Neutral Citation Number: [2021] EWHC 702 (Admin)

Case No: CO/3242/2020

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24/03/2021

Before :

SIR DUNCAN OUSELEY
Sitting as a High Court Judge

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Between :

CAMILLA SWIRE	**Claimant**
- and -	
ASHFORD BOROUGH COUNCIL	**Defendant**
-and-	**Interested**
PATRICK MCGRATH	**Party**

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HEATHER SARGENT (instructed by **RICHARD BUXTON SOLICITORS**) for the **Claimant**
EMMALINE LAMBERT (instructed by **CORPORATE DIRECTOR (LAW AND GOVERNANCE) AND MONITORING OFFICER TO ASHFORD BOROUGH COUNCIL**) for the **Defendant**

Hearing dates: 17-18 February 2021

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APPROVED JUDGMENT

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, released to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 10.30am on Wednesday 24th March.

SIR DUNCAN OUSELEY:

1. Ms Swire challenges by way of judicial review the grant of planning permission by Ashford BC on 30 July 2020 to the Interested Party, Mr McGrath, for a new winery and visitor centre for Domaine Evremond Winery on agricultural land in Chilham, Kent, near the village of Old Wives Lees in the Kent Downs Area of Outstanding Natural Beauty, AONB. The issues raised concern the Town and Country Planning (Environmental Impact Assessment) Regulations SI No 2017/571, the EIA Regulations, and in particular the provisions which govern screening opinions for Environmental Impact Assessment, EIA. The Council's Screening Officer concluded that the development was not likely to have significant environmental effects, and so no EIA was necessary.

2. The Claimant primarily contended that the Council ought to have considered whether to review the screening opinion to see if its conclusion remained sound in the light of further information and representations it received; indeed, having considered whether to review the conclusion of the screening opinion, it ought to have reviewed it. That review could, reasonably, have concluded that the development should now be seen as EIA development. Part of this contention alleges that the Officer's Report to the Planning Committee on 15 July 2020, which resolved that planning permission be granted, misled it about the conclusions of Mr McGrath's Landscape and Visual Impact Assessment, LVIA, and about the response of the AONB Unit, a statutory consultee. Second, it is alleged that the screening opinion did not consider relevant paragraphs of Schedule 2 to the EIA Regulations. Third, it is alleged that the screening officer erred in law in failing to take into account the positive effects of the proposal when judging whether it was likely to have significant effects, and so require EIA. That error is not disputed; its significance is disputed. There are also arguments about delay, and discretion.

The EIA Regulations

3. By Reg.3, a planning authority is forbidden to grant planning permission "for EIA development unless an EIA has been carried out in respect of that development." "EIA development" is defined in Reg.2(b), as "Schedule 2 development likely to have significant effects on the environment by virtue of factors such as its nature, size or location." "Schedule 2 development" is development of a description mentioned in Schedule 2, where either it is within a "sensitive area" which includes an AONB, or a threshold or criterion applicable to that development in Schedule 2 is exceeded or met. An application for permission for an EIA development must be accompanied by an Environmental Statement, ES; Reg.18.

4. In *R (Bateman) v South Cambridgeshire DC* [2011] EWCA Civ 157, Moore-Bick LJ, with whom Mummery and Jackson LJJ agreed, at [17] considered the meaning of "likely" in this context: "something more than a bare possibility is probably required, though any serious possibility would suffice." "Likely" did not mean "probable". It was not at issue but that the concept of "likely significant environmental effects" is not confined to those which are adverse. Of course, that is how the question usually arises, but that is not the language of the Regulations or of the underlying Directive. The rationale for the inclusion of positive effects must at least include the importance of avoiding a debate about whether an effect is adverse,

neutral or positive, an issue which can arise with mitigation which may overtop, or be claimed to overtop the harm done and go on to provide benefits instead.

5. As the development was proposed in an AONB, and it was considered by the Council that it could fall within the category described in paragraph 10 of Schedule 2 as an "Infrastructure project" of the description "(b) Urban development project", the question of whether it was "EIA development" turned on whether it was "likely to have significant effects on the environment". It did not matter that the proposal fell below or outside the size thresholds applicable to an urban development project. The language of the screening opinion suggested that the screening officer thought that it was no more than a possibility that the proposal fell within that category of development. But Ms Lambert for the Council affirmed that the Council accepted that it was an "urban development project", albeit that it fell below the size thresholds applicable outside an AONB.

6. Two other paragraphs in Schedule 2, prayed in aid by Ms Sargent for the Claimant, to which I shall come later in ground 2, were in category 7 "Food industry", as "(b) Packing and canning of animal and vegetable products" or "(d) Brewing and malting". The size threshold for those categories was exceeded. But EIA would still only be required if the development was "likely to have significant effects on the environment by virtue of factors such as nature, size or location."

7. The Regulations enable a developer to ascertain the planning authority's view on that point, in advance of submitting an application, and avoiding the unnecessary time and cost of preparing an EIA, if the authority were of the view that significant effects were unlikely. Reg. 5 deals with these "screening opinions." Reg.5(1) provides: "Subject to [immaterial provisions], the occurrence of an event mentioned in paragraph (2) shall determine for the purpose of these Regulations that development is EIA development." The two events in paragraph 2 are the submission of an ES by the applicant, which did not happen here, and "(b) the adoption by the relevant planning authority of a screening opinion to the effect that the development is EIA development." That did not happen here either. In reaching its decision on whether the development is EIA development, the planning authority must take into account any information provided by the applicant, and the selection criteria in Schedule 3 that are relevant. These include magnitude and spatial extent of change, area and population likely to be affected, intensity and complexity of effects.

8. There are certain formal requirements once a screening opinion has been reached; Reg.28. It has to be placed on the Planning Register maintained by the local authority, available for public inspection.

9. In *R (Jones) v Mansfield District Council* [2003] EWCA Civ 1408, Dyson LJ, with whom Laws and Carnwath LJJ agreed, said:

> "39. I accept that the authority must have sufficient information about the impact of the project to be able to make an informed judgment as to whether it is likely to have a significant effect on the environment. But this does not mean that all uncertainties have to be resolved or that a decision that an EIA is not required can only be made after a detailed and comprehensive assessment has been made of every aspect of

> the matter. As the judge said, the uncertainties may or may not make it impossible reasonably to conclude that there is no likelihood of significant environmental effect. It is possible in principle to have sufficient information to enable a decision reasonably to be made as to the likelihood of significant environmental effects even if certain details are not known and further surveys are to be undertaken. Everything depends on the circumstances of the individual case."

10. The Regulations do not provide for a negative screening opinion to "determine" that a development is not EIA development, in the way that a positive screening opinion determines that a development is EIA development. A permission may still fall foul of Reg.3, despite a negative screening opinion, if it is for a development which is likely to have a significant environmental effect, and there has been no EIA. There is no provision however in the Regulations which makes it unlawful to grant a planning permission without a screening opinion. Nor is there any provision in the Regulations which provides for a reconsideration of a screening opinion, or for any specific consequential unlawfulness in the grant of planning permission, if a negative screening opinion has not been reconsidered. The legal consequences of material changes between a negative screening opinion and the grant of planning permission, and how the materiality of any change is to be assessed, have been considered in a number of cases which I deal with after setting out the chain of events affecting all three grounds.

The chain of events

11. The applicant submitted a screening request to the Council, asking for its opinion as to whether the proposed development was EIA development. The request ran to some 28 pages, describing the proposed development with images, the site and its context, and dealing with various effects, one of which was landscape and visual effects. This single page described the landscape and AONB setting, and the landscape and visual effects of the proposal; it was called the initial Landscape and Visual Impact Assessment, initial LVIA. I set part of this out more fully as it is the topic upon which the claim rested. It said:

> "In terms of views of the Site, it is most visible from the public bridleway which crosses the Site and from the public footpath and two nearby properties off New Forest Lane to the north east, looking across the valley. The majority of remaining views from the east and north a largely restricted by the rising landform and dense intervening field boundary vegetation. Views from New Cut Lane are largely screened by the dense roadside hedgerow, although occasional gaps in the hedgerow allow framed views of the lower, eastern parts of the Site. A more open view of these lower slopes is also possible from the junction of New Cut Lane and New Forest Lane to the north and the adjacent footpath to the immediate west."

12. It then turned to views from the west which are not at issue here. A comment in the "environment/ecology" section was relevant to ground 3:

> "An ecological enhancement and management plan will also be created for the site which aims to provide a net gain in biodiversity post development. There are not likely to be any significant environmental effects on ecological areas and /or protected species."

13. The one page Summary at the end of the applicant's screening request included this paragraph, the first sentence of which the Claimant relied on in ground 3:

> "The proposal is to incorporate significant environmental and biodiversity gains across the extent of the Domaine Evremond vineyards. The building itself is set within a landscape traditionally dominated by fruit farming. the growth of grape growing and wine production in Kent is an excellent example of the resilience of the agricultural sector and its willingness to embrace change, but there will be a continuity in terms of landscape character (with vines appearing in and amongst commercial fruit orchards). The proposed winery building will meld into the landscape with the effective use of excavated material to form a gently undulating setting."

14. On 18 June 2019, the Screening Officer issued her negative screening opinion. She did not undertake any consultation process before doing so, nor was she required to do so. The Officer concluded that the development was not Schedule 2 development, considering it only as an "urban development project" which fell below the applicable thresholds. The relevant criteria from Schedule 3 of the Regulations were considered: the characteristics, location of the development and the types and characteristics of the potential impact. She also considered the Government's Planning Policy Guidance on what urban development projects could require EIA. The location, because of its landscape and visual effects was specifically discussed; the substance of the screening request was set out, and there was no expression of disagreement. She said this:

> "The proposal has been designed to sink into the landscape such that the majority of the building will be below ground level and hidden from any wider key views in the AONB. The design of the building, with incorporation of a green roof and materials sensitive to its location, will ensure that the building does not appear incongruous in the landscape with glimpses of the building available on approach on the access from the east. The potential developable land has been assessed within a high level landscape strategy, setting out a retained landscape features and with enhancements incorporated into the scheme where possible. A Landscape Visual Impact Assessment of the site when viewed from these key points in the surrounding countryside will accompany the application and mitigation introduced as mentioned above. The size, design and location of the development are not likely to result in significant environmental effects on the AONB."

15. In discussing ecological effects, and how they would be minimised, the Screening Officer referred to a mitigation strategy to reduce impacts on potential protected

species within the habitats affected. She adopted the language of the applicant's screening request in the "environment/ecology" section of the request; see [11] above. She did not refer to the sentence from its summary.

16. She concluded:

> "In the light of the above, the proposal is not believed to constitute Schedule 2 development. However, applying the relevant considerations in Schedule 3 the proposed development would be small scale in terms of the environmental impact and would not give rise to significant environmental effects. Any minor impacts could be mitigated as described. The proposed development is therefore not environmental impact assessment development and therefore an environmental impact assessment is not required."

17. The full planning application followed on 6 December 2019. It was accompanied by a number of reports. There was mix-up over the LVIA, which meant that it had not seen by the AONB Unit when it first responded, and it treated the Design and Access Statement as the only report on landscape and visual impact, which it thought was inadequate. There was also a Viticulture Statement which provided some information about why the winery was proposed where it was.

18. The AONB's first consultation response of 14 January 2020 is largely superseded by its second response after it had read the LVIA. It did not mention EIA, but did say that careful consideration was required as to whether the application comprised "major development" within paragraph 172 of the then current version of the National Planning Policy Framework, NPPF. This read:

> "Planning permission [in an AONB] should be refused for major development other than in exceptional circumstances, and where it can be demonstrated that the development is in the public interest. Consideration of such applications should include an assessment of: a) the need for the development, including in terms of any national considerations, and the impact of permitting it, or refusing it, upon the local economy; b) the cost of, and scope for, developing outside the designated area, or meeting the need for it in some other way; and c) any detrimental effect on the environment, the landscape and recreational opportunities, and the extent to which that could be moderated."

19. The NPPF, in footnote defined "major development" as:

> " 55. For the purposes of paragraphs 172 and 173, whether a proposal is 'major development' is a matter for the decision maker, taking into account its nature, scale and setting, and whether it could have a significant adverse impact on the purposes for which the area has been designated or defined."

20. The similarities between that language and that of "likely to have significant environmental effects" featured in submissions about part of the Planning Officer's Report to Committee recommending the grant of planning permission, which it accepted.

21. The AONB Unit's first response also criticised what it saw as the omission of analysis of the extensive views from the higher land of Grove Lane including Public Access Land, to the north east of the site. It objected to the white facing materials proposed for the building, which it thought would make it visually more intrusive than necessary, and to the proposed sedum roof, which it thought inappropriate. It **"strongly objects to the application**."

22. The applicant's LVIA is the first element in Ms Sargent's submission that there had been a change of circumstance such that a reconsideration of the negative screening opinion was required. Her submission entailed close textual consideration of the small print. It is a considerable document, explaining and containing a structured assessment of landscape quality and sensitivity, value, magnitude of change and effects. It covered a variety of viewpoints, though not Grove Lane. Its headings for the steps of this analysis were "Substantial, Moderate, Slight, Negligible, Neutral." A "Substantial Change" was "Total loss or a significant impact on key characteristics, features or elements." A "Moderate Change" was a "Partial loss" of those elements.

23. A "Substantial Landscape Effect" was described as:

> "The proposals will alter the landscape ...in that they:
>
> - will result in substantial change in the character, landform, scale and pattern of the landscape…;
> - are visually intrusive and would disrupt important views;
> - are likely to impact on the integrity of a range of characteristic features and elements and their setting;
> - will impact a high quality or highly vulnerable landscape; cannot be adequately mitigated."

24. A "Moderate Effect" occurred when:

> "The proposals:
>
> - noticeably change the character, scale and pattern of the landscape …;
> - may have some impacts on a landscape …of recognised quality or on vulnerable and important characteristic features or elements;
> - are a noticeable element in key views;

- not possible to fully mitigate."

25. "Slight Effect" was defined as:

- "The proposals: do not quite fit the landform and scale of the landscape …and will result in relatively minor changes to existing landscape character;
- will impact on certain views into and across the area;
- mitigation will reduce the impact of the proposals but some minor residual effects will remain."

26. A separate analysis followed for visual sensitivity, magnitude of change, and effects, under essentially the same five headings. "High Sensitivity" included views from within an AONB, users of Public Rights of Way, PROWs, in sensitive or generally unspoilt areas, and users of outdoor recreational facilities with predominantly open views, where the purpose of the recreation was enjoyment of the countryside. "Moderate Sensitivity" included less sensitive areas, the presence of intrusive features, and users of minor roads.

27. "Substantial Visual Magnitude of Change" was "Large and dominating changes which affect a substantial part of the view." A "Moderate Visual Change" was: "Clearly perceptible and noticeable changes within a significant proportion of the view." "Slight Changes were "Small changes to existing views, either as a minor component of a wider view, or smaller changes over a large proportion of the view(s)."

28. "Substantial Visual Effects" were defined thus: "The proposals would have a significant impact on a view from a receptor of medium sensitivity or less damage…to a view from a highly sensitive receptor, and would be an obvious or dominant element in the view." "Moderate Visual Effects" meant: "The proposals would impact on a view from a medium sensitive receptor, or less harm …to a view from a more sensitive receptor, and would be a readily discernible element in the view." "Slight Visual Effects" would arise where: "The proposals would have a limited effect on a view from a medium sensitive receptor but would still be a visible element within the view, or a greater effect on a view from a receptor of lower sensitivity."

29. The final two tables set out the magnitude of change and the effects, landscape and visual, of the proposed development. They considered first the position at the completion of the development in Year 1, and then the position 15 years later at Year 15. Direct and indirect effects were considered in sequence; direct effects were those experienced on the site itself. Direct landscape effects first. **Trees**: medium sensitivity, slight magnitude of change, effect would be slight adverse in Y1 becoming slight beneficial in Y15. **Hedgerows**: medium sensitivity, substantial magnitude of change, effect going from moderate adverse in Y1 to slight adverse in Y15. **Public footpaths and public access**: high sensitivity, slight magnitude of change, effect slight adverse at both Y1 and Y15. **Arable and fruit growing land**:

Medium sensitivity, moderate magnitude of change, Y1 and Y15 effects both moderate adverse.

30. I turn to the indirect landscape effects. "Landscape character of Site and neighbouring area: this was highly sensitive, with a moderate magnitude of change and the Y1 effect of "Moderate adverse" becoming "Moderate-slight adverse" in Y15. Ms Sargent submitted that that last phrase had been misunderstood or misquoted in the Officer's Report, as "Moderate adverse" becoming "slight", thereby misleading the Committee. I set out the description of that change, assessed as moderate becoming moderate-slight as it featured in the submissions:

> "The proposed development will introduce a new building into a field currently used for growing fruit trees resulting in the loss of a small area of farmland , although the function of the winery building is inherently linked to the surrounding fruit growing fields. The building is not entirely in keeping with the existing scale and pattern of development within the local area, although it has been designed to respect the existing landform….The retention of the majority of existing boundary vegetation, together with new mitigation boundary planting will help to contain the proposals within two fields, where the effect on the landscape character would be greatest. Beyond these two fields, the containment of the site will limit the impact on the wider landscape."

31. The wider landscape character of the Kent Downs AONB was of very high sensitivity, but the magnitude of change would be negligible, with a slight adverse impact at Y1 becoming negligible adverse at Y15.

32. Visual effects from the public bridleway, AE9, which crossed the site were on receptors of high sensitivity. The changes were of substantial magnitude within the western fields of the site where the Y1 effects were substantial adverse becoming moderate adverse at Y15. Elsewhere, from this bridleway, the magnitude of change was negligible and the visual effects negligible adverse both at Y1 and at Y15. The views from New Cut Road, which ran roughly north-south to the east of the site were of medium sensitivity, the change moderate and the effect moderate adverse, becoming slight adverse from Y1 to Y15. The views from public footpath, AE5 which ran roughly east-west across New Cut Road, were of high sensitivity, but the change was slight, and the effect slight adverse in both Y1 and Y15. New Forest Lane, to the east of the site, was of medium sensitivity, with slight change and an effect which went from slight adverse in Y1 to negligible adverse in Y15. A couple of "slight adverse" viewpoints remained "slight adverse" from Y1 to Y15. The visual effects at other viewpoints were "neutral" at both Y1 and Y15.

33. The conclusions of the LVIA were at [6.7]:

> "The proposed development will be predominantly screened in views from its surroundings by the retained boundary vegetation and new mitigation planting. Near distance views of the new winery building will be possible from the short section of public bridleway 0060/AE9/1 which crosses the Site's

> western field. Partial views of the building will also be possible from the eastern side of the valley beyond New Cut Road, although where elevated views are possible they will look towards the buildings green roof and the upper part of the eastern facade. As mitigation planting established, views will become further filtered and screened, helping to integrate the proposals into the landscape."

34. On 12 February 2020, the AONB Unit responded to the applicant's LVIA. It was in general agreement with its methodology. It thought that a major omission in the analysis was the views from Grove Lane and open access land off Grove Lane. It disagreed with the assessment that the views of the building from footpath AE5 would be screened by the retained shelter belt; it thought that its upper section and roof would be visible over the shelter belt, and other parts would be visible through the shelter belt in winter. It remained of the view that impacts would be further reduced through a grass chalkland roof rather than sedum. It agreed with the assessment, without identifying any particular location to which the comment applied, that the building "Is not entirely in keeping with the character of scale and pattern of development within the local area", but disagreed that the harm, "Moderate adverse" at Y1, would reduce to "Moderate-Slight" at Y15, rather than remaining at "Moderate adverse". It disagreed strongly with the assessment at footpath AE5 of "Slight adverse" from the upper part of the route. This echoes what it said in respect of the landscape impact at this point, but emphasised the large white building contrasting sharply with the current undeveloped view. This would be a "Moderate adverse" effect, given the sensitivity of the public use receptor, and the degree of change. There would be a similar "Moderate adverse" effect from the Grove Lane Open Access Land, "which given the high sensitivity of the Receptor, would result in a Significant Impact." Ms Sargent emphasised those latter words. A more muted colour for the building would mitigate the visual intrusion.

35. The applicant responded to this, after discussions with the AONB Unit, with revised proposals for the roof and the colour of the facing materials, and an assessment of the Grove Lane viewpoint, on 24 April 2020. Grove Lane is to the east of and higher up than New Forest Lane. It assessed this as of high sensitivity, with a "Slight magnitude" of change, the visual effects of which were "Slight adverse" in both Y1 and Y15.

36. The final response of the AONB Unit to this came on 19 May 2020, welcoming the change in the roof to chalk grassland from sedum, but maintaining its objection to the facing materials, although they had been amended to include darker shades. It disagreed that the change at Grove Lane would be "Slight" because the viewpoint was on higher ground, and views would remain over existing and new planting and, in winter, through it as well.

37. None of its responses had said that the development was EIA development, or that the development was "major development" for the purposes of paragraphs 172-3 of the NPPF.

38. The Claimant's solicitors wrote to the Council on 11 February 2020, raising a number of planning points. It raised the use of buildings owned by the applicant or a related company at a place called Stone Stile Farm, where it was contended that the

development would have less impact. It queried the lack of EIA, which had been screened out. It referred to extracts from the screening request on ecology which the solicitors described as indicating "significant positive environmental gains" adding, with some perspicacity, that it was often not appreciated that EIA is required when there are significant positive effects as well as when more usually there are significant adverse effects. It pointed out that the screening opinion had to be kept under review. In addition to mitigating harm and reducing ecological impacts, the screening request had referred to an ecological enhancement and management plan which included enhancing the site for turtle doves, and it proposed "to incorporate significant environmental and biodiversity gains across the extent of the Domaine Evremond vineyards." It urged that the first AONB Unit letter, of 14 January 2020, showed that significant effects were likely, and so this should be treated as EIA development.

39. The Claimant's solicitors wrote to the Council on the eve of the Planning Committee's consideration of the planning application, and after considering the Officer's Report. It contended that the development should have been seen as "major development" within the NPPF. The Council was in serious error in not requiring an EIA, screening opinions had to be kept up to date, and repeated that the AONB Unit's objections alone should have alerted the Council to the need to re-screen the application, and then require EIA. One important aspect of that EIA would be the identification of alternative sites considered by the developer for that development.

40. The Planning Officer's Report, not by the same person as the screening opinion, is over 40 pages, and is a thorough consideration of the issues which arose. It summarised the applicant's case for the proposal including the location of the building which would incorporate the visitor centre.

> "The location of the building is of paramount importance, which for practical reasons is required to be located in close proximity to the vineyard, requiring the grape pressing process to take place as soon as possible after harvest to minimise oxidation and potential damage. …The appearance of the building in terms of scale and dimensions is dictated by the functional requirements and in that gravity plays an essential part in the process of wine making which could not be achieved in a more conventional location such where a largely subterranean could not be accommodated. …There are certain size and layout requirements dictated by the scale of production required…."

41. It continued with the applicant's case: the building was located in the centre of the wider estate, enlarged by several recent acquisitions, which was the logical location. Having the processing of grapes close to the vines would reduce traffic on the wider road network, and encourage visitors to go to the visitor centre, where vines and processing could be more readily seen. The bottling would be done on site but by a mobile bottling unit operating inside building. The spoil from the excavation of the subterranean part of the building would be distributed across the eastern arable field, with the creation of a pond and hay meadow.

42. The applicant's LVIA was summarised, including the effect on views around the cardinal points. That summary finished:

> "AONB is recognised as a landscape of the highest quality under the NPPF paragraph 172. The development would result in loss of a relatively small land area currently used for fruit trees. The proposed building is inherently linked to the surrounding fruit growing fields. The retention of the shelterbelts will provide containment and would be characteristic of the local landscape and the Kent Downs AONB. Retention of the existing PROW alignment with new planting would mitigate visual impact and filter views. There will be an incremental change to the wider landscape of the Kent Downs AONB. Views from the eastern side of the valley will be partial, beyond New Cut Road, although where elevated views are possible, they will be of the building's green roof and upper part of the eastern facade. As planting becomes more established and mature, it will further filter views and screen the site, helping to integrate the proposals into the landscape."

43. The responses of consultees followed. The AONB Unit's responses were set out in over thirty bullet points. The comments of objectors were summarised. One point to which the Development Management Manager responded was this: "The EIA is required where there are positive effects as well as more usually concerns about negative impact. [**DMM comment**: it is only necessary to identify significant harmful effects]." This is the error against which Mr Buxton had helpfully warned the Council.

44. The Planning Officer, on behalf of the DMM, then set out his appraisal of the application, and recommending the conditional grant of permission. He accepted what the applicant said, set out above, about the location of the building. His assessment of visual amenity and impact on the AONB included the following:

> "52. Whilst the development is located within the AONB, as outlined in the principle section of this report, the development would be justified. The development proposed, would exceed 1000sqm of floor space (GIA). As a result, it is classified as a major application and as such is advertised in line with the statutory requirements. However, as noted under paragraph 172 of the NPPF (and footnote 55). This states that, for the purposes of paragraph 172, whether a proposal is 'major development' or not is a matter for the decision maker, taking into account its nature, scale and setting, and whether it could have a significant adverse impact on the purposes for which the area has been designated or defined. I do not consider the development constitutes major development as defined by the NPPF…."

45. The Planning Officer then discussed landscape and visual effects between [53-65]. [55] contained this general analysis:

> "The site is visible from near distance from the east, including the opposite value side, PROWs within the wider area, including AE5, New Forest Lane and Grove Lane on the eastern side of the valley towards Old Wives Lees, although these views are restricted to a large extent by roadside vegetation and hedgerow. Views are available from Grove Lane but are partly obscured by existing trees within the public access land and from the lane itself …and to the north of the site agricultural buildings… at Selling, which is also within the Kent Downs AONB with associated polytunnels and associated building … are also highly visible within the landscape from Grove Lane. The views of the proposed development would be limited being longer distance with the proposed landscaping and green roof mitigating the visual impact. The height of the building, given its subterranean design, would result in 4.75m being above ground level. Overall, the site does benefit from good containment due to the shelter about boundaries noted above within the immediate context."

46. The concerns of the AONB Unit about the white chalk facing brick had led to discussions and alternatives being suggested, and "a more muted palette of facing brick" had now been chosen. The "more characteristic" chalk grassland roof was now proposed, reducing the potential impact on the landscape. The Report recognised the Unit's objection to the proposed revised facing brick was maintained, although welcoming the chalk grassland roof and the additional planting. It continued:

> "61…[The Unit] also have concerns that the LVIA assesses the impact of the development upon the designated landscape as slight when views will be afforded of the site, especially during the winter months due to the deciduous nature of the shelterbelt and additional landscaping.
>
> 62. The LVIA concludes that the development will introduce a new building which is not entirely in keeping with the scale and pattern of development within the local area. However the conclusion of the report is that the level of harm would reduce from moderate adverse to slight over a 15 year period as landscaping becomes established and matures. …
>
> 63. The changes to the facing material of the building would be more muted than initially proposed and this would mitigate the visual intrusion of the Winery into this highly sensitive location and help it to integrate into its surroundings. Whilst the development is a Sui Generis use, it has also been demonstrated, as outlined in the principle section of this report, that there is a justified need for such a facility in this location. Other options for siting the building within close proximity to the site had been explored at pre-application stage and there were no other suitable sites for such a building of the scale with the design requirements to enable it to serve its function and in close proximity to the vines. It is also noted that in the wider

> landscape to the north, close to Selling is an agricultural building which is less recessive in the landscape with a reflective roof which is visually intrusive….this is visible from long distance views from the public access land on Grove Lane to the north east of the site. The proposed development would sit lower in the landscape, be more recessive and the green roof and landscaping would significantly mitigate the visual impact on the designated landscape.
>
> 64. The landscaping and amended facing details, as acknowledged by the AONB Unit, can be used to help mitigate visual and adverse landscape impact. Whilst they disagree with the conclusions reached by the applicant, their views are acknowledged and on balance, it is considered that the landscape and visual impact would be suitably mitigated for the reasons outlined above.
>
> 65. In light of the above, it is considered that whilst there is an objection, the level of longitudinal harm would be slight and be acceptable and be reduced over time…."

47. The comments in the Report on ecology were referred to by Ms Sargent in her submissions about positive environmental effects and EIA. The Officer commented at [73] that the proposed development was "required to ensure there is a net gain in terms of biodiversity and no harm to protected or notable species and their favourable conservation status." (This was a policy requirement). The site was rich in potential habitat, which was to be retained and reinforced. It added at [75], that a range of "ecological enhancements are proposed as part of the development including new landscaping." These included the new hay meadow on the field where excavated soil would be spread, turtledove feeding strips, a meadow sown with wild bird seed and a pond. The roof of the building had been amended to green chalk grassland.

48. The Planning Officer provided an updated Report to add the final round of consultation responses from the AONB Unit. The light facing materials would highlight the building and make it seem larger than it was, and so more intrusive. It would be visible from higher ground, and the landscape would not fully screen it. A more muted material should be used. Points from the Claimant's solicitor's letter of 14 July 2020 were mentioned: the EIA needed to be kept up to date. The application should be re-screened as there was no consultation with the AONB Unit when the screening opinion was reached. An important aspect of an EIA would be to consider alternative sites. Mr McGrath wrote in support of the application, commenting that the promoters were "already investing in refurbishing our existing buildings to bring them into a usable attractive condition."

49. There was a transcript of the Committee meeting. The Planning Officer summarised the letter of 14 July 2020 from Richard Buxton Solicitors, for the Claimant. He responded:

> "In response to that, I can provide Members with additional advice. In respect of the EIA screening of the development, the Development Order…does not require consultation with the

> AONB unit at the EIA screening stage. Whether there was a likely significant effect is a matter of planning judgement for the Local Planning Authority and the fact that another planner employed by the AONB unit has reached a different conclusion does not mean that the view of the Local Planning Authority Planning Officer was incorrect. This is a matter of professional opinion based on assessing all of the information available at that time. A landscape visual impact assessment was required as a conclusion of the EIA screening opinion by the Local Planning Authority and submitted with the application. The concerns raised by the AONB unit have been addressed in the report to Members."

50. Ms Sargent pointed to the words "at that time" as showing ignorance of the obligation to keep a screening opinion up to date, and therefore supporting her contention that it had not been reconsidered, when it should have been.

51. The resolution to grant planning permission was approved unanimously. The grant followed on 30 July 2020. And the pre-action process began promptly.

52. One issue raised in the pre-Action Protocol correspondence was that there had been no reconsideration of the negative screening opinion. The Council's response did not positively assert that it had been reconsidered. It said that a review "would have taken place in the ordinary course of considering the application…." If there had been a material alteration to the scheme after screening, "which could have caused a '*significant environmental effect'*, then, naturally," the opinion would have needed reconsideration:

> "However, no such material alteration was proposed and so it was self- evident that the Negative Screening Opinion would stand. The Defendant Authority would not need to proclaim the self-evident simply to demonstrate that a '*review*' had taken place. The fact that nothing was said merely indicated that there was nothing to say."

Ground 1: failure to reconsider the screening opinion

53. Ms Sargent made three submissions under this head. First, she submitted that the cases showed that there was an obligation to keep the validity of a negative screening opinion under continual review. The Planning Officer did not apply that approach, nor therefore did the Committee. Indeed, the view taken by the Planning Officer was that once a screening opinion had been given, it did not need to be, or even could not be, reviewed. His advice to the Committee in response to Richard Buxton & Co's letter of 14 July 2020 was that a screening opinion was a professional opinion based on all the information "available at that time." Such language was not consistent with acknowledgment of a continuing duty to review.

54. I should give no weight to the witness statement of the Planning Officer, Mr Bewick, dated 9 December 2020, in which he said that during the planning process he had considered the LVIA and the AONB Unit's responses, and did not consider that either showed that the proposal was likely to cause a significant environmental effect. There

was no evidence that this was what the Committee knew and took into account. The Court should be very cautious about such evidence given after the event, unsupported by contemporaneous documents. It was not supported by any response to either of the Claimant's solicitor's letters which raised the point, before the decision was reached. Nor was that said in the Council's pre-Action Protocol letter.

55. Second, Ms Sargent submitted that that reconsideration ought to have occurred on receipt of the LVIA, its addendum, and the consultation responses of the AONB Unit, or upon consideration of them when all were in. That failure made the grant of planning permission unlawful. That contention required consideration of the various reports set out above. She characterised all that as "clear new information that resulted in (at least) a reasonable prospect of the Council coming to a positive screening conclusion, had it reviewed the screening opinion." She submitted that, although a council decision upon reviewing a negative screening opinion was to be tested by the rationality of the conclusion that the negative opinion still held, where a council had not considered whether to review the screening opinion, "it is for the court to decide whether any change in the proposals or their environmental context created any realistic prospect of the screening opinion being different." A negative screening opinion had to be revisited whenever there was a change which led to a reasonable prospect of a different view on it being reached. If the court decided that there was a reasonable prospect of a different opinion emerging from a review, the failure to review the screening opinion would be unlawful.

56. Ms Sargent submitted, on the facts, that the LVIA did identify "likely significant environmental effects." Ignoring Y1 effects, and slight, negligible and neutral effects at Y15, there were moderate effects on the arable and fruit growing land where the building would be, and on the field where excavated soil was to be spread, and turned to a hay meadow, and a moderate-slight effect on the landscape character of the site and neighbouring area. The LVIA also included new information and an assessment of the effects of mitigation measures. She further submitted that the AONB Unit's response identified a number of changes which it characterised as "moderate adverse", and effects seen from Grove Lane Open Access Land as having a significant impact. On the facts here, any reasonable planning officer would have checked his view.

57. On these first two limbs, Ms Lambert submitted that the screening opinion was valid and there was no need for the Council to review it, although accepting that the Council needed to keep the screening opinion under continual review. The trigger for a further review was a change in circumstances which created a realistic prospect of a positive screening opinion. If no such circumstances arose, the absence of a further review would not breach the Regulations. The fact that nothing requiring a review registered with the Planning Officer was relevant to whether the reasonable planning officer would think that there was a reasonable prospect of a different result, if the screening opinion were reviewed. The Court was entitled to consider Mr Bewick's witness statement.

58. Those circumstances requiring a reconsideration of the screening opinion did not arise here. The Officer's Report was correct. The LVIA added detail to the initial LVIA, but did not change it. The moderate or moderate-slight effects in the LVIA would all have been obvious at the time of the screening opinion. The site, surroundings, and public viewpoints were unchanged in their aspects. The proposal was modified in its

roof and facing materials, reducing the visual and landscape effects of the development. A viewpoint had been added at Grove Lane and the public access area off it, but such additional viewpoints were a commonplace of a landscape and visual assessment. Moderate effects did not mean significant effects. Looking at the factors in Schedule 3 to the EIA Regulations, there was no more than some change in a very small part of the AONB. The disagreement of a consultee with an applicant's assessment, and with the view of the Screening Officer, could not be a basis for a review of the screening opinion. That was also what was only to be expected of the planning process, and of itself could not warrant a review, or provide a reasonable prospect of one yielding a different outcome. The texts of the various documents here did not furnish such a basis or prospect either. The mitigation was developed in the degree of planting detail but not in its essential implications for the effects of the proposal.

59. The early stage at which a screening opinion was delivered would commonly mean that further material would be provided, whether with the application, or in the form of consultation responses. Changes to the detail of a development proposal, particularly on a full application, were commonplace, and that could not be taken as a trigger point without the review process becoming endless. The task of the authority or developer should not be an obstacle race. Here there had been no change in external circumstances or in the substance of the proposal itself. It was important, as Moore-Bick LJ had said in *Bateman,* above, at [3], "not to impose too high a burden on planning authorities in relation to what is no more than a procedure intended to identify the relatively small number of cases in which the development is likely to have significant effects on the environment…." The expectation of the PPG was that only a very small proportion of Schedule 2 development would require EIA.

60. Ms Sargent's third point was not connected directly to the EIA Regulations. This was that the Officer's Report had materially misled the Committee as to the level of visual effect which the applicant's LVIA had assessed. This depended on the significance to be attributed to the passages in the LVIA and the Report, comparing the Y15 change to "Moderate-slight adverse", in the LVIA and "slight" in the Report. Ms Lambert and Ms Sargent agreed that the approach to be adopted to this issue was that of Judge LJ, with whom Pill and Butler-Sloss LJJ agreed, in *Oxton Farms, Samuel Smiths Old Brewery(Tadcaster) v Selby DC*, [1997] E.G 60 (C.S.), [no neutral citation, but invariably cited and never doubted in all the ensuing jurisprudence on how to read an Officer's Report], 18 April 1997:

> "the issue would not normally begin to merit consideration unless the overall effect of the report significantly misleads the committee about material matters which thereafter are left uncorrected at the meeting of the planning committee before the relevant decision is taken."

61. Ms Lambert submitted that the passage at [62] of the Report was not significantly misleading on the question of whether there were likely to be significant effects. It was an accurate summary of the landscape and visual effects in the LVIA generally rather than being related to one particular location, and accurately stated what would be done to reduce the effects from moderate to slight. The conclusion at [65] of the Officer's Report was also supported by the LVIA. The responses of the AONB Unit were fully set out, including what the LVIA said, which the Unit repeated. The LVIA

was also available in full to Committee members. The Officer's Report could not be said overall to be misleading in a material way.

Conclusions on Ground 1

62. The parties were not significantly apart on the law, but I have certain qualifications to make, which are germane to how I consider that this issue should be approached. I will however consider it also within the framework they adopted. The qualifications do not alter the outcome. The issue is how a negative screening opinion, that a development is not "likely to have significant environmental effects", interacts with the prohibition in Reg.3 on granting permission for EIA development, without EIA. That is the crucial Regulation here. There is no provision in the EIA Regulations which provides for a negative screening opinion to have any legal effect, unlike a positive screening opinion.

63. The prohibition in Reg.3 only bites at the time of the grant of planning permission. The prohibition is interpreted as prohibiting development which the planning authority considers to be EIA development, in an assessment or "planning judgment" reviewable on public law grounds, that is traditional *Wednesbury* principles. There is a duty necessarily implied into the Regulations, and a necessary part of making the underlying Directive effective, that the planning authority at the time of granting permission, should be satisfied that the development is not EIA development, whether there has been no screening request, or a negative screening opinion.

64. The purpose of the screening request and opinion, of course, is to enable the developer to know what the authority's initial appraisal is. It may be a considerable nuisance to a developer to be told at the last gasp that the development is EIA development, when such a view could have been reached very much earlier in the process, but if that is the view formed at the time when the grant of permission is considered, that is that. EIA must precede the grant.

65. A negative screening opinion is not conclusive that the development is not EIA development at the point of grant, by which time the authority may have changed or have had to change its mind. The prohibition on the grant of permission for EIA development without EIA, requires the authority to have considered, and rationally to hold the view, that the development is not EIA development at the time when it grants permission. All this is common ground, and borne out by the authorities to which I now turn.

66. In *Evans v First Secretary of State* [2003] EWCA Civ 1523 at [23-24] obiter, Simon Brown LJ offered what Sullivan LJ in *R(Mageean) v SSCLG* [2012] Env LR 123 described as "eminently sensible advice" in the different context of the power or obligations of an Inspector, hearing an appeal and faced with a negative screening direction from the Secretary of State, to revert to him to see if he now wished to come to a different view. Simon Brown LJ said this:

> "23. In what circumstances, however, *should* an Inspector invite the Secretary of State to reconsider his screening direction with a view to his deciding that the application is after all one for EIA development so that all the necessary

> procedures with regard to environmental assessment must now be undertaken?
>
> 24. Clearly the Inspector ought not to invite such reconsideration merely because, on essentially the same facts, he finds himself in disagreement with the Secretary of State. He must recognise that there is often room for two views in making judgments of this nature and that the Regulations accord the final responsibility to the Secretary of State. If, however, the Inspector were to discover during the course of the appeal process that the Secretary of State had proceeded under some important misapprehension as to the nature of the proposed development or the assumptions underlying it, or if other material facts came to light which appeared to invalidate the basis of the Secretary of State's direction, then he might well think it appropriate to invite reconsideration of the matter. This, however, would be expected to happen only very exceptionally and only if the Inspector thought that there was at the very least a realistic prospect of the Secretary of State now coming to a different conclusion. It should be recognised, moreover, that the Inspector is under no express duty to refer the matter back to the Secretary of State and, indeed, has no express power to do so. The Regulations are silent on the point. In any given case, therefore, his decision on whether or not to refer the matter back to the Secretary of State would fall to be judged solely by the touchstone of rationality. If, as here, no one even asked him to consider referring the matter back, it is difficult to see how his omission to do so could be adjudged irrational. In any event, nothing came to light at the inquiry before the Inspector here such as to invalidate the basis of the Secretary of State's Direction."

67. This advice is directed to the particular problem of when an Inspector should refer back to the Secretary of State the issue of whether development, which had been screened as not being EIA development, was EIA development. The Inspector's failure to refer it back could not itself have been unlawful for any breach of the Regulations directly, because there was no explicit Regulation dealing with that point. What is clear, see [23] of *Evans*, is that the unlawfulness would have been in the grant of permission for EIA development without EIA. That is because, for the purposes of Reg.3, the decision-maker at the time of the grant of permission has to have considered and rationally hold the view that the development was still not EIA development, notwithstanding the changes at issue. Hence the advice, that the threshold of at least a reasonable prospect of the Secretary of State coming to that view, should be adopted by Inspectors. It is couched as advice, not as a statement of a legal duty as such on an Inspector. But it meets the problem that, at the time of granting planning permission, the decision-maker may not be able continue to rely, without more, on a past negative screening opinion which may rationally be thought to have been superseded by events, to show that the grant of permission complies with Reg.3.

68. As Sullivan LJ said in *Mageean*, there is no difference, for these purposes, between a change of circumstances, and existing facts not previously appreciated. He envisaged that, absent a challenge to the continuing reliability of the previous screening opinion, there would have to be an "obvious flaw" in it to require reference to the Secretary of State. The change there, but not sufficient to make a change rationally requiring reference to the Secretary of State of the negative opinion, was the inscription of a World Heritage Site nearby to a proposed windfarm. The challenge was dismissed.

69. I note the strength of the changes which have to take place both by language and nature from those two cases: "obvious flaw", "important misapprehension…or…other material facts". It is in the nature of screening opinions that they are usually provided at an early stage and on incomplete information, and with the consultation process yet to take place. It is not a continuous obligation to review the negative screening opinion, regardless of changes in circumstances.

70. Those principles have been applied to a local planning authority which has reached a negative screening opinion, and a change in circumstances occurs or factors arise which had not hitherto been appreciated. In *R (Loader) v SSCLG* [2012] EWCA Civ 869, the Secretary of State's screening direction, on an appeal, that the development was not EIA development, was at issue. Pill LJ, with whom Toulson and Sullivan LJJ agreed, noted the agreement of counsel for the Secretary of State with what Sullivan LJ had said in *Mageean*, (in fact rather with the implications of what he had said), that although screening decisions would usually be made at an early stage of the planning process, "…if a council came to the belief during the course of making the decision that the proposed development might have significant effects on the environment it would be open to the council to require an environmental statement at that stage." Pill LJ said this in his conclusions at [47], making it clear that the critical time for judging whether a development was EIA development was at the point of decision:

> "Moreover, judgement was exercised, not at the early stage of the procedure when such decisions are often made, but after full consideration of the planning issues by the local planning authority and also by an inspector appointed by the Secretary of State. Full information as to the nature of the proposal and its likely effects was available."

71. In *R (CBRE Lionbrook (General Partners) Ltd) v Rugby BC* [2014] EWHC 646 (Admin) Lindblom J at [43], commenting on the lawfulness of a planning officer's decision that changes to the circumstances surrounding a development, which had been the subject of a negative screening opinion, did not change the development in a material way, accepted that the officer's consideration of that point do not have to be through a further formal screening process. He adopted this formulation at [47], for holding a screening opinion to be broad enough under what is now Reg,8 to cover an earlier version of the development proposal: "…so long as the nature and extent of any subsequent changes to the proposal do not give rise to a realistic prospect of a different outcome if another formal screening process were to be gone through ."

72. That case considered whether the failure of the council to issue a further screening opinion after a change to the proposal breached the duty in Reg.8, which is reflected in his language of "another formal planning process". That Regulation did not arise

here and, in view of the nature of the arguments, it is difficult to see that it could have been raised. The principle behind the formulation, however, is clearly not confined to Regulation 8. Where a negative screening opinion has been given, and the nature and extent of the subsequent changes have not been considered by the time the planning permission decision comes to be made, and there is a realistic prospect that, had those changes been considered, the development would have been considered to be EIA development, the grant of planning permission would be unlawful. If the changes had been considered, to put it another way, a reasonable planning officer could have concluded that the development was now EIA development.

73. *R (Champion) v North Norfolk DC* [2015] UKSC 52, [2015] 1WLR 3719, involved both EIA and the appropriate assessment required under the Habitats Directive. Lord Carnwath adopted what Pill LJ had said in *Loader v SSCLG* [2013] PTSR 406, [40] set out above. It is expressed, "open to the council", as an option. *Champion* differs fundamentally from the preceding cases because, in those cases, the negative screening opinions were rational and lawful, as is the position here, where it is not contended that the negative screening opinion was irrational, and I am satisfied that it was lawful. I deal later with and reject grounds 2 and 3 which attack the lawfulness of the screening opinion on other grounds. Those grounds, anyway, do not bite on the issue of how changes in the proposal surrounding circumstances or information about it may affect the lawfulness of continued reliance on an existing negative screening opinion.

74. In *Champion*, however, the screening opinion was unlawful when given; the development was bound to be thought of as EIA development. That is not the issue here. The issue in *Champion* therefore concerned the lawfulness of the grant of permission to what was accepted to be EIA development without an EIA. If development was EIA development, the Regulations could not be complied with by reliance on steps, notably mitigation measures, especially ones of uncertain effect, outside the EIA process. EIA was required. *Champion* did not decide anything about the point at which or the manner in which a negative screening opinion might have to be reconsidered.

75. That issue was given full consideration by Dove J in *R (Milton (Peterborough) Estates Co v Ryedale DC* [2015] 1948 (Admin), which concerned the effect of a change in the circumstances in which the impact of one application for a large retail store had been considered. There was a second application for a similar store on another site. There had been a negative screening opinion in respect of the first application, but it was not reconsidered at all when the second application was made. Dove J said at [40-43]:

> "40…Here the question is when, in the absence of that obligation [on an Inspector to refer a screening opinion back to the Secretary of State], the point arises where consideration should be given as to whether or not the Screening Opinion ought to be revisited. The challenge is not therefore to a positive decision not to reconsider an earlier Screening Opinion; the challenge is to a failure to consider the point at all.
>
> 41. In my view the germ of the answer to this question is to be found in both of the authorities to which I have referred. In

paragraph 47 of the CBRE case Lindblom J caveated the breadth of a previous screening process by stating that it would continue to have validity "so long as the nature and extent of any subsequent changes to the proposal do not give rise to a realistic prospect of a different outcome if another formal screening process were to be gone through". In the Mageean case the question for the Inspector distilled in paragraph 21 of the judgment is "whether there is a "realistic prospect" of the Secretary of State changing his or her opinion". Thus the trigger point, if a development has been previously negatively screened, to determine whether any change in its environmental context or its proposals require consideration to be given as to whether or not the Screening Opinion ought to be revisited, in order to discharge the duty under Regulation 3(4) at the point at which consent is granted, is whether or not those changes create any realistic prospect of the Screening Opinion being different. If such circumstances arise and the local authority apply their mind to the point and reach a further negative Screening Opinion then that is a decision challengeable on the normal public law grounds. Failure to give any consideration to the issue places the local authority in the position of subsequently granting permission for EIA development without having gone through the procedure required for EIA development by the 2011 Regulations.

42. It is correct to observe that the 2011 Regulations do not expressly contain any continuing duty in relation to Schedule 2 development which has been previously negatively screened. However, I accept the submission made on behalf of the claimant by Mr Strachan QC that the effect of Regulation 3(4) is that the discharge of the requirements under the Regulation crystallises at the point at which planning permission is granted since at that point the Regulations preclude the grant of consent for development which is in truth EIA development. It follows that in order to discharge that obligation it is necessary for a decision maker, dealing with a Schedule 2 development subject of a negative Screening Opinion (and not the subject of a definitive direction in that respect under Regulation 4(3) of the 2011 Regulations) to continue to ensure that the requirements of the Regulations and the directive are met throughout the lifetime of the application prior to consent.

43. Denial of this proposition could envisage a Schedule 2 application being made to the local authority and the subject of a negative Screening Opinion followed by a change in its environmental circumstances or in the nature of the proposal which would make it obviously EIA development but which as a result of the earlier Screening Opinion the local authority were under no duty or obligation to reconsider. Such an approach would lead to the grant of consent for that

> development without it having been the subject of EIA contrary to Regulation 3(4) and indeed the wider scope and broad purpose of the parent Directive. In such circumstances, therefore, the local planning authority are clearly under an obligation in order to discharge their duties under the 2011 Regulations to keep the circumstances of the application under review and, if there is a realistic prospect that a change of circumstances may lead to a different outcome to the Screening Opinion, to reconsider that question. That is the key difference between the present case and the CBRE case. In the CBRE case the question was considered and a conclusion reached; in the present case the question was never considered at all."

76. He applied that in coming to his conclusion at [61]:

> "For the reasons which I have set out above in relation to the legal argument which relates to this ground I am satisfied that the correct approach is that the defendant needed to keep under continual review the validity of the Screening Opinion which it had given bearing in mind any changes in circumstances which might lead to a different conclusion. In the light of that legal background the factual question which then emerges is as to whether or not there were any changes in the circumstances of the WSCP proposal which might lead to a different conclusion being reached and which required attention to be given to whether the Screening Opinion needed to be reconsidered."

77. He did not conclude that the local authority was bound to conclude that a further screening opinion was necessary, but that that ought to have been considered, but never had been. He refused to exercise his discretion not to quash the permission because it might have considered that a positive screening opinion should be made, followed by EIA.

78. I do not disagree with the thrust of what Dove J says at all, nor with what he says as sound advice, but I consider that, in places, it overstates the nature of the legal obligations on authorities. First, I think that the emphasis on a continuing review at the end of [42] and in [61] upon which Ms Sargent put some weight, overstates the duty to which Reg.3 gives rise. There is no duty under the EIA Regulations on an officer, regardless of any change in circumstances, or factors coming newly to light, to keep a constant lookout to see if he or she now wishes to come to a different view on precisely the same facts. No doubt if he or she does so, a positive screening opinion will follow so as to avoid a breach of Reg.3. But so constant a surveillance is not what the Regulations, or the public law duties applied to them in the cases, require.

79. There is also a danger that this approach understates the importance of the existing screening opinion, which was given such weight, when itself lawful, in each of the cases I have cited. There has to be a change in circumstances for any issue then to arise at all at the point of grant under Reg.3, and it has to be one rationally capable of leading to a change in the established lawful view that the development is not EIA development. The negative screening opinion, provided that it is not itself irrational,

will have this continuing relevance: it will provide a benchmark against which the significance of the changes will be judged both by planning officer, and by a court reviewing the rationality of any new assessment or how the reasonable planning officer would view the changes. The nature of the change may support the contention that it did not need to reconsider the opinion.

80. Second, what Dove J said in [43] about the consequences of a failure to reconsider a negative screening opinion does not cover the more problematic circumstances which may arise, and do here. Of course, he is right that if the change "would make it obviously EIA development", no reconsideration can alter that fact; permission cannot lawfully be granted without EIA. But that is not the only situation which may present itself. It does not provide for the position if the change only *could* make the development EIA development; the grant of planning permission would not necessarily breach Reg. 3. Whether it does so depends on what the officer did and thought between the change and the grant.

81. In my judgment, where there has been a negative screening opinion, rational when made, followed by changes in circumstances after the screening opinion which the planning officer considered, and reasonably concluded did not alter the basis for the negative screening opinion, and that the development was still not likely to have significant environmental effects, there would be no breach of Reg.3 in the grant of permission.

82. If the officer does not consider whether those changes mean that the development is not likely to have significant environmental effects, the grant will still be lawful and not in breach of Reg.3, if no reasonable planning officer, having reached the screening opinion that it did, would have thought that the changes could make the development EIA development, that is one likely to have significant environmental effects. If a reasonable planning officer could have so concluded, the grant of permission will be unlawful. What would be tested is not the rationality of a conclusion or planning judgment by the officer, because there is none, but the lawfulness of the grant, in the absence of a conclusion that it was not EIA development.

83. A third possibility is that the local authority may be able to show that, even where the point is not explicitly addressed within the screening opinion framework or even by specific reference to the previous opinion, it has in fact considered whether the changes in circumstance at issue mean that there are now "likely [to be] significant environmental effects." If it can do so, applying the same tests for significance to those effects, and to their likelihood, that is their serious possibility of occurrence, that the EIA Regulations require, and can show that it has reached the view that the development was still not likely to have significant environmental effects, the prohibition in Reg.3 will not be breached by the grant of planning permission. That is a matter of how the evidence stacks up to prove compliance with the prohibition in Reg.3. That consideration can then be tested for its rationality under the usual principles. It is not necessary for it to draw the EIA Regulations to its mind, if the relevant points have in fact been dealt with.

84. It follows that I do not consider that the correct question is whether the planning officer has kept the screening opinion under constant review; that is irrelevant in law, though obviously helpful in disposing of factual issues. Nor is there any legal error in

a planning officer not asking whether there are reasonable prospects that he would change his mind about the likelihood of significant environmental effects, or reasonable prospects of a hypothetical planning officer concluding that they were likely. Those are the aspects of the parties' framework which I think are an oblique or misdirected approach to where unlawfulness lies. The correct question for the planning officer to ask, at the time of the grant, is: is this development "likely to have significant environmental effects"? He can answer lawfully by saying "I consider that nothing that has happened since the negative screening opinion to cause me to change my mind" or "I have considered the changes and remain of the view in the screening opinion", or "This development, lawfully subject to a negative screening opinion, is still not likely to have significant environmental effects in the light of what I now know".

85. I turn now to the application of the law to the issues under Ground 1. The real factual issue, regardless of the differences in approach, is what the planning officer in fact considered and concluded. There is an issue as to whether he did somehow review the screening opinion. There is no evidence that the matter was ever passed back to the Screening Officer. It was either the Planning Officer who reconsidered it, or no one. There is no evidence of any formal or informal reconsideration by him as to whether the screening opinion, as such, still held good, looking specifically at the LVIA and the AONB Unit responses, at any stage. Mr Bewick, the Planning Officer, in his witness statement of 9 December 2020, at [7], said that he had considered the LVIA and the AONB Unit's responses. That much is obvious as he wrote the Report to committee. He continued: "I did not consider either document to contain information which would mean that the proposal was likely to cause a significant environmental effect."

86. As Ms Sargent submitted, a statement after the event about what was in the witness' mind, but which does not appear in the contemporaneous documents, has to be viewed with caution, although the statement was not said to be inadmissible. But it is not entirely clear what Mr Bewick means. If he meant that he did reconsider the screening opinion, or whether he should reconsider it, that would sit uneasily with his comment in the transcript of the Committee meeting, which I have set out above in [62], the accuracy and substance of which have not been denied: a difference of opinion did not mean that the screening opinion "was incorrect. This is a matter of professional opinion based on assessing all of the information available at that time." There is no acceptance there, as was to follow in the pre-Action Protocol response, that there could be circumstances in which a screening opinion had to be reconsidered, or at least, considered for reconsideration, but those simply had not arisen. I am not prepared to conclude that Mr Bewick is saying either that he did reconsider the screening opinion, or that he considered whether he should reconsider it. In my judgment, there was no active consideration of whether the screening opinion should be revisited or was now superseded.

87. I take Mr Bewick to mean that he considered the documents, and having considered them, nothing struck him in the information they contained that the proposal, which was lawfully assessed not to be likely to have a significant effect, was now likely to do so. That approach is not inconsistent with what the Officer's Report itself shows. However, I do not consider that Mr Bewick's evidence is of any real significance to the decision, and I rely on the contemporaneous documents for my conclusions.

88. However, that factual conclusion does not mean that, in this case, the significance of the LVIA and the AONB Unit's responses were not considered, and their significance for whether there were now likely to be significant environmental effects left unassessed. That is a further factual issue to which I now turn.

89. The Planning Officer plainly did consider those documents, as the Officer's Report makes clear, and is not at issue. I am satisfied, moreover, that he reached the positive conclusion that they contained nothing new of substance, or showing that there could be a significant environmental effect. This is plain from the Officer's Report itself. Although [52] of the Report is concerned with whether the development is "major development" for the purposes of the NPPF, the test for major development is "whether, taking into account its nature, scale and setting, and whether it could have a significant adverse impact on the purposes for which the [AONB] has been designated…." The Planning Officer considered that it was not major development, and there was no need for exceptional circumstances in the public interest to be demonstrated in order for it to be permitted. "It would be necessary to consider the impact on the designated landscape and ensure its character is conserved and enhanced by the development."

90. The NPPF and EIA tests are not materially different or different in a way which would advance the Claimant's argument here: "could" the development have "significant adverse effects" and was the development "likely to have significant effects." "Could" might be a lower threshold than "likely to" or "a serious possibility", but it is not higher. This is also in line with [65] of the Officer's Report.

91. Ms Sargent suggested that the NPPF test was less prescriptive than the test in the EIA Regulations and the more easily passed on that account. The EIA test is more wide ranging and is not confined to landscape and visual effects, nor is it limited to adverse effects. But I conclude that a planning officer addressing his mind to whether development "could have significant adverse effects on the purposes for which the AONB was designated" and concluding that it would not, would be bound to reach the same conclusion, so far as adverse effects on landscape and visual impacts were concerned, as he would if asking himself "whether the development was likely to have significant effects" from that perspective. Ms Sargent acknowledged that if the thinking over "major development" covered the question of "whether there were likely to be significant environmental effects" from a development, that would be fatal to this claim.

92. The wider ranging scope of the EIA test is not material to the issue in this case. First, the only issue of concern in relation to the reconsideration of the screening opinion was created by the LVIA, its addendum, and the AONB Unit responses. These were confined to landscape and visual issues. Other effects did not arise as matters of concern for reconsideration. Those were the only changes of any materiality suggested. It was not suggested that they themselves could have an effect on other topics covered in the screening opinion, and on which its continued rationality was not contested.

93. Second, the positive effects, which arose in respect of ecology and bio-diversity, were not said to be significant as a change. Moreover they cannot rationally be regarded as "likely significant" in the EIA context. This latter point arises in ground 2, and I foreshadow my conclusions by saying here that it fails.

94. Ms Sargent further sought to avoid the consequences of the conclusion in [52] by submitting that (i) the conclusion in relation to "major development" had been infected by the erroneous approach to the continuing effect of the screening opinion; (ii) the LVIA had itself been misunderstood by the Planning Officer and misreported to the Committee, whose acceptance of his recommendation was thereby flawed. This is Ms Sargent's third limb to ground 1. I take those points in turn here.

95. The first point is no more than speculation, and is not sustainable on the evidence. The LVIA and the responses were plainly considered at the time of the preparation of the Officer's Report and at the Committee meeting. The error lay in considering that there could be no legal obligation to reconsider the screening opinion, and that the screening opinion was now done and dusted, in my language. That is a far cry from failing to consider the significance of the material submitted with the application and the consultation responses to it, when dealing with whether this was "major development" for NPPF purposes. [52] of the Officer's Report contains no reasoning based on the continuing force of the screening opinion. The section in the transcript, where the error is expressed, goes on to say that the LVIA and the points raised by the AONB Unit have been addressed in the Report. Indeed, the passage reads more in the way of a contrast being pointed between the obligation at the time of the screening opinion and the consideration later of all the material now available, which he has undertaken for the Report and presented to Committee. The error was concerned solely with the formal position in relation to the screening opinion and did not relate at all to the obligation to consider all that came in. This was done, and because it was in the AONB, consideration again had to be given to what here was materially the same issue, namely whether there could be significant adverse effects. In dealing with this, the Planning Officer could not have been dealing with the acceptability of the impacts but was looking at them for their adverse significance.

96. I do not consider that the planning officer reached the view that something had emerged which could be significantly different from what was considered at the time of the screening opinion, but that he was legally not obliged to revisit the screening opinion. I would have expected that to have emerged more clearly from the documents than it does: the reference in the transcript to the phrase "information available at that time" does not go so far. Indeed, as I have said, it points the contrast between the time of the screening opinion and the consideration given now to all the material. I consider that it just did not strike him that anything which could be significantly different had emerged at all. This is borne out by the conclusion of the Officer's report at [52] and [65]. That is also consistent with the interpretation I have put on what Mr Bewick said in his statement. There is nothing in the nature of the decision he reached either to suggest that he was reaching an irrational conclusion; but that is elaborated when I consider irrationality.

97. Next, I do not accept the significance of Ms Sargent's third limb to this ground and the second point raised above, which is that the Officer misunderstood the LVIA and misreported it to the Planning Committee, so that its conclusion on the significance of the adverse effects was misplaced. I have set out above the relevant test. The passage at issue concerns the description at [62] of the Officer's Report of an effect as changing from "Moderate adverse to slight" Y1 to Y15, when the LVIA from which the analysis was taken said that the change was "Moderate adverse" to Moderate-slight adverse".

98. The first issue was whether that was a general conclusion drawn by the Planning Officer from the LVIA as a whole rather than one related to a particular part of the analysis in the LVIA, namely "Indirect effects on… Landscape character of Site and neighbouring area." If it is taken from the latter, it has been taken incorrectly. The language of the particular part of the LVIA does include the fairly distinctive language which appears in the Officer's Report at this point, where it says that "The building is not entirely in keeping with the existing scale and pattern of development within the local area." The rest of [62] does not refer to that particular entry in the LVIA.

99. I am satisfied that that is where the Officer got his language from for that particular sentence in [62], but I am not satisfied that he was simply recounting what the LVIA said about that particular aspect. The summary of the LVIA at [23-27] is quite full, but it does not go through each of the entries in the appendix, in the way I have done above. This particular entry is not set out there. The appraisal section in the Report does not set it out either. The Officer, as I read the Report, has referred to the comment in the LVIA for the indirect effect of the building on the site and neighbouring area, in the first sentence of [62]. But the second sentence, the one at issue, makes a more general point. That to me is how it is phrased, as "the conclusion of the report", along with the general and wider points which follow in [62], and it is not related to any particular entry from the LVIA or site. It would be odd as well for one entry to be so closely analysed, and none of the others.

100. In any event, without the texts of both to hand for a reader and careful exegesis, I am satisfied that that is how the Officer's Report would have been read and understood. To say that the conclusion of the LVIA was that where there was moderate harm at Year 1, it reduced from "moderate" to "slight" over 15 years, is a fair overall summation of the LVIA. If error it was, and I have misconstrued what the Officer intended, I conclude that it would have been seen as a summation of the LVIA. I do not regard it as misleading, read as a summation. They would not have been misled by its overall thrust. That is what matters for this limb of Ms Sargent's ground 1.

101. Even if the first two sentences of [62] had been read as dealing with the specific entry in the LVIA on which Ms Sargent relied, and Members had then been told that "slight adverse" should have been "moderate to slight adverse", I cannot see that anything of any real note would have changed, nor anything which could be said to render the Report, as a whole, misleading or misleading in a material way which could conceivably have affected the outcome.

102. The final stage in what I consider to be the correct analysis is whether the Officer's Report contains an irrational conclusion that the development was not likely to have significant environmental effects. I note that it is not said that the conclusion in relation to "major development" was irrational, nor was the screening opinion ever said to be irrational. Indeed, no such actual submission was made about a conclusion that the development was not likely to have significant environmental effects. The issue was whether that conclusion had been reached on the changed material. For the reasons which I have given, I am satisfied that the substantive points which Reg.3 requires to be considered, were considered in the Officer's Report, and the conclusion rationally reached that the changes to the landscape and visual material did not make the development one likely to have significant environmental effects.

103. I shall deal now with the second limb of Ms Sargent's ground 1, within the framework which the parties generally agreed. This requires her to show that any reasonable planning officer would have reconsidered the screening opinion, and that a reasonable planning officer could have then concluded that it was EIA development, that is a project "likely to have significant environmental effects". The reasonable planning officer would only have to reconsider a negative screening opinion if there were some point in doing so: that arises where the reasonable planning officer would conclude that there was a reasonable prospect of his coming to a different view if he were to reconsider the point.

104. I have already concluded that the Planning Officer did in substance, and so far as material, consider whether there were likely to be significant effects. I am supported in that view by the rationality of that approach. That in my view disposes of the point.

105. In any event, I do not consider that Ms Sargent has demonstrated that the reasonable planning officer, who had already reached the negative screening opinion here, would have reconsidered the opinion, or have thought that there was a reasonable prospect of his coming to a different opinion. That negative screening opinion matters to the rationality judgment, because the question for the hypothetical planning officer is whether the opinion should be reconsidered. Here I am satisfied that there was nothing about the LVIA or about the various AONB Unit responses which elicited such a reaction in fact. I am also satisfied that no reasonable planning officer would have reacted differently either.

106. I have set out the various expressions of effect in the LVIA. Ms Sargent submitted that those which were "Substantial" and "Moderate" fell within the scope of "likely significant" when reconsidering a screening opinion, as did "Slight"; only "negligible" and "neutral" were not likely to be significant. Even at Year 15, there were direct moderate adverse landscape effects on the site. There were indirect moderate Y1 to moderate-slight adverse Y15 effects on the landscape character of the site and neighbouring area. There were substantial, becoming moderate, adverse effects on the public bridleway where it passed along the site's western field. None of the other points examined came within what Ms Sargent submitted were possibly significant effects. The addendum LVIA, dealing with views from Grove Lane and the public access land off it, did not come within that category.

107. I am satisfied that these do not represent changes which would have led the reasonable planning officer to change his mind on EIA development or to consider that he should reconsider the screening opinion. First, these are all matters which would have been obvious to the Screening Officer. The landscape and visual effects prayed in aid are all on or close to the site and the building. The effects would have been obvious to anyone considering the proposal in those locations, without the benefit of the LVIA. The Screening Officer would not have had the same structure within which to consider landscape and visual effects, but would have been able without difficulty to assess the position in the areas relied on by Ms Sargent. The LVIA framework is important for clarity, transparency of thought and consistency. Its adjectives help understand the most significant effects, without saying that those fall within the scope of "likely to have significant effects". But the LVIA did not purport to be the EIA, and I cannot simply transpose across its adjectives. Slight effects could not be regarded as "significant"; moderate or moderate-slight effects could be so regarded, but that would be less a matter of comparative adjectives and

more of a view of their environmental significance, including their extent. That is what the Screening Office would have obviously considered in the areas in question.

108. But, second, it is clear to me, and with respect to the quality of and thoroughness of Ms Sargent's submissions, that, accepting the rationality of the screening opinion in the first place, the LVIA and addendum contained nothing rationally to warrant its reconsideration. The detail of the landscape and visual mitigation does not rationally here require reconsideration of whether the development was likely to have significant environmental effects.

109. The response from the AONB Unit does disagree with the LVIA and takes a more serious view of the effects, although it does not suggest that the development should be regarded as EIA development or that its views meant that it should now be regarded as EIA development. The Unit said that there would be a "Moderate adverse" impact on the landscape character in Y1 and15, in other words it would not reduce to "Moderate to-Slight adverse." There would be moderate adverse visual effects from the upper part of the footpath and "significant" impact from Grove Lane.

110. I accept that the Unit is not the decision-maker, but I am surprised that it offered no view that development was likely to have significant environmental effects from the effects which it considered, if that is what it thought, or that it did not say that it was "major development" if it concluded that there could be "significant adverse effects". After all, these issues were central to its purpose in responding as consultee.

111. The simple reality is that there is a difference of view on landscape and visual effects as between the Planning and Screening Officers on the one hand and the Unit, on the other. The Planning Officer was well aware of those differences. Differences of assessment are not uncommon on visual and landscape effects. This is not an area where science matters and effects are uncertain. This is an area where there are two reasonable and differing views largely about how adverse the effect of what will be seen in the landscape will be, to some extent about how effective new and existing planting will be, and about the effect of muted colours for the facades, but not muted as the Unit would wish. This is not an area where further enquiry will advance matters. This is rather an area where a judgment is called for. It is the judgment of the planning authority which matters. The fact that the Unit disagrees with it cannot mean that the reasonable planning authority acts unlawfully if it does not revisit the screening opinion. Any reasonable planning authority would have known that views on an issue of that sort would differ. It took a view at the screening opinion stage, and the fact of subsequent disagreement by a reasonable and relevant consultee, does not constitute material which would make the reasonable authority, with the screening opinion to hand, consider that it should reconsider it. The difference in view would have remained to be repeated in the revised screening opinion. It cannot be that a difference of view is of itself sufficient to trigger a review with a reasonable prospect of a different screening opinion outcome. As *Evans* shows, that is not of itself a basis for a change of screening opinion.

112. Ground 1 is dismissed, on either approach.

Ground 2: a failure to screen the proposal under the correct category in Schedule 2.

113. Ms Sargent submitted that the development ought to have been assessed under category 7 of the descriptions in schedule 2 to the EIA Regulations, "Food Industry" by reference to the sub-categories of (b) Packing and canning of animal and vegetable products" or (d) Brewing and malting."

114. I accept that the approach in *Kraaijeveld,* known for short as the *Dutch Dykes* case, C72-95, [1997] 3 CMLR 1 applies to the interpretation of the EIA Regulations; they "have a wide scope and a broad purpose". That is commonly cited and often misunderstood; it speaks against a legalistic approach and requires instead a purposive approach; it does not turn a word into meaning whatever can be extruded from it. A dyke, built to retain waters to prevent flooding, fell within the scope of "Inland-waterways construction…, canalisation and flood-relief works," in Schedule 2 and did not fall outside the scope of that phrase on the ground that the phrase only covered flowing water. A very narrow and legalistic approach, which seemed doomed to fail anyway on the natural wording of the Directive, was rejected.

115. Unlike ground 1, this is a challenge to the screening opinion of 18 June 2019, put forward as a challenge to the grant of planning permission on 30 July 2020. It proceeds as something of a sidewind. The challenge is put as a failure to take a material consideration into account.

116. Ms Sargent submits that the initial screening opinion took into account, in assessing the significance of the environmental effects, the fact that the development fell below the thresholds of an "urban development project" and would not have required EIA, had it been outside a sensitive area such as AONB. If therefore, the development fell within another category as well, which I accept it is possible for a development to do, but exceeded the relevant thresholds for that other category, that would have indicated to the Screening Officer, on her reasoning, that it was more likely to have significant environmental effects than she had allowed for. The single threshold for all descriptions in category 7 was 1000 sqm, which was exceeded. Had the Screening Officer addressed the two category 7 descriptions of development, she ought to have decided that the project fell within one or both of those other categories as well, and would have had to conclude that the thresholds were exceeded in either case. She might then have treated that as a factor making significant effects more likely. Hence a material consideration was ignored.

117. The Screening Officer had said, in her screening opinion, that the project, if considered as an urban development project, fell "well below" the threshold in column 2 of Schedule 2. On that basis, it could not be Schedule 2 development. She obviously recognised that it fell within an AONB and so required screening to see if it was "likely to have significant environmental effects" so as to require EIA. The only reference she made to the fact that the project fell below the urban development threshold, which could have a bearing on her opinion was under the heading "Size and design of the development" where she said: "The total area for development would cover less than the red line of the application site of 1.5 hectares, comprising an actual built area of around 0.3ha, well below the indicative threshold in Schedule 2." This repeated what she had said in her analysis of whether it fell within Schedule 2, even if it were not in a sensitive area.

118. If a proposal falls within a Schedule 2 category, and exceeds the thresholds applicable to that category, it is still not EIA development, and no EIA is required unless the

development is likely to have significant environmental effects. If it is not likely to have such effects, it does not matter which Schedule 2 category it falls into, or whether it is in a sensitive area or whether the thresholds are exceeded. It is not said that the conclusion that the proposed development was not likely to have significant environmental effects was irrational, nor that consideration of other possible categories of Schedule 2 development would have made it so.

119. I cannot accept Ms Sargent's submissions. First, this winery is not a development for the packing and canning of animal and vegetable products. I am prepared to accept that a wide scope and broad purpose could mean that wine was a vegetable product, though the applicant might blanche at it, and the sub-categories in the overall "Food industry" category appear directed at the smellier side of food production. "Vegetable" could stand, not in contradistinction to "fruit", but as covering all plant-based products in contradistinction, along with animals, to minerals in a common order of the natural world. But the winery is not for packing and canning; bottling could have been included, but it was not. The language used is fairly precise, and must be interpreted as involving a legislative choice. Even if "packing and canning" were words apt to cover "bottling," the bottling plant is not a permanent feature of the building either; bottling is carried out, when needed, by a mobile bottling plant hired in and operated inside the building. I cannot see that that is therefore, adopting the wording at the start of Schedule 2, "a development to provide…packing and canning". Ms Sargent pointed out that the filled bottles were packed into cases before they left the building. But I think that stretches language too far again, to say that the winery was a development to provide for packing bottles into cases, or that it thereby became a development to provide for that packing. A purposive approach and wide scope does not turn a tail into a dog.

120. I found Ms Sargent's submission that the winery was a development to provide for "brewing and malting" even less persuasive. The language of "brewing and malting" is yet more precise in scope than that of "packing and canning". It would have been only too easy to have referred to "fermenting", or "fermented products", or alcoholic products if such width had been intended. The production of wine could have been included. The language chosen obviously reflects a legislative decision where the EU Commission would have been very well aware, perhaps more so than the UK alone, that that language did not cover all fermented products, nor specific forms of the manufacture of alcohol such as distillation. It may be that grape juice, brewed and malted, could be drunk with benefit, even pleasure, though there is no evidence for that, but it is not wine or the product of a winery, or intended to be covered by words of such a specific scope and purpose as the Regulations use. There was no error in that respect in the screening opinion.

121. I do not consider, contrary to Ms Sargent's suggestion, that there is a separate error in the failure to consider whether those sub-categories applied. They either applied or they did not. That is a matter of construction here and not planning judgment. They did not apply. It is irrelevant whether or not the Screening Officer considered them.

122. If the screening opinion ought to have treated the development as falling with Category 7, the opinion would still have had to consider whether there was likely to be a significant environmental effect. I cannot see, from the language used in the screening opinion, that the relationship of the size of the development to the urban development threshold played any real part in the evaluation of the likelihood of

significant effects. The screening opinion simply repeats a fact, which then does not reappear in an evaluation. So if one or other or both of those other two sub-categories did cover the proposed development, at a stretch, I cannot see that it would have made any difference at all to the relevant planning judgment about the likelihood of significant environmental effects. The outcome would obviously have been the same, or at least I consider it to be "highly likely that the outcome would not have been substantially different" if the Screening Officer ought to have applied the sub-categories to the proposed development at the screening opinion stage. I would have to refuse relief, by virtue of s31(2A)(a) Senior Courts Act 1981, if that were the only ground of success for the Claimant. I emphasise that this is not a conclusion that the Planning Officer would now decide that the development was not EIA, since that is not the relevant question, although it appeared to be how Ms Lambert phrased it at times, when dealing with discretion.

123. I do not need to deal with delay. The claim was begun within 6 weeks of the grant of permission, and it is very difficult to see a claim begun within that shortened time limit as not being made promptly. Permission to bring it has been granted, and it would require a strong case to refuse relief if the decision were unlawful, and especially where the issue concerns a breach of the obligation to undertake an EIA before granting permission. I recognise judicial concern about the problems, created by the decision in *R (Burkett) v Hammersmith and Fulham LBC* [2002] 1WLR 1593, where a planning permission is challenged on the basis that a screening opinion, which itself could have been the subject of a challenge, several months earlier was unlawful. However, that case has not been overruled. Its effect has been accepted by subsequent cases, and most notably in *R (Catt) v Brighton and Hove CC* [2007] EWCA Civ 298, [2007] Env LR 32., see [39-49]. Accordingly, had the claim succeeded on this ground, I could not have dismissed it for delay.

Ground 3: the failure to consider positive environmental effects at screening

124. This too is a challenge to the screening opinion, presented as a challenge to the grant of permission. The submission of Ms Sargent works backwards from the Officer's Report, where there was a clear error, to the screening opinion where she says that it is not clear that the error was avoided, to argue that an error was made at the screening opinion stage about the relevance of significant positive effects. It is thus used as evidence in retrospect in relation to the thinking of a different Officer. The Claimant's solicitors raised this question in their letter of 11 February 2020, albeit several months after the screening opinion, but well before the Council considered whether to grant planning permission.

125. I start with the screening request. The relevant passages are in [25-26] above and I repeat them here for convenience:

> "An ecological enhancement and management plan will also be created for the site which aims to provide a net gain in biodiversity post development. There are not likely to be any significant environmental effects on ecological areas and /or protected species."

> "The proposal is to incorporate significant environmental and biodiversity gains across the extent of the Domaine Evremond vineyards."

126. The screening opinion adopted the language of the first paragraph and did not refer to the language of the summary. I can see nothing in that paragraph of the screening request which could lead a reasonable screening officer to conclude that the "net gain" in bio-diversity could be a likely significant environmental effect, nor that the net gain had been ignored because it was a net gain. That was not the language of the section specifically dealing with that topic. If the adverse effects described were not rationally likely to have significant environmental effects, this net gain in bio-diversity could not rationally have been seen as doing so. This case has not involved arguments about the EIA role of mitigation, which can be contentious. Nor has it involved a challenge to the rationality of the screening opinion on the likelihood of significant environmental effects.

127. The Claimant's solicitors first raised the "positive effects" point in their letter of 11 February 2020, drawing only on the applicant's Summary in the screening request, without referring to the opinion itself. The Summary is a stronger version of the text on which it drew; the adjective which stimulated the Claimant's solicitor's first response was not adopted. Besides, judged in the context of "significant environmental effects", it remains impossible to see how a reasonable planning officer, let alone one who has treated the adverse effects rationally as not likely to have significant effects, could have regarded the ecological effects as failing with that description. As at June 2019, the screening opinion was lawful.

128. The next stage is the planning application. I was not referred to anything in the supporting documents to further this ground. I have set out above, [56 and 60], the passages from the Planning Officer's Report which deal with the environmental effects. They do so in terms which are materially the same as those of the screening opinion. If the evidence stopped there, I would have regarded that as showing no error, which could be worked backwards to find legal error invalidating the screening opinion. Indeed, it is not said that in this respect there was a material change, however, described, between the screening opinion and the Committee decision. There is more detail about what is envisaged for example for turtle doves and in the hay meadow, but none of that could reasonably be regarded as material changes.

129. However, as set out above at [57], the Planning Officer responding to an objector's comment that positive effects also required EIA, said that it was only necessary to identify "significant harmful effects". He was right to add "significant" but wrong to add "harmful", as the Council now accepts. This comment would be irrelevant to the lawfulness of the screening opinion, unless it could be shown that that was how the screening officer approached it. There is no such evidence. The error was not repeated in the pre-Action Protocol response. Nor can it be said that that error affected whether there should be a reconsideration of the screening opinion because there was no material change in circumstances.

130. I am reluctant to infer that that error was present to the Screening Officer's mind when reaching her screening opinion, on no better basis than that someone else was in error a year later. I recognise that there may be a corporate view in the Planning

Department of a local authority. The Screening Officer was not at the Committee meeting.

131. But even if the inference is drawn, I do not see how a different decision on the screening opinion could rationally have been reached. The positive effects are simply not rationally to be regarded as "significant effects" within the scope of that phrase as used in the EIA Regulations. That is especially so when the adverse effects, rationally not assessed as significant, are considered. The outcome would obviously have been the same, or at least I consider it to be "highly likely that the outcome would not have been substantially different" if the Screening Officer ought to have but failed to consider the potential significance of the positive benefits she referred to in her screening opinion. I would have to refuse relief, by virtue of s31(2A)(a) Senior Courts Act 1981, if ground 3 was otherwise successful for the Claimant. Indeed, taking the errors in grounds 2 and 3 together, I would come to the same conclusion as a matter of discretion or under s31(2A).

132. I do not consider either that, taking the Planning Officer's error as part of his thinking about likely significant effects, and the need for the judgment to be lawful as at the date of decision, I cannot see that the positive effects could rationally meet the threshold of " likely significant" on their own or with all the other effects, and certainly not where the adverse effects did not do so, and rationally did not do so. If it came to it, s31(2A) would apply as well.

Overall conclusions

133. This application is dismissed.