adequacy of the assessment as such is not challenged: the two grounds of appeal concerning the Habitats Directive have a more limited scope, relating respectively to the timing of the screening assessment and to mitigation measures.

31. The conclusions of the section of the AA dealing with Area 4 (referred to as Martlesham) and a separate proposed allocation at Felixstowe included this:

> "6.2.45 Provided that strategic housing proposals for development at Martlesham and Felixstowe Peninsula are greater than 1 km from the Deben Estuary and Orwell Estuary respectively, together with improvements in accessibility to greenspace provision, it is unlikely that visitor recreation activity would substantially increase on the foreshore of those estuaries. It is therefore concluded that there would be no adverse affect [*sic*] upon the integrity of the respective European sites."

The section on mitigation included a tabular summary which identified the relevant impact as "New large-scale increase in car-borne trips for recreation on European sites causing harm to features of European interest, primarily for sites with car parking within 8 km". The mitigation proposed had two elements:

> "Improvements to convenient local greenspace for routine use thus reducing the demand for visits to European sites.
>
> The provision of a new Country Park (or similar high quality provision) to provide an alternative attraction for recreational activity for residents of existing and proposed new dwellings. This new Country Park will be attractive to dog walkers and others and include adequate provision for car parking, visitor facilities, dog bins, dogs off leads areas etc."

The conclusion was that with the proposed mitigation the relevant housing policies would have no adverse effect upon the integrity of any European site.

32. On 15 December 2011 the full Council again considered the matter, on the basis of the most recent documents and a report from officers which included a summary of issues raised by responses to the recent consultation and officers' advice that those comments raised no matters requiring further review of the CS. The debate at the meeting included consideration of a motion by one of the councillors that "(a) The Council agrees to undertake a full Strategic Environmental Assessment and Appropriate Assessment in relation to each strategic option for the East of Ipswich Allocations; (b) Prior to commencement of the examination in public, the Council consults the public and statutory consultees on the fresh SEA and AA reports so that the outcome of consultation was before the inspector; (c) The Council agrees to reconsider the preferred option in light of (a) and (b) above …". The motion was defeated by a substantial majority. It was resolved that the draft CS be published for pre-submission consultation and thereafter be submitted for examination by an inspector.

33. The draft CS was submitted for examination in May 2012. The history of the inspector's examination is summarised at paragraphs 72-91 of Patterson J's judgment. I need mention only some of the matters covered.

34. BT plc, the owner of Adastral Park, had submitted a planning application for the site which, although distinct from the strategic policies of the CS, was relevant *inter alia* to the question of mitigation to avoid adverse effects to the Deben Estuary SPA. A revised appropriate assessment provided in July 2012 in support of BT's planning application included the proposed provision of some 54 hectares of public open space by way of on-site green space on BT's land, together with improvements to public rights of way encouraging movements away from the SPA, and additional measures related to the Deben Estuary to offset any residual impacts. That proposal was relied on by the Council, in its submissions to the inspector, as showing that the package of mitigation measures could be achieved by way of developer funding.

35. A statement of common ground on green infrastructure was agreed between Natural England, various other bodies and the Council. Natural England confirmed that it was happy with the detail provided in the draft CS. It noted that it had seen additional detail in relation to BT's planning application. The AA was agreed as using the best and most up to date information available. The statement contained certain agreed suggested modifications.

36. In February 2013, proposed modifications to the CS were published for consultation. They included modifications to policy SP20 that were relevant to the issue of mitigation. The inspector subsequently confirmed that the CS could be adopted subject to those modifications, and on 5 July 2013 the Council resolved to adopt it.

37. The adopted CS included an allocation of 2000 new homes on Area 4. The text explained that the development would be progressed as part of the Area Action Plan. It included the following in relation to potential impact on the Deben Estuary SPA:

> "4.16 … The Core Strategy has been subject to Sustainability Appraisal and Appropriate Assessment both of which consider that the broad scale and distribution of development can be successfully mitigated. However, should the more detailed Appropriate Assessment of the Area Action Plan conclude that

> part of the Strategy cannot be delivered without adverse impacts on the Deben Estuary SPA which cannot be mitigated, then the Area Action Plan will only make provision for the level and location of development for which it can be concluded that there will be no adverse effect on the integrity of the SPA, even if this level is below that in the strategic allocation."

38. Strategic Policy SP20 itself stated that the strategic approach to development in the Eastern Ipswich Plan Area could be divided into three sections, one of which related to the area to be covered by the Martlesham, Newbourne & Waldringfield Area Action Plain. The strategy for that Area Action Plan was said to have a number of features listed in the policy. In line with the text quoted above, the list ended with this:

> "(xii) the Council will require further proposals to be supported by an Appropriate Assessment to meet the requirements of the Habitats Regulations. If the results of the Appropriate Assessment show that part of the Strategy cannot be delivered without adverse impacts on designated European sites which cannot be mitigated, then the proposals will only make provision for the level and location of development for which it can be concluded that there will be no adverse effect on the integrity of a designated European nature conservation site."

39. After a sentence relating to the necessary transport and other infrastructure to serve the proposed employment and housing, the policy continued:

> "… The November 2011 Appropriate Assessment and the mitigation measures it contains … will provide the basis for more detailed project level assessments associated with the Area Action Plan and planning application proposals and associated cumulative impacts. Those measures will be required to reflect the objectives set which include the creation of alternative opportunities for countryside recreation for existing and future residents as a preferred alternative to visiting European nature conservation sites; improved visitor infrastructure including wardening; and monitoring to quantify reductions in visitor harm achieved by mitigation projects.
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> Specifically, on land to the south and east of Adastral Park, strategic open space in the form of a country park or similar high quality provision will be required to mitigate the impact of development at this site and the wider cumulative impact of residential development on the relevant designated European nature conservation sites."

Ground 1: compliance with the SEA Directive

Patterson J's judgment

40. The issues raised by the first ground of appeal arise out of paragraphs 92-129 of Patterson J's judgment. Having set out the rival submissions, the judge began her discussion, at paragraphs 106 et seq., by considering various provisions of the SEA Directive and the guidance on it issued by the European Commission. She continued:

> "118. The wording of the domestic Regulations, read in the context of the Directive, make it clear that the environmental assessment of a draft plan should be an ongoing process. The objective is to ensure that the environmental effects of emerging policies can be taken into account while plans are actually being "developed". To enable that to occur the process of preparing the environmental report should start, as the Commission says in its guidance, as early as possible, and ideally, at the same time as the preparation of the plan or programme.
>
> 119. That does not mean that there is an absolute rule that the plan and the environmental report proceed in parallel so that there is a requirement for simultaneous publication of the draft plan and environmental report. What it does mean though, in my judgement, is that there should be an integrated process whereby the environmental report assesses the emerging plan and the subsequent iteration of that plan has regard to the contents of the environmental report and public consultation on both documents. Whilst there is some flexibility in the process the objective of the Directive can only be met properly by taking into account an environmental report on the environmental effects of the policies in a draft plan as the policies develop. What is required may vary according to the plan being promoted and the stage that it has reached."

41. On that basis the judge found that SAs should have been produced for the consultation exercises in 2006-2008, albeit relatively rudimentary at the commencement of the process and increasing in content as the draft plan developed. Without them, the decisions taken on the options were not adequately informed. She held that the decisions taken by the Task Group counted for that purpose, rejecting a contention that the first relevant decision was when the full Council resolved to approve the draft CS on 18 March 2010. Accordingly, there was a flaw in the early decision-making process. But she continued:

> "124. The matter, though, does not end there. In December 2008 the defendant published the Core Strategy and Development Control policies Preferred Option document with option 4 as the preferred option for 1050 houses. The latter document was accompanied by a SA and a scoping and screening report for an AA to be carried out under the 2010 Habitats Regulations. That clearly recorded the nature

> conservation significance of the Deben Estuary. The potential negative impact as a result of visitor pressure was clearly noted. Further consultation took place with that information clearly in the public domain.
>
> 125. When the results of the consultation exercise were considered by the LDFTG on 16th June 2009 their decision to proceed with the housing allocation on the Area East of Ipswich was thus a well and properly informed decision."

42. She moved to NANT's criticism of the decision to increase the housing allocation to 2000 without considering the effect of that increase on the sites which had originally been considered as alternatives before the preferred option was chosen. She considered a contention by the Council that by September 2009 the original alternative sites were non-starters: the reason for the increase was to provide significantly improved community facilities and a better opportunity to mitigate potential impacts on the countryside and the Deben Estuary through provision of properly managed open space, as well as delivering greater funding opportunities for transport provision, so that the rationale for increasing the number of dwellings on Area 4 could not apply elsewhere. She held, however:

> "128. The increase in the allocation on SP20 to 2000 houses was, in my judgment, a material change of circumstances. It would have been better, therefore, to have consulted as part of the September 2009 consultation on the effect of the additional dwellings at the original alternative option sites. However, an assessment of the alternative option sites was carried out in January 2010 for 2000 houses on each of the original options 1-5 in the [Eastern Ipswich Plan Area]. All of the options were assessed as having strongly negative impacts for bio-diversity. The overall assessment recorded,
>
> > 'The updated appraisal looking at 2000 houses suggests area 4 is very marginally the least sustainable however all areas will require new investment in infrastructure and generate similar concerns for cumulative impact upon Natural 2000 designations.'"

43. The judge's reference in that paragraph to the January 2010 SA requires qualification in that, as explained above, that SA was originally an internal document and was only published for consultation, in updated form, in August 2011 and again in November 2011. It is clear from other passages in her judgment, in particular paragraph 67, that the judge was in fact aware of the point.

44. The judge concluded this section of her judgment as follows:

> "129. The claimant contends that because of the 2 significant errors the entire SEA process was vitiated. As is clear I do not accept that submission for the following reasons:-

(i) the individual decisions complained about were corrected by the defendant before the plan was adopted as set out above;

(ii) the decision to increase the housing numbers on SP20 to 2000 was taken on valid grounds taking into account environmental considerations as part of a classic planning judgement. There is no basis for separating out environmental considerations;

(iii) when the council made the decision on the 18th March 2010 to proceed with the Development Plan it was fully informed about the environmental implications on all alternative sites and the results of the public consultation on the effect of 2000 houses on all 5 of the original option sites;

(iv) the pre-submission draft Development Plan included an updated SA which dealt with the main issues raised on housing distribution, the alternative sites which had been considered, and the increase in housing numbers at SP20 including their environmental impact. Although the claimant criticises that document and that in August 2011, which also went out for consultation, on the basis that they create an unacceptable paper chase the situation is very different from the case of *Berkeley v Secretary of State for the Environment [2000] 3 WLR 420* which the claimant relies upon. In that case there was no environmental assessment at all. In the instant case there was a complete reference back to earlier documents and the reasons for rejecting earlier options. Applying the test of Collins J in *Save Historic Newmarket Limited v Forest Heath [2011] EWHC 606* at [40] … [t]he consultees were well aware of the reasons for rejecting the alternatives to the development that was proposed here.

(v) The inspector considered whether the CS was sound in his report. He considered that it was for reasons set out in paragraphs 16-27 … of his report to the defendant. His report was fully reasoned and took into account all material considerations, including the development of the CS and the various legal judgments that were delivered during its preparation. It has not been criticised by the claimant;

(vi) The council had sufficient and good reasons to act as it did as set out above. It, therefore, acted rationally at the critical stage of the Development Plan."

45. The reference in sub-paragraph (iii) to the Council's decision of 18 March 2010 requires a qualification corresponding to that made above in relation to the January 2010 SA. As at 18 March 2010, the January 2010 SA had not been consulted on: the consultation on that SA took place in August 2011 and then November 2011. It was the Council's decision of 15 December 2011, not the decision of 18 March 2010, that was informed by the results of the consultation. The judge's essential reasoning,

however, is not affected if the relevant passage in her judgment is amended so as to refer to the December 2011 decision rather than the March 2010 decision. I will proceed on the basis that the amendment is made.

The issues in the appeal

46. The Council does not seek to challenge the judge's findings that there were two deficiencies in the course of the SEA process, namely (i) the failure to carry out an SEA at the early stages of preparation of the CS, prior to the Preferred Options consultation in December 2008, and (ii) the failure to consult on the alternative options to Area 4 at the time when an increase in housing allocation to 2000 dwellings was proposed in September 2009. But the Council supports the judge's conclusion that each of those two deficiencies was subsequently cured and that the requirements of the SEA Directive and implementing regulations had been complied with by the time of adoption of the CS – indeed, by the time of submission of the draft CS for examination by the inspector. (The Council's concession in relation to (ii) makes it unnecessary to consider whether, as Mr Buxton repeatedly asserted in his submissions on behalf of NANT, the September 2009 consultation was unlawful on ordinary public law principles by reason of the failure to mention the alternatives considered: see *R (Moseley) v London Borough of Haringey* [2014] UKSC 56.)

47. By the first ground of appeal, NANT challenges the judge's conclusion. The ground is elaborately formulated and the development of it in written and oral submissions was not altogether clear, but there appear to be two essential contentions, namely that (a) as a matter of law, the earlier deficiencies were not capable of being cured later in the process, and (b) as a matter of fact, they were not so cured. I will consider each point in turn.

48. As to the legal issue, a convenient starting-point is the judgment of Singh J in *Cogent Land Llp v Rochford District Council and Bellway Homes Ltd* [2012] EWHC 2542 (Admin), [2013] 1 P&CR 2, in which a very similar issue arose. The case concerned the development of a Core Strategy. The claimant submitted that documents produced in 2008 for the SA/SEA did not set out adequately the reasons for preferring the selected locations over alternatives that had been rejected, so that the public was not allowed the early and effective engagement that was required. The judge was inclined to accept that submission but he held that a July 2011 Addendum cured any defects in the earlier stages of the process.

49. In rejecting the claimant's submission that as a matter of law the Addendum was incapable of curing the earlier defects, Singh J reasoned as follows. First, he said this about the SEA process:

> "112. … First, it should be noted that 'Strategic Environmental Assessment' is not a single document, still less is it the same thing as the Environmental Report: it is a *process*, in the course of which the Directive and the Regulations require production of an 'Environmental Report'. Hence, art 2(b) of the SEA Directive defines 'environmental assessment' as:
>
> > 'the preparation of the environmental report, carrying out consultations, the taking into account of the environmental

> report and the results of the consultations in the decision making and the provision of information on the decision in accordance with Articles 4 to 9'.
>
> 113. Furthermore, although arts 4 and 8 of the Directive require an 'environmental assessment' to be carried out and taken into account 'during the preparation of the plan', neither article stipulates when in the process this must occur other than to say that it must be 'before [the plan's] adoption'. Similarly, while art 6(2) requires the public to be given an 'early and effective opportunity … to express their opinion on the draft plan or programme and the accompanying environmental report', art 6(2) does not prescribe what is meant by 'early', other than to stipulate that it must be before adoption of the plan. The Regulations are to similar effect: reg 8 provides that a plan shall not be adopted before account has been taken of the environmental report for the plan and the consultation responses."

50. He then considered a number of authorities, including the decision of the High Court in Northern Ireland in *Seaport Investments Ltd's Application for Judicial Review* [2008] Env LR 23; the decision of Ouseley J in *Heard v Broadland District Council* [2012] EWHC 344 (Admin), [2012] Env LR 23; and the decision of Collins J in *Save Historic Newmarket Ltd v Forest Heath District Council* [2011] EWHC 606 (Admin), to which the judge in the present case referred at paragraph 129(v) of her judgment, quoted above. Singh J found that none of those authorities gave material support to the claimant's case.

51. Next, he gave the following additional reason in support of his view that defects at earlier stages of the proposal could in principle be cured at a later stage:

> "125. I also consider … that the claimant's approach would lead to absurdity, because a defect in the development plan process could never be cured. The absurdity of the claimant's position is illustrated by considering what would now happen if the present application were to succeed, with the result that Policies H1, H2 and H3 were to be quashed. In those circumstances, if the claimant is correct, it is difficult to see how the defendant could *ever* proceed with a Core Strategy which preferred West Rochford over East. Even if the defendant were to turn the clock back four years to the Preferred Options stage, and support a new Preferred Options Draft with an SA which was in similar form to the Addendum, the claimant would, if its main submission is correct, contend that this was simply a continuation of the alleged 'ex post facto rationalisation' of a choice which the defendant had already made. Yet if that choice is on its merits the correct one or the best one, it must be possible for the planning authority to justify it, albeit by reference to a document which comes at a later stage of the process."

52. Finally, at paragraph 126, Singh J drew an analogy with the cognate area of Environmental Impact Assessments, quoting from paragraph 41 of the judgment of Sullivan J in *R (Blewett) v Derbyshire County Council* [2004] Env LR 29, as approved by the House of Lords in *R (Edwards) v Environment Agency* [2008] Env LR 34:

> "[it is] an unrealistic counsel of perfection to expect that an applicant's environmental statement will always contain the 'full information' about the environmental impact of a project. The Regulations are not based on such an unrealistic expectation. They recognise than an environmental statement may be deficient, and make provision through the publicity and consultation processes for any deficiencies to be identified so that the resulting 'environmental information' provides the local planning authority with as full a picture as possible. There will be cases where the document purporting to be an environmental statement is so deficient that it could not reasonably be described as an environmental statement as defined by the Regulations … but they are likely to be few and far between."

53. Mr Buxton, in his submissions on behalf of NANT, said that he did not disagree with the analysis in *Cogent*. That was a realistic stance. In my judgment, the conclusion reached by Singh J on the issue of principle was correct for the reasons he gave. A similar view of the law was expressed by Sales J, albeit *obiter* and without the benefit of argument, in *Ashdown Forest Economic Development Llp v Secretary of State for Communities and Local Government* [2014] EWHC 406 (Admin), at paragraph 89. In Sales J's view the correct focus for analysis under the SEA Directive was the Core Strategy documents submitted for independent examination by the inspector: "[the] procedures involved in independent examination of a plan by an inspector, including by examination in public, appear to me to be a consultation process which is capable of fulfilling the consultation requirement under Article 6 of the Directive".

54. Mr Buxton sought to distinguish *Cogent* as dealing with a different issue from that in the present case. He said that the defect in *Cogent* concerned the giving of reasons – it was a failure to explain why the Council had made its choices – whereas the deficiencies in the present case were defects of process. I do not accept that there is any relevant distinction between the two cases. The failure in *Cogent* to give adequate reasons for preferring the selected locations over alternatives was just as much a defect of process as were the deficiencies in the present case. In any event, the reasoning of Singh J in *Cogent* is just as applicable to the deficiencies in the present case as it was to the defect in *Cogent* itself.

55. Mr Buxton's submissions on the legal issue tended to slip into submissions on the factual issue, to which I now turn. NANT's case is that neither of the deficiencies identified by the judge was cured as a matter of fact. Although both deficiencies are relied on, the argument is concentrated on the failure to consult on alternative options at the time when the decision was taken to move from 1050 to 2000 houses on Area 4. What is said is that at no subsequent stage was there a "meaningful" consultation on the other options.

56. I think that there are two strands to that argument. First, NANT contends that by the time the Council came to take its decision in December 2011 on the basis of the further consultation, the Council's mind was effectively made up. The notion that the Council might have changed its mind and rejected the preferred option at that stage is said to be unrealistic. It is submitted that the purported consultation in November 2011 was not a real consultation and that it did not therefore cure the absence of a proper consultation at an earlier stage in the decision-making process.

57. In my judgment, that line of argument is untenable. I can see no evidential basis for the proposition that the November 2011 consultation was not a real consultation or that the Council approached the results of the consultation with a closed mind. The very fact that the meeting of the Council on 15 December 2011 included debate on a motion calling for reconsideration of the preferred option in the light of further assessments shows that the issue was still a live one at that time. The fact that the motion was defeated does not begin to show a closed mind on the part of those voting against it. There is nothing whatsoever to suggest that the decision taken by the Council at that meeting to submit the draft CS for examination by the inspector was anything other than a genuine decision reached after due consideration of the November 2011 SA and the responses to the consultation on it.

58. The second strand to NANT's factual argument is a contention that the documentation consulted on in November 2011 did not sufficiently identify the reasons for rejecting the alternatives to Area 4 as locations for the allocation of 2000 dwellings. It is said that the SA involved too much of a "paper chase", referring back to previous documents, and in any event that cross-reference to previous flawed decisions did not save the position.

59. Again I cannot accept the argument. It is true that the November 2011 SA did refer back to previous documents: I have referred in particular, at paragraph 28 above, to the appendices that summarised the evolution of the CS, the options that had been considered and the reasons for selection of the preferred option, and that set out the sustainability appraisal of strategic housing areas undertaken in 2008 and 2010. All this was done, however, in a manner that was perfectly intelligible, and the material specifically included the January 2010 appraisal of the impact of an allocation of 2000 dwellings on each of the five options originally considered. I agree with Patterson J that there was no unacceptable paper chase and that consultees were made well aware of the reasons for rejecting the alternatives to Area 4. I also agree with the judge that when the Council made the decision to proceed with the CS, it was fully informed about the environmental implications on all alternative areas and of the results of the public consultation on the effect of 2000 dwellings on all five of the original option areas. The judge was right to find that the earlier deficiencies in the SEA process had been cured.

60. I would therefore reject the first ground of appeal, relating to the SEA process. I turn to consider the two grounds of appeal relating to the Habitats Directive.

Ground 2: the timing of the AA under the Habitats Directive

61. Ground 2 is again elaborately formulated but the short question it raises is whether the Council was in breach of the Habitats Directive by not carrying out an initial screening assessment until December 2008. The purpose of a screening assessment is

to determine whether a full AA is required. Mr Buxton submits that there is an obligation to carry out such a screening assessment at an early stage of the decision-making process and that December 2008 was too late since by that time Area 4 had already been selected as the preferred option. He submits that if the screening assessment had been carried out earlier, the Council would have appreciated at an earlier stage the significance of the Deben Estuary SPA and of the particularly negative impacts that the allocation of housing on Area 4 would have on the SPA, and it is possible that the whole process of area selection would have been different.

62. The relevant provisions of the Habitats Directive are Article 6(2) and (3). I have set them out at paragraph 15 above. The overarching obligation in Article 6(2) is that Member States must take appropriate steps to *avoid*, in SPAs, the deterioration of habitats and significant disturbance of the species for which the areas have been designated. Article 6(3) provides that any plan or project not directly connected with or necessary to the management of an SPA but likely to have a significant effect on it shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives; and in the light of the conclusions of the assessment, 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 and, if appropriate, after having obtained the opinion of the general public.

63. Thus, the language of Article 6 focuses on the end result of avoiding damage to an SPA and the carrying out of an AA for that purpose. That point is carried through into regulation 102(1) of the Habitats Regulations, quoted at paragraph 16 above, which provides that an AA must be made "before the plan is given effect". In this case, the November 2011 AA, on which the public was consulted, concluded that, subject to proposed mitigation, the housing allocation at Area 4 would have no adverse effect on the integrity of the SPA. Mitigation is considered separately below under the third ground of appeal. Subject to that, the assessment is not challenged. If the proposed development on Area 4 would have no adverse effect on the integrity of the SPA, the basic obligation in Article 6(2) and the specific requirement of Article 6(3) are satisfied. It is difficult to see in those circumstances how anything could turn on the timing of a screening assessment.

64. Mr Buxton submitted that Article 6 is nevertheless to be interpreted as imposing an obligation to carry out a screening assessment at an early stage and that regulation 102(1) is to be read down so as to comply with that interpretation (though he does not explain precisely how it is to be read for that purpose). He sought to derive support for this from Case C-258/11, *Sweetman v An Bord Pleanala*.

65. At paragraphs 45-50 of her opinion in *Sweetman*, delivered on 22 November 2012, Advocate General Sharpston states that Article 6(3) lays down a two-stage test. At the first stage it is necessary to determine whether the plan or project is likely to have a significant effect on the site. The likelihood (or possibility) is a trigger for the obligation to carry out an AA. Where an AA is required, its purpose is that the plan or project should be considered thoroughly, on the basis of the best scientific knowledge in the field. At this, the second stage, the test which the expert assessment must determine is whether the plan or project has an adverse effect on the integrity of the site, since that is the basis on which the competent national authorities must reach their decision. For my part, however, I see nothing in that passage to assist NANT's case. The Advocate General says nothing to the effect that there must be a screening

assessment at an early stage in the decision-making process. She merely points to the need to determine at the first stage whether the plan or project is likely to have a significant effect on the site (a question that in my view will be capable of being answered in many cases without any screening assessment at all), and to the approach required at the second stage when an AA is carried out.

66. The judgment of the Court of Justice in *Sweetman*, dated 11 April 2013, describes the two stages required by Article 6(3) slightly differently. At paragraphs 29-31 the Court states that the first stage "requires the Member States to carry out an appropriate assessment of the implications for a protected site of a plan or project when there is a likelihood that the plan or project will have a significant effect on that site"; and that the second stage "allows such a plan or project to be authorised on condition that it will not adversely affect the integrity of the site concerned …". The difference between that and the Advocate General's formulation is not, however, material. The Court's judgment again gives no support to the contention that there must be a screening assessment at an early stage in the decision-making process.

67. The Court in *Sweetman* referred back to Case C-127/02, *Waddenvereniging and Vogelbeschermingsvereneging* [2004] ECR I-7405, to which Mr Buxton also took us, but neither the opinion of the Advocate General nor the judgment of the Court in that case appears to me to take matters any further. The same applies to the later decision of the Court in Case C-521/12, *TC Briels and Others v Minister van Infrastructuur en Milieu* (judgment dated 15 May 2014), to which brief reference was also made in submissions.

68. In none of this material do I see even an *obligation* to carry out a screening assessment, let alone any rule as to when it should be carried out. If it is not obvious whether a plan or project is likely to have a significant effect on an SPA, it may be necessary in practice to carry out a screening assessment in order to ensure that the substantive requirements of the Directive are ultimately met. It may be prudent, and likely to reduce delay, to carry one out an early stage of the decision-making process. There is, however, no obligation to do so.

69. Accordingly, there was no breach of the Habitats Directive by failing to carry out a screening assessment in this case until December 2008. A full AA was in fact carried out and led to a properly based conclusion that the allocation of housing proposed in the CS would not have an adverse effect on the integrity of the SPA. That met the relevant requirements of the Directive.

Ground 3: the issue of mitigation under the Habitats Directive

70. Ground 3 is another elaborately formulated ground but is to the effect that the Council was in breach of Article 6 of the Habitats Directive by leaving mitigation measures over for assessment at the stage of the Area Action Plan or specific planning applications, in circumstances where sufficient information was available to assess the effectiveness of such measures at the stage of the CS. It is submitted to be contrary to the scheme of the Directive to leave matters of mitigation to lower-tier plan-making or specific project stages if the relevant information is known at the prior stage.

71. Mr Buxton cited the opinion of Advocate General Kokott in Case C-6/04, *Commission v United Kingdom* [2005] ECR I-9017, as supporting him on this issue.

In my view, however, it does not take him very far. The case concerned various alleged failures by the United Kingdom to implement the Habitats Directive correctly. One matter of complaint, which was held to be well founded, was that the UK legislation did not require land use plans to be subject to an appropriate assessment. That was the context in which, at paragraph 49 of her opinion, the Advocate General dealt with an objection that the full effects of a measure would not be known at the land use plan stage:

> "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 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. The assessment is to be updated with increasing specificity in subsequent stages of the procedure."

In that passage the Advocate General was saying no more than that the extent of detail of an assessment will depend on the precision of the plan, so that increased specificity will be required as one moves through the various stages of the approvals procedure. She was certainly not addressing the question whether mitigation measures must be considered at each stage of the procedure in as much detail as the available information permits.

72. In my judgment, the important question in a case such as this is not whether mitigation measures were considered at the stage of CS in as much detail as the available information permitted, but whether there was sufficient information at that stage to enable the Council to be duly satisfied that the proposed mitigation could be achieved in practice. The mitigation formed an integral part of the assessment that the allocation of 2000 dwellings on Area 4 would have no adverse effect on the integrity of the SPA. The Council therefore needed to be satisfied as to the achievability of the mitigation in order to be satisfied that the proposed development would have no such adverse effect. As Sullivan J expressed the point in *R (Hart District Council) v Secretary of State for Communities and Local Government* [2008] EWHC 1204 (Admin), [2008] P&CR 16, at paragraph 76, "the competent authority is required to consider whether the project, as a whole, including [mitigation] measures, if they are part of the project, is likely to have a significant effect on the SPA".

73. That issue was answered clearly and decisively in the Council's favour by the judge, in the course of the passage at paragraphs 138-157 of her judgment where she ran together this and the preceding ground of challenge. Thus, at paragraph 149, in relation to the proposed mitigation by the provision of a country park or similar to the south and east of Adastral Park, the judge quoted the inspector's finding that "[w]hile the detailed calculations of the specific scale of provision and types of facilities to be included are matters for an area action plan or planning application, there is sufficient evidence that this element of the mitigation available by the AA can be achieved and

is deliverable in phase with the new housing development". At paragraph 150 she referred to the inspector's further finding that the provision of wardening and visitor management facilities to cope with additional visitor pressure to the area was capable of being delivered. At paragraph 151 she referred to the inspector's consideration of BT's proposals in connection with its planning application, including the proposed provision of open space. She went on to say:

> "152. The fact that the inspector was familiar with the proposed modification to SP20 and was satisfied that it could be incorporated within a sound plan meant that he was content that the proposed mitigation was practical and sufficiently certain for the plan stage. The main modifications procedure involves another SA and a further round of public consultation. The public, therefore, had every opportunity to comment, including the claimant. The inspector chose not to re-open the examination. He must have been satisfied, therefore, that the proposed modification in light of the representations was sound.
>
> 153. The claimant makes no criticism of the inspector's report for being irrational or, in itself, in error.
>
> …
>
> 155. Although the claimant asserts that Natural England carried out a *volte face* it is clear from a reading of the correspondence that they were involved in the plan making process throughout by the defendant and altered their initial position in the light of further evidence, including that within the BT planning application. They confirmed that they were satisfied that the final documents were adequate and that their comments had been adequately incorporated …. In those circumstances, the inspector was quite justified in coming to a decision that the mitigation was sufficiently certain for Development Plan purposes ….."

74. There is no inconsistency between that conclusion and the provision within Strategic Policy SP20 that "[if] the results of the Appropriate Assessment [at the Area Action Plan or planning application stage] show that part of the Strategy cannot be delivered without adverse impacts on designated European sites which cannot be mitigated, then the proposals will only make provision for the level and location of development for which it can be concluded that there will be no adverse effect on the integrity of a designated European nature conservation site". That provision does not demonstrate any uncertainty as to the sufficiency or achievability of the mitigation measures proposed. It is simply an additional safeguard, so that if some unforeseen adverse impact is subsequently identified which cannot be resolved by mitigation, the development will be cut back to the extent necessary to ensure that there will be no adverse effect on the integrity of the SPA. That is a sensible precautionary measure in a CS that sets the framework for development until 2027, and it serves to underline the obligation to have continuing regard to the avoidance of harm to the SPA at all

subsequent stages of the planning process. Such an approach is in accordance with Article 6 of the Habitats Directive, not in breach of it.

75. I should mention that reference was made to two further domestic authorities in the submissions on this ground of appeal. They were *Feeney v Oxford City Council* [2011] EWHC 2699 (Admin), in which permission to appeal to the Court of Appeal was refused, and *The Cairngorms Campaign & Others v The Cairngorms National Park Authority* [2013] CSIH 65, an appeal against which is proceeding in the Supreme Court. It suffices to say that we were not taken to any specific passages in the judgments and I have not found either case to be of particular assistance for the resolution of the present issue.

Conclusion

76. For the reasons given, I would dismiss the appeal.

Lord Justice Underhill :

77. I agree.

Lord Justice Briggs :

78. I also agree.

79.