Neutral Citation Number: [2019] EWHC 2001 (Admin)

Case No: CO/5063/2018

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24/07/2019

Before :

MR JUSTICE DOVE

- -

Between :

Gladman Developments Limited	**Claimant**
- and -	
Secretary of State for Housing, Communities and Local Government	**1st Defendant**
-and-	**2nd Defendant**
Medway Council	

- -
- -

Richard Kimblin QC and Thea Osmund-Smith (instructed by **Addleshaw Goddard LLP**) for the **Claimant**
Richard Honey (instructed by **Government Legal Department**) for the **1st Defendant**
Non-appearance and no representation for the **2nd Defendant**
Hearing dates: 14th & 16th May 2019

- -

Approved Judgment

Judgment Approved by the court for handing down.

Mr Justice Dove :

1. On the 31st August 2016 the Claimant applied to the Second Defendant for outline planning permission for up to 225 residential dwellings (including up to 25% affordable housing) and associated hard and soft infrastructure, on land at Town Road, Cliffe Woods, Kent. That application was refused on the 5th May 2017. Two reasons for refusal were relied upon by the Second Defendant. The first reason for refusal related to the accessibility of Cliffe Woods for development of the scale that was proposed. The second reason related to the adverse impact of the proposals upon the character and amenity of the local area. The Claimant appealed against the refusal of planning permission to the First Defendant pursuant to section 78 of the Town and Country Planning Act 1990. On the 13th September 2017 the First Defendant recovered the appeal for his own determination and directed that a public inquiry be held into the proposals.

2. The public inquiry opened on the 28th November 2017, and during the course of the inquiry on the 29th November 2017 a Statement of Common Ground was agreed between the Claimant and the Second Defendant in respect of the issues involved in the appeal. In particular, the Statement of Common Ground agreed as follows in relation to nature conservation issues:

> "Ecology
>
> 5.13.1 The parties agree that subject to the imposition of appropriate conditions, including an Environmental Construction Management Plan, the proposal is considered the be acceptable in terms of Ecology and accords with Policies BNE35, BNE38 and BNE39 of the Medway Local Plan 2003."

3. Amongst those matters which the Inspector noted in his report as being agreed between the Claimant and the Second Defendant was that the tilted balance from paragraph 14 of the National Planning Policy Framework ("the Framework") from 2012, which was before him at the time of completing his report, was engaged in striking the planning balance in the case. That was because it was accepted that there was a significant shortfall in the five year housing land supply requiring the application of the tilted balance when reaching an overall conclusion as to whether planning permission should be granted. The Inspector identified the main issues arising in the appeal to be the accessibility of the appeal site; the effect of the development of the appeal site on the character and appearance of the area and its landscape; and, applying the tilted balance, whether any adverse impacts of the proposals would significantly and demonstrably outweigh the benefits of the scheme.

4. Significantly, for the purposes of the application before the court, there was no issue raised in relation to any adverse nature conservation consequences arising from the proposal. In particular no adverse consequences were identified in respect of the impact of any additional recreational pressures on the Thames Estuary Marshes SPA/RAMSAR and the Medway Estuaries and Marshes SPA/RAMSAR sites.

5. The relevant parts of the Inspector's conclusions in relation to the planning balance which led him to recommend that the appeal be allowed and planning permission be granted were as follows:

> "133. In summary, there would be some conflict with Policy BNE25(i) of the Medway Local Plan in terms of the effect on the landscape. However, the development would offer access by a range of transport modes, as required by BNE25(i), although new residents may also rely on private vehicles. The scheme would be not be located within an existing urban area, as prioritised by Policies S1 and S2. Importantly, though, the Council cannot demonstrate a five year supply of housing. Moreover, Policy BNE25 is not fully compliant with the Framework, and, together with Policies S1 and S2, they are not delivering the necessary provision of housing. This diminishes the weight that can be attached to any conflict with these policies.
>
> 134. The significant ongoing housing shortfall attracts substantial weight in favour of granting permission for the proposals, unless any adverse impacts of doing so would significantly and demonstrably outweigh the benefits, when assessed against the policies of the Framework taken as a whole. I am satisfied that none of the reasons put forward for opposing the development establishes that the harm would be significant or would demonstrably outweigh the benefits. Therefore, notwithstanding any conflict with Policies BNE25, S1 and S2 of the Local Plan, I recommend that the appeal should succeed, subject to the imposition of conditions."

6. The Inspector's report was dated the 29th March 2018. On the 12th April 2018 the Court of Justice of the European Union ("the CJEU") handed down judgment in the case of People Over Wind and Sweetman v Coillte Teoranta [C-323/17]. The detail of this decision is discussed below, but in essence the CJEU made clear that in undertaking a screening assessment as to whether or not Appropriate Assessment is required for a plan or project under article 6(3) of Council Directive 92/43/EEC ("the Habitats Directive") it is not permitted to take account of measures intended to avoid or reduce the harmful effects of the plan or project under consideration. This was a departure from the domestic jurisprudence on this issue which had, since the case of R (on the application of Hart DC v Secretary of State for Communities and Local Government [2008] EWHC 1204 (Admin); [2008] 2 P&CR 16, held that it was permissible to take account of mitigation measures, or measures designed to avoid or reduce the harmful effects of a plan or project, at the time when undertaking the screening assessment required by Article 6(3) of the Habitats Directive to examine whether or not Appropriate Assessment was required.

7. On the 28th June 2018 the First Defendant wrote to the Claimant and the Second Defendant inviting the parties' representations as to, firstly, whether or not an appropriate assessment was required in the light of the decision in People Over Wind and, secondly, their views as to the correct application of planning policy in the light of the People Over Wind decision. The reference to planning policy was in particular a reference to paragraphs 14 and 119 of the 2012 edition of the Framework which provided as follows:

> "14. At the heart of the National Planning Policy Framework is a **presumption in favour of sustainable development**, which should be seen as a golden thread running through both plan-making and decision-taking.
>
> …
>
> For **decision-taking** this means:[10]
>
> - approving development proposals that accord with the development plan without delay; and
>
> - where the development plan is absent, silent or relevant policies are out-of-date, granting permission unless:
>
> – any adverse impacts of doing so would significantly and demonstrably outweigh the benefits, when assessed against the policies in this Framework taken as a whole; or
>
> – specific policies in this Framework indicate development should be restricted.[9]
>
> …
>
> [9] For example, those policies relating to sites protected under the Birds and Habitats Directives (see paragraph 119) and/or designated as Sites of Special Scientific Interest; land designated as Green Belt, Local Green Space, an Area of Outstanding Natural Beauty, Heritage Coast or within a National Park (or the Broads Authority); designated heritage assets; and locations at risk of flooding or coastal erosion.
>
> …
>
> 119. The presumption in favour of sustainable development (paragraph 14) does not apply where development requiring appropriate assessment under the Birds or Habitats Directives is being considered, planned or determined."

8. In response to the letter of the 28th June 2018 the Claimant provided a note addressing its views of the implications. Firstly, in relation to whether or not Appropriate Assessment was now required the note observed as follows:

> "In the light of the recent judgment of the Court of Justice of the European Union in *People Over Wind* (PoW) it is acknowledged that an Appropriate Assessment (AA) is now required in relation to the appeal proposals for land at Town Road, Cliffe Woods. This is because mitigation was taken into account in previous Habitats Regulation Assessment (HRA) screening process undertaken by Natural England and Medway Council, in reaching their conclusion of no likely significant impact on the Thames Estuary and Marshes SPA/Ramsar and

> the Medway Estuaries and Marshes SPA/Ramsar sites as a result of the appeal proposals. The mitigation considered comprised:
>
> - Payment of a financial contribution towards the Strategic Access Management and Mitigation Strategy (SAMMS)
>
> The appeal proposals include the provision of 3.8 ha of on-site pubic open space (POS) and green infrastructure (GI) which is an integral part of the proposed development. The opportunity that the on-site POS/GI presents through the creation of new recreational routes was also considered by Natural England and Medway Council in reaching the conclusion. For the avoidance of doubt, the on-site POS/GI is not proposed in order to mitigate likely significant effects on the European designated sites.
>
> As such, GDL have instructed our ecologists to prepare an 'Information for AA' document to ensure that the Inspector, as the current Competent Authority, has the relevant information required to undertake an AA and reach a conclusion on likely significant effects. This 'Information for AA' document has been prepared in line with the most recent case law. The conclusion of the AA has not changed from that previously reached by the Competent Authorities at the HRA screening stage, namely that the appeal proposals will not have a likely significant impact upon the integrity of the Thames Estuary and Marshes SPA/Ramsar and the Medway Estuaries and Marshes SPA/Ramsar sites. The test has therefore been passed. There is no adverse impact upon the SAC/SPA to weigh in the planning balance."

9. In relation to the implications in respect of National Planning Policy, and in particular paragraph 119 of the Framework, the note provided as follows:

> "On a *prima facie* reading of paragraph 119, it could be argued that the tilted balance (that is, a presumption that applications should be permitted unless the harm significantly and demonstrably outweighs the benefits) is not engaged due to the requirement for an AA to even be undertaken. However, such a position is illogical and perverse. The AA has been passed. There is no additional harm to weigh in the planning balance as a result of the AA having been undertaken and none of the other material considerations which led to the conclusion that the tilted balance should be engaged have changed as a result of the PoW judgment. As such GDL submit that it would be similarly illogical and perverse to disengage the tilted balance in these circumstances."

10. Accompanying the note was a document entitled "Information for an Appropriate Assessment following CJEU People Over Wind judgment". This document noted that

the appeal site falls within the 6km zone of influence of the Thames Estuary Marshes, Medway Estuary Marshes and The Swale SPA/RAMSAR and that Natural England had provided a consultation response confirming that subject to a financial contribution to the Thames Medway Swale Estuaries Strategic Access Management Monitoring Strategy ("the SAMMS") there would be no likely significant effect on the integrity of the European site and they would have no objections to the proposals. The document went on to record that on site open space was not part of the proposed mitigation in relation to the recreational impact upon the European sites. Residents' information packs were proposed for the new dwellings, together with a financial contribution to the SAMMS strategy which had been specifically designed to address the potential impact of any additional recreational pressure on the European sites through a variety of projects and initiatives.

11. Thereafter, on the 27th July 2018, the First Defendant wrote to the Claimant and the Second Defendant affording them the opportunity to make representations in respect of the newly published 2018 edition of the Framework. Once more the Claimant provided the First Defendant with a note responding to the matter raised. The first focus of the discussion in the note related to the replacement for paragraph 14 of the 2012 Framework, namely paragraph 11 of the 2018 Framework. Paragraph 11 provides as follows:

> "11. Plans and decisions should apply a presumption in favour of sustainable development.
>
> …
>
> For **decision-taking** this means:
>
> c) approving development proposals that accord with an up-to-date development plan without delay; or
>
> d) where there are no relevant development plan policies, or the policies which are most important for determining the application are out-of-date[7], granting permission unless:
>
> i. the application of policies in this Framework that protect areas or assets of particular importance provides a clear reason for refusing the development proposed[6]; or
>
> ii. any adverse impacts of doing so would significantly and demonstrably outweigh the benefits, when assessed against the policies in this Framework taken as a whole.
>
> …
>
> 6 The policies referred to are those in this Framework (rather than those in development plans) relating to: habitats sites (and those sites listed in paragraph 176) and/or designated as Sites of Special Scientific Interest; land designated as Green Belt, Local Green Space, an Area of Outstanding Natural Beauty, a National Park (or within the Broads Authority) or defined as

> Heritage Coast; irreplaceable habitats; designated heritage assets (and other heritage assets of archaeological interest referred to in footnote 63); and areas at risk of flooding or coastal change.
>
> 7 This includes, for applications involving the provision of housing, situations where the local planning authority cannot demonstrate a five year supply of deliverable housing sites (with the appropriate buffer, as set out in paragraph 73); or where the Housing Delivery Test indicates that the delivery of housing was substantially below (less than 75% of) the housing requirement over the previous three years. Transitional arrangements for the Housing Delivery Test are set out in Annex 1."

The reference in footnote 6 to habitats sites relates to paragraphs 176 and 177 of the 2018 Framework which provide as follows:

> "176. The following should be given the same protection as habitats sites:
>
> a) potential Special Protection Areas and possible Special Areas of Conservation;
>
> b) listed or proposed Ramsar sites; and
>
> c) sites identified, or required, as compensatory measures for adverse effects on habitats sites, potential Special Protection Areas, possible Special Areas of Conservation, and listed or proposed Ramsar sites.
>
> 177. The presumption in favour of sustainable development does not apply where development requiring appropriate assessment because of its potential impact on a habitats site is being planned or determined."

12. The Claimant's note, having observed the change in wording in relation to paragraph 11(d), stated that this did not "result in a need to introduce new policies into the decision taking exercise". The note went on to remind the First Defendant of the note that had been supplied in relation to the implications of People Over Wind and its supporting material. The Claimant's conclusion was described as follows:

> "2.7… The Appellant's position is that the conclusion of the AA has not changed from that previously reached by the Competent Authorities (Natural England and Medway Council) at the HRA screening stage, namely the appeal proposals will not have a likely significant impact on the integrity of either of the SPA/Ramsar sites. The test has therefore been passed and there is therefore "no clear reason" under 11 d) i, for refusing the development proposed. Nor are there any adverse impacts to weigh in the planning balance under 11d) ii."

13. The note then went onto deal with issues associated with housing need and the First Defendant's new concept of a standard methodology for the calculation of housing need. The observations in this respect, and the conclusions of the Claimant's note, were as follows:

> "3 HOUSING NEED AND THE NEW STANDARD METHOLOGY"
>
> 3.1 Current housing need is not reflected in the adopted Local Plan (CD 7.1) which was predicated on the Kent Structure Plan covering the period 1991-2011. That set an annual requirement of a 867 dpa and is the figure that led to present development boundaries. There is no dispute between the parties and the adopted Local Plan was only supposed to guide development until 2006 and is now out of date.
>
> 3.2 The Council's SHMA (CD 9.2) which forms part of the evidence base for the next Local Plan arrived at an objectively assessed need of 1281 dpa (CD 9.2, p.123) and is the figure the Council used in its own calculations. The Council's witness, Mr Sensecall agreed that if the figure of 1281 dpa was to be met; it would require a step change in housing delivery. Moreover, the 1281 dpa figure was based on the 2102 household projections.
>
> 3.3 Mr Booth on behalf of the appellant (Mr Booth, Proof 6.1.2) set out that based on the most up to date 2014 projections the housing requirement increased to 1314 dpa.
>
> 3.4 The Government's Consultation Proposals on the standardised methodology in September 2017 suggests a figure of 1665 dpa (Mr Booth, Proof, 6.2). There is therefore no indication the housing need is falling or that a five year supply of deliverable sites can be identified by using the new standard methodology.
>
> 4 Conclusion
>
> 4.1 In evidence to the Inquiry, the Appellant argued that the presumption in favour of sustainable development, the "tilted balance", was engaged and there are no changes in the revised Framework, paragraph 11 d), that lead us to the conclusion that the arguments set out in the Appellant's Closing Submissions relating to the five year housing land supply or the outdatedness of the Local Plan policies and FOAN have been materially affected by publication of the revised Framework and proposed standard methodology for assessing housing need. It remains clear that there are only very limited impacts to be weighed against a number of very significant benefits and accordingly, the Appellant respectively invites the Secretary of State to grant

> permission subject to appropriate conditions and the terms of the Section 106 Unilateral Undertaking"

14. The Second Defendant also responded and had the following observations in relation to housing issues and the use of the standard method:

> "3. Housing need and the new standard methodology:
>
> 3.1 The Appellant deals with housing need and the impact of the new standard methodology at paragraphs 3.1-3.4 in its 10th August submission. The Council continues to accept, as it did in the Public Inquiry, that there is a substantial need for housing in Medway, which it is addressing through the plan-making process. It would make the point however that it has had sight of the released population projection figures, which show that population is not growing as quickly as previous figures had suggested.
>
> 3.2 The Council is currently awaiting the household projection figures, which are due to be released in September; it anticipates that these will show that the housing figures have gone down. The Council has also had confirmation from MHCLG that if it adopts the standard methodology, it can re base the Local Plan to 2018, which will remove part of its existing backlog. These changes in methodology will show that housing need is below the Council's current OAN.
>
> 3.3 The above points notwithstanding, the Council accepts the case that there is a currently a substantial need for housing in Medway. However, for the reasons set out in its closing submissions this is the wrong development, in the wrong location to address that need"

15. On the 26th October 2018 the First Defendant issued what it described as a "Technical Consultation on Updates to National Planning Policy and Guidance" ("the Technical Consultation"). This consultation document set out the aspiration of the First Defendant to increase the delivery of new homes, which it was intended would be facilitated by a standard method of assessing local housing need. The standard method was grounded in the use of figures for household projections published by the ONS. The Technical Consultation noted that the latest household projections published by ONS on the 20th September 2018 evidenced lower projections of household growth, resulting in the national minimum housing need calculated using the standard method falling significantly from 269,000 homes to 213,000 homes. Having reviewed the implications and the potential policy options, the Technical Consultation sought views on the First Defendant's proposed approach, which was described in the document as follows:

> "The Government's proposed approach
>
> 19. The Government considers that the best way of responding to the new ONS household projections and delivering on the

three principles in paragraph 18 above is to make three changes:

1. For the short-term, to specify that the 2014-based data will provide the demographic baseline for assessment of local housing need.

2. To make clear in national planning practice guidance that lower numbers through the 2016-based projections do not qualify as an exceptional circumstance that justifies a departure from the standard methodology; and

3. In the longer term, to review the formula with a view to establishing a new method that meets the principles in paragraph 18 above by the time the next projections are issued.

20. All other elements of the standard method of assessing housing need would, for now, remain unchanged. The use of the standard method applies to plan-making for plans submitted on or after the 24 January 2019. Any period specified for using the 2014-based projections would use that as the start date. As specified in existing planning practise guidance the relevant housing need figure can be relied upon for the purposes of plan examination for 2 years. For decision making, any proposed revisions would apply from the day of publication of the revised planning practice guidance, unless otherwise stated. This change can be implemented by changes to national planning practice guidance.

…

27. The Government considers that this is a reasonable approach in the short term because:

1. Basing the assessment of local housing need on 2016-based household projections, would either not support the Government's objective of significantly boosting the supply of homes (if other variables were unchanged) or produce major distributional changes that would produce instability for local planning authorities in general (if other variables were changed to produce an aggregate consistent with other estimates). For example, if the Government were to change the parameters of the formula to ensure the level of minimum local housing need is consistent with previous levels 151 local authorities would see changes in excess of 20%.

2. Although the Government generally recommends the use of the latest data in producing assessments of housing need, in this case there have been substantial changes in the method for producing the projections that have resulted in major changes in the distribution of households nationally, and the

> Government would like to see the new method settling down before making a decision on whether this data provides the best basis for planning; and
>
> 3. Local housing need does not represent a mandatory target- it is simply a starting point for planning, and local authorities may either choose to plan in excess of this or to conclude that they are not able to meet all housing need within their boundaries, for example due to constraints such as protected designations and Green Belt, or whether that need is better met elsewhere. This means there is flexibility for local authorities to manage movements in local housing need locally."

16. The Technical Consultation also proposed changes to the Framework to reflect the judgment in People Over Wind. The proposal upon which views were sought, and the justification for the change, were set out as follows:

> "41. One of the measures which the National Planning Policy Framework takes to protect habitats sites is to disengage the presumption in favour of sustainable development where there is potential for harm to these sites. However the judgment [in People Over Wind] means that sites with suitable mitigation are now excluded from the application of the presumption, which was not the intention of the policy.
>
> 42. To rectify this we propose to amend paragraph 177 of the Framework to make clear that the presumption is disapplied only where an appropriate assessment has concluded that there is no suitable mitigation strategy in place. The revised paragraph would read:
>
> 177. The presumption in favour of sustainable development does not apply where the plan or project is likely to have a significant effect on a habitats site (either alone or in combination with other plans or projects), unless an appropriate assessment has concluded that there will be no adverse effect from the plan or project on the integrity of the habitats site.
>
> 43. The European Court judgment was delivered after the consultation on the revised Framework was published in March this year. Although some consultation responses asked for an amendment to the Framework in light of the ruling, there was not an opportunity for all interested parties to comment at the time. Alongside the minor change to paragraph 177 that we are now proposing to make, we are considering what other changes to regulations and guidance may be necessary following the European Court's ruling."

17. On the 9th November 2018 the First Defendant issued his decision in relation to the appeal in the light of the Inspector's report. He did not accept the Inspector's recommendation that planning permission should be granted for the Claimant's

proposal. In his decision he set out a sequence of conclusions in relation to the issues arising in the appeal. In respect of questions associated with both the emergence of the Technical Guidance and the five year housing land supply the First Defendant concluded as follows:

> "8. On 26 October 2018, Government published "Technical consultation on updates to national planning policy and guidance", dealing with the calculation of local housing need and other matters, including the *People Over Wind and Sweetman v Coillte Teoranta* issue. While a number of the issues dealt with in that document are relevant to this case, given these remain the subject of consultation and may not be the final position, the Secretary of State has made his decision here based on existing policy.
>
> …
>
> Five-year housing land supply
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> 14. The Secretary of State has given careful consideration to the Inspector's analysis of the five-year housing land supply at IR93 which reports that the parties do not dispute that the Council cannot demonstrate a deliverable 5 year supply of housing, and that the appellant believes it to be no better than 2.75 years, with the Council claiming it to be around 3 years.
>
> 15. However, as the Local Plan was adopted in 2003, the adopted housing requirement figure is more than 5 years old. Paragraph 73 of the Framework indicates that in that scenario, local housing need should be applied. The Secretary of State has applied the standard method set out in guidance, and has concluded that local housing need for Medway is 1,310.
>
> 16. He notes that under paragraph 73 of the Framework, a 20% buffer should apply where there has been significant under-delivery of housing over the previous three years. He further notes that the most recent Monitoring Report before the inquiry (December 2016) (IR23) shows that in 2015-16, there were 553 completions against a requirement of 1,000 dwellings. He considers that this is significant under-delivery. The Secretary of State has taken into account the fact that no evidence has been put forward in response to his reference back letter of 27 July 2018 to suggest that Medway (which accepted that it was a 20% authority under the old Framework – IR23) is not a 20% authority under the provisions of the revised Framework. He therefore considers that a 20% buffer should be applied. This gives an annual requirement of 1,572 dwellings. The Secretary of State further notes that no party has suggested in representations that the assessment of housing supply should change as a result of the change in definition of 'deliverable' in

> the revised Framework. Overall he considers that there is a housing land supply of 3.9-4.3 years.
>
> 17.While this means that the shortfall in housing land supply has reduced since the inquiry, there is still not a 5-year housing land supply. The Secretary of State considers that his conclusions on housing land supply do not alter the weight he assigns to the matters set out below, or his decision on the case as a whole. For this reason, he does not consider that it is necessary to refer back to parties on this matter before reaching his decision."

18. The First Defendant went on to disagree with the decisions of the Inspector in relation to accessibility and to attribute substantial weight against the proposal in connection with the policy conflict associated with accessibility. He agreed with the Inspector that there was an adverse effect upon the character of the landscape, and in the light of the policy conflict which arose from that conclusion, moderate weight was to be afforded to the conflict with development plan policies. In respect of benefits the First Defendant concluded as follows:

> "Benefits of the proposal
>
> 25.The Secretary of State agrees with the Inspector that the proposal would introduce much-needed market and affordable housing for local people; would create investment in the locality and increase spending in shops and services; and would result in jobs during the construction phase (IR127). Overall he considers that the additional housing carries significant weight, and the economic benefits carry moderate weight in favour of the proposal. He further agrees with the Inspector that the creation of open space with play area, new planting and landscaping, the provision of a pond, new pedestrian routes would convey benefits to the wider population in addition to mitigating the adverse effects of the development (IR128). He considers that these benefits carry limited weight."

19. The First Defendant's conclusions in relation to Appropriate Assessment were as follows:

> "Appropriate assessment
>
> 27. Following the reference back to parties exercise described in paragraph 5 of this letter, the Secretary of State has concluded that the screening assessment undertaken for the purposes of this appeal and presented to the inquiry is no longer legally sound.
>
> 28. Therefore, as competent authority for the purposes of the Conservation of Habitats and Species Regulations 2010, the Secretary of State has carried out a new screening. He has concluded on the basis of this screening that an appropriate

> assessment is required, and has carried out that assessment, consulting Natural England as the appropriate nature conservation body. Both the screening and appropriate assessment are attached to this decision letter at Appendix B. On the basis of his appropriate assessment, and for the reasons set out in that assessment, the Secretary of State considers that he can safely conclude that the proposed development would not adversely affect the integrity of any European site.
>
> 29. The Secretary of State notes that under paragraph 177 of the Framework, the presumption in favour of sustainable development does not apply where development requiring appropriate assessment is being determined."

20. The First Defendant's striking of the planning balance and overall conclusions were expressed in the following terms leading to the dismissal of the appeal:

> "Planning balance and overall conclusion
>
> 35. For the reasons given above, the Secretary of State considers that the appeal scheme is not in accordance with Policies BNE25, S1 and S2 of the development plan, and is not in accordance with the development plan overall. He has gone on to consider whether there are material considerations which indicate that the proposal should be determined other than in accordance with the development plan.
>
> 36. Although there is no 5-year housing land supply, the presumption in favour of sustainable development does not apply because of the effect of paragraph 177 of the Framework (as set out in paragraph 29 above).
>
> 37. The Secretary of State considers that the housing benefits of the proposal carry significant weight, and the economic benefits carry moderate weight. The provision of open space with play area, new planting and landscaping, the provision of a pond, new pedestrian routes and improvements to public transport infrastructure carry limited weight in favour of the proposal.
>
> 38. The Secretary of State considers that the conflict with the Framework and the development plan in terms of sustainable transport carries substantial weight, the conflict with development plan policies designed to protect the countryside and prioritise development within existing urban areas carries moderate weight, and the loss of BMV land carries limited weight against the proposal.
>
> 39. Overall, the Secretary of State considers that there are no material considerations that indicate that the proposal should be determined other than in accordance with the development

> plan. He therefore concludes that planning permission should be refused."

21. Attached to the decision letter at Annex B was the "Record of the Screening Assessment and Habitats Regulations Assessment undertaken under regulation 61 of the Conservation of Habitats and Species Regulations 2017 (as amended) for an application under the Town and Country Planning Act 1990". This document records that the First Defendant concluded that since, in the absence of avoidance and mitigation measures, the proposal would have potential to contribute towards a significant effect on the features of interest for which the Thames Estuary and Marshes SPA/RAMSAR site had been classified, Appropriate Assessment was required. The document went on to record the Appropriate Assessment which, reliant upon the information provided by the Claimant, concluded that the proposal would not adversely affect the integrity of the European site in the light of the provision of the proposed mitigation and avoidance measures in the form of the financial contribution to the SAMMS strategy.

The Grounds

22. The Claimant brings an application under section 288 of the 1990 Act in relation to the First Defendant's decision. The application proceeds upon five grounds. Ground 1 is that the First Defendant failed to apply his own policy rationally, or as he had himself understood it, in particular in the Technical Consultation. The element of policy particularly in focus in relation to this ground is paragraph 177 of the Framework. It is submitted by Mr Richard Kimblin QC, who appears on behalf of the Claimant, that it is clear when the Technical Consultation is understood, that it was never the intention of the First Defendant's policy to deprive a proposal, which had successfully passed an Appropriate Assessment, of the tilted balance to which it was entitled by virtue of the application of paragraph 11 of the Framework. This proposition, he submits, can be tested by comparison with the clarified paragraph 177 proposed by the Technical Consultation. The approach taken in paragraph 29 and 36 of the decision letter is therefore wrong, and a misinterpretation of the First Defendant's own policy.

23. Ground 2 of the application is that the First Defendant failed to have regard to a material consideration in that he failed to have regard to the contents of the Technical Consultation and applied the policy in paragraph 177 in an illegitimately rigid fashion. In effect the First Defendant failed to exercise discretion in applying the policy to the decision before him, notwithstanding that his "black letter" reading of the Framework policy clearly ran contrary to the intention of his policy. There were good reasons for not applying the policy in the rigid way in which the First Defendant did, to which no reference is made in the decision letter. The First Defendant should have had regard to the intention of the policy expressed in the Technical Consultation in applying paragraph 177. The Claimant points out that a similar approach was taken to that advocated by the Claimant in a decision of one of the First Defendant's Planning Inspectors.

24. Ground 3 is the complaint that the First Defendant failed to consult the Claimant in relation to the Technical Consultation. Such a consultation would have enabled the Claimant to point out to the First Defendant the need for him to apply his own understanding of his policy when interpreting and applying paragraph 177 of the Framework. The Claimant points out that in other decisions of the First Defendant

there were referrals back to the parties in order to enable responses to be provided in respect of the contents of the Technical Consultation.

25. By way of ground 4 the Claimant contends that the CJEU decision in People Over Wind is wrongly decided, and that the approach taken by Sullivan J in Hart is the proper interpretation of the provisions of the Habitats Directive in respect of screening assessments. The Claimant contends that the issue is not *acte clair* on the basis that People over Wind conflicts with Hart and the domestic authorities which follow it, and is a decision which is inadequately reasoned and explained. The Claimant seeks a reference to the CJEU in order to clarify the position.

26. In ground 5 the Claimant contends that the conclusions of the First Defendant in relation to the five year housing land supply and its impact on the decision were in error in a number of respects. As a result of the First Defendant's recalculation of the five year housing land supply it appears that the position had improved from the 2.75-3 years noted by the Inspector at the time of the inquiry, to a calculation of 3.9-4.3 years in the First Defendant's decision. The conclusion in paragraph 17 of the First Defendant's decision letter that these conclusions on housing land supply "do not alter the weight he assigns to the matters set out below, or his decision on the case as a whole" is wholly unexplained. It is submitted that it cannot be right to suggest that a change in the housing land supply of the scale identified in the decision could have had no impact on the weight to be attached to that issue.

27. In respect of the calculation itself, the Claimant notes that there were a number of figures that were in play in respect of the housing requirement (see the Claimant's note during the exchange of correspondence at paragraphs 3.1-3.4 above). The First Defendant undertook the calculation based upon applying the standard method to the 2016 based household projections which were unavailable at the time of the inquiry. Having used 2016 household projections for the period 2018/19-2023/24, the housing land supply calculation was then undertaken deploying supply side figures from a period relating to 2017/18-2022/23: thus the First Defendant used need and supply figures from differing time periods. The Claimant contends that there should have been consultation about the use of the 2016 household projections as there had been in other cases. These household projections were new evidence which as a matter of law should have been referred back to the Claimant.

28. I propose to deal with the relevant law, and the submissions and conclusions, in respect of grounds 1-3 and 5 first, and separately, from the law and the submissions and conclusions on ground 4.

Grounds 1, 2, 3 & 5: The Law

29. Section 70(2) of the 1990 Act requires a decision taker to have regard to the provisions of the development plan so far as material to any application for planning permission that is being determined. Section 38(6) of the Planning and Compulsory Purchase Act 2004 requires that the determination of a planning application "must be in accordance with the plan unless material considerations indicate otherwise". The Framework is a material consideration to which regard must be had in accordance with the statutory decision-taking regime. The interpretation of planning policy is a question of law for the court pursuant to the decision of the Supreme Court in Tesco Stores Limited v Dundee City Council [2012] UKSC 13; [2012] PTSR 983.

30. In British Oxygen Co. Limited v Minister of Technology [1971] AC 610 the House of Lords confirmed that where a statute confers a power upon a Minister to exercise a discretion in relation to a particular decision it is legitimate for the Minister to adopt a policy as to how the power will be exercised. Lord Reid provided as follows in relation to the approach to be taken to decision-taking alongside such policies:

> "…The general rule is that anyone who has to exercise a statutory discretion must not "shut his ears to an application"… I do not think there is any great difference between a policy and a rule. There may be cases where an officer or authority ought to listen to a substantial argument reasonably presented urging a change of policy. What the authority must not do is to refuse to listen at all. But a Ministry or large authority may have had to deal already with a multitude of similar applications and then they will almost certainly have evolved a policy so precise that it could well be called a rule. There can be no objection to that, provided the authority is always willing to listen to anyone with something new to say, of course- I do not mean to say that there need be an oral hearing. In the present case the respondent's officers have carefully considered all that the appellants have had to say and I have no doubt that they will continue to do so. The respondent might at any time change his mind and therefore I think that the appellants are entitled to have a decision whether these cylinders are eligible for grant."

31. Turning to the law relating to consultation there can be circumstances where a duty to consult arises as a consequence of legal requirements, including the provisions of relevant statute or its accompanying secondary legislation. A decision-taker can assume a duty to consult in the absence of a legal requirement to do so if it chooses to go out to consultation. In all of these circumstances once the duty to consult is engaged the consultation must be undertaken in accordance with what have become known as the "Sedley Principles" endorsed by the Supreme Court in Moseley v Haringey London Borough Council [2014] UKSC 56, [2014] 1 WLR 3947. These principles include the requirement that consultation must be undertaken with an open mind in relation to the decision which is being consulted upon. In the context of the present case the Claimant contends that a duty to consult arose in relation to the Technical Consultation as a consequence of other appeals in which the First Defendant had consulted about that document and sought representations in relation to it. The Claimant also contends in relation to ground 5 that, as a matter of law, the duty to consult arose by virtue of the provisions of rule 17(5) of the Town and Country Planning Act (Inquiries Procedure) (England) Rules 2000, which provides as follows:

> "17. Procedure after inquiry
>
> …
>
> (5) If, after the close of an inquiry, the Secretary of State-

> (a) differs from the inspector on any matter of fact mentioned in, or appearing to him to be material to, a conclusion reached by the inspector; or
>
> (b) takes into consideration any new evidence or new matter of fact (not being a matter of government policy),
>
> and is for that reason disposed to disagree with a recommendation make by the Inspector, he shall not come to a decision which is at variance with that recommendation without first notifying [in writing] the persons entitled to appear at the inquiry who appeared at it of his disagreement and the reasons for it; and affording them an opportunity of making written representations to him or (if the Secretary of State has taken into consideration any new evidence or new matter of fact, not being a matter of government policy) of asking for the reopening of the inquiry."

32. It will be evident from what has been set out above about the factual circumstances of the case that the issues associated with the five year housing land supply, and its absence, had an impact on the decision-taking process, in that the tilted balance was engaged. As is evident from both paragraph 14 and 49 of the 2012 Framework and paragraph 11 of the 2018 Framework and its associated footnote 7, where a local planning authority is unable to demonstrate a five year housing land supply the tilted balance will apply. In Hallam Land Management v Secretary of State for Communities and Local Government and Another [2018] EWCA Civ 1808 the Court of Appeal considered the question of "how far does the decision-maker have to go in calculating the extent of any shortfall in the five year supply of housing land?". Davis LJ, in agreement with the leading judgment given by Lindblom LJ, dealt with this issue in the following terms:

> "81. Clearly a determination of whether or not there is a shortfall in the 5 year housing supply in any particular case is a key issue. For if there is, then the "tilted balance" for the purposes of paragraph 14 of the NPPF comes into play.
>
> 82. Here, it was common ground that there was such a shortfall. That being so, I have the greatest difficulty in seeing how an overall planning judgment thereafter could properly be made without having at least some application of the extent of the shortfall. That is not to say that the extent of the shortfall itself will be a key consideration. It may or not be: that is itself a planning judgment, to be assessed in the light of the various policies and other relevant considerations. But it ordinarily will be a relevant and material consideration, requiring to be evaluated.
>
> 83. The reason is obvious and involves no excessive legalism at all. The extent (be it relatively large or relatively small) of any such shortfall with bear directly on the weight to be given to the benefits or disbenefits of the proposed development. That is

> borne out by the observations of Lindblom LJ in the Court of Appeal in paragraph 47 of ***Hopkins Homes***. I agree also with the observations of Lang J in paragraphs 27 and 28 of her judgment in the ***Shropshire Council*** case and in particular with her statements that "…Inspectors generally will be required to make judgments about housing need and supply. However these will not involve the kind of detailed analysis which would be appropriate at a Development Plan inquiry" and that "the extent of any shortfall may well be relevant to the balancing exercise required under NPPF 14." I do not regard the decisions of Gilbart J, cited above, when properly analysed, as contrary to this approach.
>
> 84. Thus exact quantification of the shortfall, even if that were feasible at the stage, as though some local plan process was involved, is not necessarily called for: nor did Mr Hill QC so argue. An evaluation of some "broad magnitude" (in the phrase of Lindblom LJ in his judgment) may for this purpose be legitimate. But, as I see it, at least some assessment of the extent of the shortfall should ordinarily be made; for without it the overall weighing process will be undermined. And even if some exception may in some cases be admitted (as connoted by the use by Lang J in ***Shropshire Council*** of the word "generally") that will, by definition, connote some degree pf exceptionality: and there is no exceptionality in the present case."

33. Dealing with the question of reasons in the determination of an appeal under section 78 of the 1990 Act by the First Defendant, rule 18 of the 2000 rules provides as follows:

> "Notification of decision
>
> 18(1) The Secretary of State shall, as soon as practicable, notify his decision on an application or appeal, and his reasons for it in writing to- (a) all persons entitled to appear at the inquiry who did appear, and (b) any other person who, having appeal at the inquiry, has asked to be notified of the decision."

34. It follows from Rule 18 of the 2000 Rules that in reaching his decision the First Defendant is under a duty to provide reasons for the decision. The question which arises is as to whether or not those reasons are legally adequate. There are two dimensions to the consideration of that issue: the first is the question of the correct approach to the reading and examination of decisions in section 288 challenges, and the second is the allied question of whether or not the reasons provided in the decision meet the legal requirements for the provision of reasons. So far as the approach to the reading and examination of decision letters in challenges under section 288 of the 1990 Act is concerned, Lindblom LJ in St Modwen v SSCLG [2017] EWCA Civ 1643 summarised 7 principles to be applied in considering such cases, at paragraph 19 of his judgment as follows:

"19. The relevant law is not controversial. It comprises seven familiar principles:

1) Decisions of the Secretary of State and his inspectors in appeals against the refusal of planning permission are to be construed in a reasonably flexible way. Decision letters are written principally for parities who know what the issues between them are and what evidence and argument has been deployed on those issues. An inspector does not need to "rehearse every argument relating to each matter in every paragraph"

2) The reasons for an appeal decision must be intelligible and adequate, enabling one to understand why the appeal was decided as it was and what conclusions were reached on the "principle important controversial issues". An inspector's reasoning must not give rise to a substantial doubt as to whether he went wrong in law, for example by misunderstanding a relevant policy or by failing to reach a rational decision on relevant grounds. But the reasons need refer only to the main issues in the dispute, not to every material consideration.

3) The weight to be attached to any material consideration and all matters of planning judgment are within the exclusive jurisdiction of the decision-maker. They are not for the court. A local planning authority determining an application for planning permission is free, "provided that it does not lapse into Wednesbury irrationality" to give material considerations "whatever weight [it] thinks fit or no weight at all"

4) Planning policies are not statutory or contractual provisions and should not be construed as if they were. The proper interpretation of planning policy is ultimately a matter of law for the court. The application of relevant policy is for the decision-maker. But statements of policy are to be interpreted objectively by the court in accordance with the language used and in its proper context. A failure to properly understand and apply relevant policy will constitute a failure to have regard to a material consideration, or will amount to having regard to an immaterial consideration.

5) When it is suggested that an inspector has failed to grasp a relevant policy one must look at what he thought the important planning issues were and decide whether it appears from the way he dealt with them that he must have misunderstood the policy in question.

6) Because it is reasonable to assume that national planning policy is familiar to the Secretary of State and his inspectors,

> the fact that a particular policy is not mentioned in the decision letter does not necessarily mean that it has been ignored.
>
> 7) Consistency in decision-making is important both to developers and local planning authorities, because it serves to maintain public confidence in the operation of the development control system. But it is not a principle of law that like cases must always be decided alike. An inspector must exercise his own judgment on this question, if it arises."

35. So far as the test for the adequacy for reasons is concerned the principles are set out (albeit not necessarily exhaustively) in the speech of Lord Brown in South Bucks v Porter (No.2) [2004] 1 WLR 1953 at paragraph 36 (which cross refers to the second principle from St Modwen) in which he provided as follows:

> "36. The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the principle important controversial issues, disclosing how any issue of law or fact was resolved. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision. The reasoning must not give rise to a substantial doubt as to whether the decision-maker erred in law, for example by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds. But such adverse inference will not readily be drawn. The reasons need refer not to the main issues in the dispute, not to every material consideration. They should enable disappointed developers to assess their prospects of obtaining some alternative development permission, or, as the case may be, their unsuccessful opponents to understand how the policy or approach underlying the grant of permission may impact upon such future application. Decision letters must be read in a straightforward manner, recognising that they are addressed to parties well aware of the issues involved and the arguments advanced. A reasons challenge will only succeed if the party aggrieved can satisfy the court that he has genuinely been substantially prejudiced by the failure to provide an adequately reasoned decision."

Grounds 1, 2, 3 and 5: Submissions and Conclusions

36. It will be recalled that the contention under the Claimant's ground 1 is that the First Defendant failed to apply his policy rationally, or as he himself understood the purpose and intention of the policy. Mr Kimblin submits that it is clear from paragraph 177 of the 2018 Framework, and the Technical Consultation and the changes that it made to paragraph 177, that it was never the intention of the First Defendant to deprive a proposal of the tilted balance if in fact it had been subject to Appropriate Assessment, and it had been demonstrated beyond scientific doubt that it would not adversely affect the integrity of a European site. The purpose and intention

of the Framework both before and after the decision in People Over Wind was that where a proposal satisfied the requirements of the Habitats Directive following Appropriate Assessment the tilted balance could apply if, for instance, the local planning authority were unable to demonstrate a five year supply of housing as in the present case. It was not, therefore, a rational application of the First Defendant's policy in the Framework, bearing in mind its expressed purpose and intention, for the First Defendant to have applied paragraph 177 to the Claimant's proposals in the way in which he did, depriving them of the tilted balance on the basis that the proposals required Appropriate Assessment.

37. In response to these submissions Mr Richard Honey, on behalf of the First Defendant, submits that all the First Defendant was, in truth, doing in the decision letter was simply reaching a decision based upon existing and settled policy. The policy contained in paragraph 177 of the Framework remained in place and unaffected at the time of the decision, awaiting the outcome of the Technical Consultation. In fact, in the consultation exercise in relation to the draft revised Framework in the spring of 2018 (at the time when the judgment in People Over Wind had just emerged) the First Defendant received representations in relation to the impact of the People Over Wind judgment, and in response to those consultation replies stated that he was "examining the implications of this judgment closely and is not proposing any changes to the Framework at this stage". Thus the policy in paragraph 177, which was published in final form after the judgment in People Over Wind had been handed down, represented the settled policy of the First Defendant at the time of the decision, which did not change until February 2019 when the process of the Technical Consultation was complete. Thus, Mr Honey submits, there is no substance in the Claimant's complaint that the application of the policy was unlawful or represented a failure to apply the purpose and intention of the policy.

38. Having analysed these submissions I am satisfied that there was nothing unlawful in respect of the decision which the First Defendant reached relating to the application of paragraph 177 of the 2018 Framework. The starting point for consideration of this issue must be that the text of paragraph 177 is clear and that it was applied in a straight forward and uncomplicated manner to the circumstances of the present case. Paragraph 177 must be read with and alongside the provisions of paragraph 11, as these paragraphs are related and complementary elements of the Framework. Once this is done the effect of these related policies is clear and was properly applied in the decision letter. Where a proposal requires Appropriate Assessment the presumption in favour of development, the tilted balance, did not apply.

39. Secondly, it is also clear that the text of the policy was finalised at a time when the First Defendant was fully cognisant of the People Over Wind judgment but had formed the view that at the time of its publication the policy as formulated would continue to apply. There can in my judgment be no error of law in the First Defendant applying his own policy, which he published at a time when he knew of the existence of the judgment in People Over Wind that he knew might have implications for its application. Thirdly, whilst it is clear both from the emergence of the Technical Consultation and the subsequent decisions reached in February 2019 that an amendment to the policy has occurred subsequent to this decision, that does not in my judgment affect the legality of the decision which the First Defendant reached at the time of the decision. It is far from unusual for a decision-taker to be making a

decision at a time when changes to a policy are under consideration. It would be premature, and potentially undermine the interests of those participating in the consultation exercise in respect of policy alteration, for the decision-taker to effectively apply the amended policy prior to the process of considering that alteration being completed.

40. Further, whilst the Claimant contends that the policy should be interpreted by reference to the First Defendant's suggested intention of permitting the tilted balance to apply in cases where Appropriate Assessment is required and passed, I can see no warrant in the language of paragraph 177 to justify any such interpretation. Indeed, as evidenced by the changes made in February 2019, it is simply not possible to interpret the policy in that way. What would be required is a departure from the policy rather than an exercise of interpretation. Ultimately therefore I am not satisfied there is any substance in the Claimant's ground 1.

41. Under ground 2 the Claimant contends that the First Defendant has failed to have regard to a material consideration namely the Technical Consultation. In particular it is submitted by Mr Kimblin that regard should have been had to the approach set out in the Technical Consultation in relation to paragraph 177 of the Framework, and at paragraph 8 of the decision letter the First Defendant applied a "black letter" reading of the Framework policy which failed to have regard to the intention expressed as to how the policy should apply set out in the Technical Consultation.

42. In response to this submission Mr Honey contends that the First Defendant did not leave the Technical Consultation out of account in reaching his decision. It is clear from the language of the decision, he submits, that the First Defendant had regard to the Technical Consultation but decided to apply his existing policy whilst the proposed policy was still subject to consultation procedures and the outcome of that consultation was at the time of the decision unknown. Whilst there may have been other decisions in which the Technical Consultation was taken into account, what the First Defendant did in the present case was an exercise of judgment which was open to him. Mr Honey emphasises that the context of this judgment was that the Technical Consultation did not involve simply a clarification of policy but an amendment and alteration of the policy which was articulated in its re-wording.

43. I am unable to accept that the First Defendant failed to have regard to the Technical Consultation as something which was material to his decision. What the decision makes clear is that having considered the Technical Consultation, the First Defendant formed the view that it was appropriate to apply his existing policies pending the outcome of the process initiated by the Technical Consultation. I see nothing wrong, and indeed much to commend, in an approach whereby a decision-taker continues to apply existing policy whilst it is subject to review, and await the outcome of a consultation process on the review of a policy before applying any new policy which might emerge. For a consultation exercise to be lawful it must be engaged in with an open mind. That must contemplate a number of potential outcomes from the consultation process, (including, potentially, no change to the policy) which could be undermined by the premature second guessing of its outcome through the application of a policy which was being consulted upon. In my view the First Defendant's approach in applying his existing policy in the present case was in principle entirely correct.

44. The Claimant also contends under this ground that the First Defendant fell into error in that he adopted a "black letter", or wholly inflexible, approach to the application of the policy in paragraph 177 of the Framework, and ought to have exercised a discretion to allow the appeal to be put back into the tilted balance based upon the existence of what were described as good reasons for departing from the policy. The reasons relied upon were essentially that within the Technical Consultation the First Defendant had said himself that it was not intended that the tilted balance could not apply where the rigors of Appropriate Assessment had been satisfied, and thus it reflected that intention that a discretion should have been exercised to depart from the policy and apply the tilted balance in the case of this decision. There was, it was submitted, no evidence that the First Defendant had entertained exercising his discretion in this way and therefore, contrary to the principles set out in British Oxygen, the First Defendant had applied his policy with a closed mind and without considering the outcome of his inflexible application of the policy.

45. In my view there is no substance in these contentions. It is, of course, axiomatic that a decision-taker does not always have to apply a policy and can where appropriate and for good reason depart from that policy. Where the decision-taker does so it will be an exercise of judgment. In the present case the First Defendant made clear why, as an exercise of judgment, he was going to apply existing policy and not that which was being consulted upon in the Technical Guidance, on the basis that what was in the Technical Guidance was not yet policy. It was a proposal which was the subject of consultation. The adoption of the exercise of discretion contended for by the Claimant would, for the reasons already set out above, have pre-judged the outcome of the consultation process and it was an entirely rational exercise of judgment for the First Defendant to proceed as he did. I therefore do not consider that ground 2 of the Claimant's case can succeed.

46. Turning to ground 3, the Claimant contends that the First Defendant ought to have consulted the Claimant about the Technical Consultation and his proposals to recast the terms of paragraph 177 of the Framework. The First Defendant's failure to do so was unfair and accompanied by a failure to give any reasons for failing to consult the Claimant. In my view there are a number of difficulties with this ground. Firstly, as Mr Honey correctly contends, it would be necessary for the Claimant to demonstrate that they have been subject of unfairness as a consequence of a failure to consult in relation to the issues associated with People Over Wind and the implications of paragraph 119 and thereafter 177 of the 2012 and 2018 Frameworks respectively. The reality is that, as set out above, on the 28th June 2018 the First Defendant sought the Claimant's views following the judgment in People Over Wind and, additionally, the Claimant's views as to the correct application of planning policy in this case in the light of that judgment. The Claimant was therefore consulted on the issue and provided their its response to it, relying upon what they contended to be the proper intention of the First Defendant's policy. Those representations were, as set out in the First Defendant's decision, taken into account. Whilst Mr Kimblin contends that the Claimant was prejudiced in that if consulted it would have drawn attention to the First Defendant's own proposals in the Technical Consultation, it is plain and obvious that the First Defendant was aware of all of that material and, as set out in paragraph 8 of the First Defendant's decision, consideration was given to applying it, but the conclusion was reached that it ought not to be applied for all the reasons which have already been rehearsed. There is therefore no substance in Claimant's complaint.

Whilst the Claimant draws attention to other appeal processes in which the First Defendant sought representations on the Technical Consultation those were individual exercises of discretion which no doubt hinged on the particular circumstances of those appeals. In the present case it is clear from the exchanges of correspondence that the Claimant was not in any way prejudiced and had every opportunity to present their contentions in respect of these issues.

47. At the heart of the Claimant's ground 5 is the contention that both in the way in which the First Defendant went about reassessing the housing land supply, and also in the assessment of the weight to be attached to the housing land supply, the First Defendant fell into error. It will be recalled that the Inspector had concluded that the "on going housing shortfall attracts substantial weight in favour of granting permission". This was against the backdrop of a housing land supply of 2.75-3 years. In the decision letter at paragraph 15 the First Defendant undertook a calculation of local housing needs using the standard method (which had been incorporated into the Planning Practice Guidance on the 13th September 2018) and the most recent 2016 ONS household projections to arrive at a local housing need figure of 1,307 dwellings. The First Defendant then went on to apply the policy contained in paragraph 73 of the Framework and determine that a 20% buffer should be applied to that figure, leading to an annual requirement of 1,572 dwellings. Having noted that no representations had been received suggesting that the assessment of available housing supply should change, he recalculated the available five year housing land supply finding that it measured between 3.9-4.3 years. Thus, the housing land supply shortfall had reduced but, as set out above, the First Defendant stated that he "considers that his conclusions on housing land supply do not alter the weight he assigns to the matters set out below, or his decision on the case as a whole." In the overall planning balance the First Defendant concluded that the housing benefits of the proposal should "carry significant weight".

48. Against the background of that assessment, Mr Kimblin makes a number of criticisms of the approach of the First Defendant and his reasons. Dealing firstly with the way in which the housing land supply was recalculated, he submits, firstly, that the 2016 ONS household projections should not have been used or, at the very least, the opportunity to make representations about their use should have been afforded to the Claimant. It was apparent from the Technical Consultation that the First Defendant was seriously concerned about the continued use of the most recent ONS household projections in the standard method because of the implications of the use of those figures for the achievement of household growth nationwide. It was wholly inconsistent with that concern and the First Defendant's proposed approach to use the 2016 household projections. Furthermore, those household projections were unknown prior to September 2018 and were not consulted upon by the First Defendant: the consultation in post-inquiry correspondence on the standard method which was undertaken by the First Defendant occurred at a time where they were not available, in August 2018. Mr Kimblin submits that the use of the 2016 ONS projections had a significant impact upon the housing land supply figure, and therefore consultation on that figure ought to have been undertaken. Furthermore, Mr Kimblin submits that the First Defendant's calculation illegitimately mixes two data sets to arrive at his view of supply, namely the housing requirement for the period 2018/19 to 2023/24 with a supply of deliverable housing relating to 2017/18 to 2022/23. That was an illegitimate and unlawful calculation. Mr Kimblin also draws attention to other occasions when in

considering appeal decisions the First Defendant had consulted upon the impact of the use of the 2016 projections.

49. Turning from his complaints in relation to the substance of the calculation, Mr Kimblin goes on to contend that the First Defendant's reasoning is opaque, and the conclusion reached in respect of the weight to be attached to the housing land supply shortfall irrational. Relying upon the observations of Davis LJ in Hallam, Mr Kimblin submits that the extent of any housing land supply shortfall would bear directly upon the weight to be attached to that as a benefit of the proposals. Having recalculated the housing land supply, and concluded that the position of the Second Defendant had improved, it is unclear what conclusion the First Defendant reached in relation to the appropriate weight to be attached to the housing land supply issue. In addition to what he submits is the lack of clarity in the approach of the First Defendant to this issue, he draws attention to the distinction between the Inspector's attribution to the housing shortfall of "substantial" weight, and the First Defendant's description of "significant" weight which adds, he submits, to the lack of proper clarity in respect of the approach which has been taken to this issue. Thus, it is submitted by the Claimant that the First Defendant's conclusions on this issue are unlawful.

50. In my view it is appropriate to commence the evaluation of these submissions by examining whether or not there is substance in the Claimant's contentions that the conclusions of the First Defendant in relation to the weight to be attached to the housing land supply are incoherent and inadequately reasoned. It is important to observe that the First Defendant embarks upon his consideration of this issue by noting in paragraph 14 of the decision that there was no dispute but that the Council could not demonstrate a deliverable five year supply of housing. Having brought matters, as he perceived it, up to date in paragraphs 15 and 16, in my view it is clear that in paragraph 17 of the decision the First Defendant was concluding that notwithstanding that the housing land supply position may have improved (albeit not to the extent that a five year supply could be demonstrated), this made no difference to the weight which was to be assigned to housing land supply issues in the overall planning balance. Whilst it is fair to observe that there is no accredited standard metric for the descriptors of weight in respect of issues to be placed into the planning balance, I do not consider that there is any material distinction to be drawn between weight which is described as "substantial", and weight which is described as "significant". In the context of this case, the language at paragraph 17 of the decision letter is clear, in that the weight which is assigned to this issue is not altered from the conclusions of the Inspector and, therefore, I am content to conclude that there is no substance in the suggestion that there is any difference to be drawn between the use of those two adjectives.

51. Whilst it is correct, as Davis LJ observed in Hallam, that some determination of the housing land supply shortfall would be required for nearly all cases so as to determine the weight to be attached to the housing land supply issue, that was in fact undertaken in the present case. As set out above, the First Defendant undertook a calculation to bring the assessment up to date. Thereafter, what weight attaches to that issue is a matter for the decision maker since it is quintessentially a question of planning judgment. In the present case the judgment which the First Defendant reached was that significant or substantial weight should continue to attach to that issue notwithstanding the improvement in the housing land supply situation. In my

judgment, it is beyond argument that the weight which a decision-taker may attach to housing land supply considerations will vary from case to case bearing in mind the particular circumstances of the decision. It was entirely open to the First Defendant to conclude that, notwithstanding some improvement in the Second Defendant's housing land supply position, the weight which the Inspector had ascribed to that issue should continue to apply in the overall planning balance. I am unable, therefore, to accept the legitimacy of the Claimant's complaints in this regard.

52. Turning to the criticisms of the First Defendant's calculations, I accept the submissions made on behalf of the First Defendant by Mr Honey, and I am satisfied that there is in reality no substance in the Claimant's complaints. Firstly, the Claimant was afforded the opportunity to make representations about the standard method and secondly, in that correspondence it is noteworthy the Second Defendant anticipated that housing need would go down as a consequence of the application of the standard method and emerging household projections. The Claimant did not respond to the Second Defendant's consultation response. The Technical Consultation had made clear that any change from the standard method in terms of the use of the most recent ONS projections would only be affected from the implementation of a change to the PPG. Thus, the First Defendant was simply applying his extant policy and guidance at the time when the decision was reached, and not anticipating or pre-judging what might emerge from the Technical Consultation as to the correct approach to be taken to the 2016 projections. In this case there was no justification for a further reference back to the parties in relation to the 2016 ONS household projections in circumstances where, as noted in the decision at paragraph 17, it made no difference to the decision that the First Defendant was reaching. There was, therefore, no prejudice to the Claimant in circumstances where they had made representations about the standard method and it was known that the projections would reduce as a result of the application of the ONS 2016 projections in the standard method. The Technical Consultation was clear that it would only apply once the PPG had been changed to give effect to the outcome of the consultation, and the alteration noted to the housing land supply made no difference to the decision.

53. In so far as Mr Kimblin relies upon rule 17(5)(a) of the 2000 Rules I accept the submissions of Mr Honey, who contended that the question of the extent of housing land supply was a question of opinion or judgment, not fact. In so far as the Claimant relied upon the use of the 2016 projections as being a fact, the reality was that this did not lead to a different conclusion from that which had been reached by the Inspector, since the weight to be attached to the issue of housing land supply remained the same even after the 2016 projections had been used, and this was not a reason for the disagreement which the First Defendant had with the recommendation of the Inspector. Thus, the provisions of rule 17 of the 2000 Rules do not avail the Claimant. The calculation of housing land supply involves the collation of a variety of judgments in relation to issues such as deliverability of housing land and/or the need to make adjustments to the requirement if there has been under supply in earlier years, and is, therefore, not a question of fact. In so far as it may include factual ingredients within the calculation, such as ONS household projections, the use of the 2016 household projections did not lead to a different conclusion in relation to the weight which should be attached to the housing land supply issue in the planning balance. In my view ground 5 is without substance and must be dismissed.

Ground 4: The Law

54. Under ground 4 of the claim the Claimant contends that the decision of the CJEU in People Over Wind was wrongly decided, and that a reference to the CJEU should be made by this court on the basis that the question of whether or not mitigation measures can be taken into account at the screening stage of applying Article 6(3) of the Habitats Directive is not *acte clair*, and in the light of Hart this question should be re-examined.

55. The relevant law in relation to Appropriate Assessments under the Habitats Directive was recently set out and reviewed by this court in the case of Canterbury City Council v Secretary of State for Housing, Communities and Local Government and Crondall Parish Council v Secretary of State for Housing, Communities and Local Government [2019] EWHC 1211 (Admin). At paragraphs 65-76 of the judgment the competing positions of the CJEU in People Over Wind and the cases leading up to it, and the domestic authorities of Hart and Smyth v SSCLG [2015] EWCA Civ 174; [2015] PTSR 1417 are fully set out and I do not propose to repeat the recitation of that legal material here: the reader is referred to that extensive citation and what follows is based upon that material. In summary that judgment concluded at paragraph 77 in relation to the effect of the CJEU decision in People Over Wind on the domestic law authorities as follows, alongside setting out the legal position established by People Over Wind as to the correct approach to undertaking Appropriate Assessment under Article 6(3) of the Directive as follows:

> "77. It is clear that the approach of the CJEU to taking into account mitigation measures at the screening stage is directly contrary to the approach which had been taken in domestic law in Hart and Smyth. The approach to the interpretation and application of Article 6(3) of the Directive set out in those cases can no longer therefore be regarded as good law. The position of the CJEU on the proper interpretation of Article 6(3) of the Directive is clear: to take account of mitigation effects at the screening stage presupposes that there will be likely significant effects on the European site in question and therefore, based on the clear terms of the first sentence of Article 6(3), the requirement for Appropriate Assessment has been made out (see paragraph 38 of People over Wind). To fail to undertake Appropriate Assessment would circumvent the procedural safeguards provided by the Habitats Directive for decision taking in these circumstances, and pre-empting or second-guessing the outcome of the Appropriate Assessment by taking account of mitigation measures at the screening stage is illegitimate. In the light of this analysis the fact that mitigation measures may be relevant within the matters considered in an Appropriate Assessment itself does not justify their inclusion as part of the screening process, and indeed could lead to the circumventing of the Appropriate Assessment stage depriving this requirement of the Habitats Directive of its purpose (see paragraph 37 of People over Wind). In cases where there may be implications for effects upon European

> sites it is now necessary to follow the approach set out in People Over Wind, and to disregard any mitigation measures when considering the effects of the proposal on the European site at the screening stage. It is against that background that the Defendant in both cases and the Interested Party in the Canterbury case and Second Defendant in the Crondall case accept that there was an error of law in each of these decisions on the basis that the approach from People Over Wind was not adopted in deciding whether Appropriate Assessment was required."

56. In addition to this material, in his submissions Mr Honey drew attention to a decision of the CJEU subsequent to People over Wind in Grace v An Bord Pleanala (case C-164/17); [2018] ENV LR 37 833. The case concerned a challenge to the grant of permission for a wind farm which had the effect of the permanent direct loss of nine hectares of hen harrier habitat, and the unavailability of 162.7 hectares of hen harrier habitat due to the displacement effect of the turbines of the wind farm. The developer proposed a Species and Habitat Management Plan which noted that the hen harrier's foraging area within the relevant European site was dynamic, and proposed future management of land within the hen harrier's foraging habitat, firstly, to restore to blanket bog areas currently under forest planting and, secondly, during the lifetime of the wind farm, to subject 137.3 hectares of forest under rotation to sensitive management to secure that area of land as perpetually open canopy forest providing suitable foraging habitat for the hen harrier, undertaking the felling to create it on a phased basis. The question which was posed by the referring court noted that those parts of the European site which were beneficial to the specified species altered naturally in any event over time, and then posed the question as to whether or not where a management plan was put in place which was designed to ensure that the amount of the site available as suitable habitat was not reduced that plan could properly be regarded as mitigation where some of the European site would for the lifetime of the project be excluded from being able to provide suitable habitat.

57. The CJEU's introduction to the consideration of these issues and its conclusions were set out as follows:

> "25 Next, as regards the terms in which the question referred is couched, it should be added that Article 6 of the Habitats Directive does not contain any reference to 'mitigating measures' (judgments of 21 July 2016, *Orleans and Others*, C-387/15 and C-388/15, EU:C:2016:583, paragraph 57, and of 12 April 2018, *People Over Wind and Sweetman*, C-323/17, EU:C:2018:244, paragraph 25).
>
> 26 In this connection, the Court has previously observed that the effectiveness of the protective measures provided for in Article 6 of the Habitats Directive is intended to avoid a situation where competent national authorities allow so-called 'mitigating' measures' — which are in reality compensatory measures — in order to circumvent the specific procedures laid down in Article 6(3) of the directive and authorise projects which adversely affect the integrity of the site concerned

(judgment of 21 July 2016, *Orleans and Others*, C-387/15 and C-388/15, EU:C:2016:583, paragraph 58 and the case-law cited).

…

48 In the present case, it is apparent from the findings of the referring court that some parts of the SPA would no longer be able, if the project went ahead, to provide a suitable habitat but that a management plan would seek to ensure that a part of the SPA that could provide suitable habitat is not reduced and indeed may be enhanced.

49 Accordingly, as the Advocate General observed in paragraph 71 et seq. of his Opinion, while the circumstances of the main proceedings are different from those of the cases which gave rise to the judgments of 15 May 2014, *Briels and Others* (C-521/12, EU:C:2014:330), and of 21 July 2016, *Orleans and Others* (C-387/15 and C-388/15, EU:C:2016:583), those cases are similar in that they are based, at the time the assessment of the implications of the plan or project for the area concerned, on the same premise that there will be future benefits which will address the effects of the wind farm on that area, even though those benefits are, moreover, uncertain. The lessons to be drawn from those judgments may therefore be transposed to a set of circumstances such as those of the main proceedings.

50 In that regard, the Court has previously ruled that the measures provided for in a project which are aimed at compensating for the negative effects of the project cannot be taken into account in the assessment of the implications of the project provided for in Article 6(3) of the Habitats Directive (judgments of 15 May 2014, *Briels and Others*, C-521/12, EU:C:2014:330, paragraph 29, and of 21 July 2016, *Orleans and Others*, C-387/15 and C-388/15, EU:C:2016:583, paragraph 48).

51 It is only when it is sufficiently certain that a measure will make an effective contribution to avoiding harm, guaranteeing beyond all reasonable doubt that the project will not adversely affect the integrity of the area, that such a measure may be taken into consideration when the appropriate assessment is carried out (see, to that effect, judgment of 26 April 2017, *Commission* v *Germany*, C-142/16, EU:C:2017:301, paragraph 38).

52 As a general rule, any positive effects of the future creation of a new habitat, which is aimed at compensating for the loss of area and quality of that habitat type in a protected area, are highly difficult to forecast with any degree of certainty

or will be visible only in the future (see, to that effect, judgment of 21 July 2016, *Orleans and Others*, C-387/15 and C-388/15, EU:C:2016:583, paragraphs 52 and 56 and the case-law cited).

53 It is not the fact that the habitat concerned in the main proceedings is in constant flux and that that area requires 'dynamic' management that is the cause of uncertainty. In fact, such uncertainty is the result of the identification of adverse effects, certain or potential, on the integrity of the area concerned as a habitat and foraging area and, therefore, on one of the constitutive characteristics of that area, and of the inclusion in the assessment of the implications of future benefits to be derived from the adoption of measures which, at the time that assessment is made, are only potential, as the measures have not yet been implemented. Accordingly, and subject to verifications to be carried out by the referring court, it was not possible for those benefits to be foreseen with the requisite degree of certainty when the authorities approved the contested development.

54 The foregoing considerations are confirmed by the fact that Article 6(3) of the Habitats Directive integrates the precautionary principle and makes it possible to prevent in an effective manner adverse effects on the integrity of protected areas as a result of the plans or projects being considered (see, to that effect, judgment of 15 May 2014, *Briels and Others*, C-521/12, EU:C:2014:330, paragraph 26 and the case-law cited).

55 Lastly, it should be noted that, in accordance with Article 6(4) of the Habitats Directive, in the event that, in spite of the fact that the assessment conducted in accordance with the first sentence of Article 6(3) of that directive is negative, a plan or project must nevertheless be carried out for imperative reasons of overriding public interest, including those of a social or economic nature, and where there are no alternative solutions, the Member State concerned is to take all compensatory measures necessary to ensure that 'the overall coherence of Natura 2000' is protected.

56 Therefore, in such a situation, the competent national authorities may grant an authorisation under Article 6(4) of the Habitats Directive only in so far as the conditions set out therein are satisfied (judgment of 21 July 2016, *Orleans and Others*, C-387/15 and C-388/15, EU:C:2016:583, paragraph 63 and the case-law cited).

57 It follows that the answer to the question referred is that Article 6 of the Habitats Directive must be interpreted as meaning that, where it is intended to carry out a project on a site designated for the protection and conservation of certain

> species, of which the area suitable for providing for the needs of a protected species fluctuates over time, and the temporary or permanent effect of that project will be that some parts of the site will no longer be able to provide a suitable habitat for the species in question, the fact that the project includes measures to ensure that, after an appropriate assessment of the implications of the project has been carried out and throughout the lifetime of the project, the part of the site that is in fact likely to provide a suitable habitat will not be reduced and indeed may be enhanced may not be taken into account for the purpose of the assessment that must be carried out in accordance with Article 6(3) of the directive to ensure that the project in question will not adversely affect the integrity of the site concerned; that fact falls to be considered, if need be, under Article 6(4) of the directive."

58. Mr Honey submits that this subsequent decision of the CJEU is all of a piece with People Over Wind in emphasising that the requirements of the Habitats Directive are substantive as well as procedural and must be strictly complied with. He submits on behalf of the First Defendant that People Over Wind is correctly decided and that the Hart line of authorities can no longer stand. The stance taken by the First Defendant in the present proceedings reflects the stance that was taken in the Canterbury and Crondall case.

Ground 4: Submissions and Conclusions

59. The question which Mr Kimblin contends in his submissions should be referred to the CJEU is in the following terms:

> "If, having regard to the mitigation proposed as part of the plan or project, the risk of significant effects can be excluded on the basis of objective information at screening stage, it is still necessary to carry out an Appropriate Assessment."

60. In effect, Mr Kimblin concedes that if People Over Wind is correct then mitigation proposed as part of a plan or project cannot be taken into account at the screening stage so as to exclude the necessity for Appropriate Assessment. However, Mr Kimblin contends that the approach in People Over Wind is incorrect, and that the long-standing domestic law authority of Hart represents the correct construction of Article 6(3). He submits that Article 6(3) does not prescribe the point at which mitigation measures should be taken into account, it only prescribes that Appropriate Assessment should be carried out if significant effects are likely to arise and cannot be excluded on the basis of objective information. If on the basis of objective information, and mitigation measures known at the screening stage, likely significant effects can be excluded he submits, firstly, there is no reason why Appropriate Assessment should then be required and, secondly that no reason is offered by the CJEU in People over Wind as to why Appropriate Assessment would be required. In particular, he submits that in many cases such as the present, where the mitigation for the European site which is proposed is entirely uncontroversial and well established, there is no sensible basis for the requirement of Appropriate Assessment and the need

for it should be screened out. Thus he contends that People over Wind was wrongly decided and the reference of the question set out above should be made to the CJEU.

61. I am wholly unpersuaded firstly, that there is any justification for the reference of the question proposed to the CJEU or, secondly, that in substance People Over Wind was wrongly decided in any event. My reasons for these conclusions are as follows.

62. The thrust of the CJEU's decision in People Over Wind is to emphasise firstly, that a full and precise analysis of the effects of a proposal upon a Natura 2000 site must inform the decision made under Article 6(3) of the Directive. The Appropriate Assessment must not have lacunae, and must remove all reasonable scientific doubt in relation to the effects of the proposal (paragraphs 36-38 of the judgment). Secondly, the CJEU in People Over Wind emphasises that the provisions of Article 6(3) of the Habitats Directive are procedural as well as substantive, since Appropriate Assessment includes the requirement that the competent national authority will not agree to the plan or project until it has ascertained that it will not adversely affect the integrity of the site and, if appropriate, after having consulted with the general public (paragraph 39 of the judgment).

63. The first point, in relation to the need for full and precise analysis removing all reasonable scientific doubt, reflects a consistent line of authority in the CJEU emphasising these features of the requirements of the Habitats Directive. Both of these points are clearly derived from the language of Article 6(3), and underpin a construction of that language which excludes the consideration of mitigation measures when screening the development to see whether Appropriate Assessment is required. The rationale for taking this approach is, as set out in paragraph 37 of the judgment in People Over Wind, that taking account of mitigation measures at the screening stage would compromise the practical effect of the Habitats Directive by circumventing the full and precise analysis required by Appropriate Assessment. In short, the incorporation of mitigation measures at the screening stage seeks to answer the question posed by Appropriate Assessment, without any Appropriate Assessment being in fact undertaken.

64. Whilst there may be cases in which the existence of significant effects could be addressed by the examination of mitigating measures at the Appropriate Assessment screening stage that is not, in principle, any justification for not undertaking the Appropriate Assessment itself. Even given the existence of cases, such as the present, where at the end of the Appropriate Assessment process it is concluded that the mitigation measures overcome any significant effects, that does not justify the exclusion of the full and precise analysis required by Appropriate Assessment in all cases where the plan or project is likely to have a significant effect. There may well be cases in which the proposed mitigation measures themselves need to be the subject of full and precise analysis so as to see whether or not, in truth, they remove all scientific doubt as to the effects of the proposed works and such an analysis may not be possible without undertaking the full Appropriate Assessment process.

65. This leads to the further point relied upon by the CJEU in People Over Wind at paragraph 39 of the judgment, that the taking account of mitigation measures and exclusion of the Appropriate Assessment process may also deprive the public of a right to participate in the decision-taking process. If Appropriate Assessment is required then Article 6(3) requires the decision-taker firstly, to consider whether

consultation with the public is appropriate, and, secondly, if it is, to take into account the fruits of that consultation exercise in reaching its decision. Those procedural safeguards do not exist if Appropriate Assessment is not undertaken. They are reinforced by the need to provide the Appropriate Assessment as publicly available information to inform the consultation exercise.

66. The decision in Grace which post-dates the decision in People Over Wind reinforces the consistent approach of the CJEU in respect of Article 6(3) of the Habitats Directive. I see no purpose or justification for referral of the question identified by Mr Kimblin to the CJEU. The CJEU's construction of Article 6(3) of the Habitats Directive is clear and reflects the language and purpose of that provision. Furthermore, for the reasons which I have set out above, I am entirely satisfied that the CJEU's decision in People Over Wind was correct and, as set out in paragraph 77 of the Canterbury and Crondall case, the domestic law line of authority based upon Hart can no longer be regarded as good law. It follows that for all of these reasons ground 4 of the Claimant's case must be dismissed.

Conclusions

67. For all of the reasons set out above I am satisfied that each of the Claimant's grounds in this case must be dismissed.