Neutral Citation Number: [2019] EWHC 3505 (Admin)

Case No: CO/2118/2019

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19 December 2019

Before :

MRS JUSTICE LANG DBE

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Between :

THE QUEEN	**Claimant**
on the application of	
JOHN HUDSON	
- and -	
ROYAL BOROUGH OF WINDSOR AND MAIDENHEAD	**Defendant**
(1) LEGOLAND WINDSOR PARK LIMITED (2) MERLIN ATTRACTIONS OPERATIONS LIMITED (3) MERLIN ENTERTAINMENTS PLC	**Interested Parties**

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Marc Willers QC (instructed by **Richard Buxton Solicitors**) for the **Claimant**
Cain Ormondroyd (instructed by **Legal Solutions**) for the **Defendant**
John Litton QC (instructed by **DLA Piper UK LLP**) for the **Interested Parties**

Hearing dates: 29 & 30 October 2019

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Approved Judgment

Mrs Justice Lang :

1. The Claimant seeks judicial review of the decision of the Defendant ("the Council"), dated 10 April 2019, granting planning permission to the First Interested Party ("IP1") for the construction of a holiday village and other works at the Legoland Windsor Resort, Winkfield Road, Windsor SL4 4AY ("the Resort").

2. The Council's Planning Committee Development Management Panel ("the Panel") resolved, on 10 May 2018, to grant planning permission, subject to conditions and an agreement under section 106 of the Town and Country Planning Act 1990 ("TCPA 1990"), the terms of which were delegated to the Head of Planning, in consultation with four Panel Members.

3. The Claimant is the Chairman of the Berkshire branch of the Campaign to Protect Rural England ("CPRE-Berkshire") and he brings this claim in that capacity.

4. The Council is the local planning authority and the Interested Parties are the owners and operators of Legoland.

5. On 8 July 2019, Lieven J granted the Claimant permission to judicially review the Defendant's decision to grant IP1 planning permission on grounds 2(b), 3 and 4 of the grounds of challenge pleaded in the Claimant's Statement of Facts and Grounds.

Grounds of challenge

6. The Claimant submitted that the Defendant's decision to grant planning permission was unlawful on the following grounds:

    i) **Ground 2**: Failure to give adequate reasons as to why the Panel departed from the recommendation in the Officer's Report ("OR"), in particular in regard to the impacts upon significant, including veteran, trees.

    ii) **Ground 3**: Failure to reconsider the decision in light of the publication of new planning policy in the July 2018 edition of the National Planning Policy Framework ("the Framework"), and in particular, the requirement in paragraph 175 that there be "wholly exceptional reasons" to warrant the grant of planning permission for development which would harm veteran trees.

    iii) **Ground 4**: Breach of the requirement in Council Directive 92/43/EEC ("the Habitats Directive"), and the Conservation of Habitats and Species Regulations 2017 ("the Habitats Regulations 2017"), that an Appropriate Assessment be prepared to consider the impacts on the European designated Special Area of Conservation ("SAC").

7. In response, the Council and IP1 submitted that:

    i) **Ground 2**. The reasons given for the decision to grant planning permission on 10 May 2018 met the required standard, when read together with the transcript of the Panel's meeting, and the conditions and section 106 agreement.

ii) **Ground 3**. Since the proposed development, properly implemented in accordance with the planning conditions and the section 106 TCPA 1990 agreement, would avoid harm to aged and veteran trees, neither paragraph 118 of the 2012 edition of the Framework, nor paragraph 175 of the July 2018 edition of the Framework applied, and so were not material considerations for the Council to consider.

iii) If, contrary to this submission, the Council did conclude that the proposed development could harm aged and veteran trees, Mr Ormondroyd accepted at the hearing that, in light of the relevant authorities, the Council ought to have re-considered its decision, after the more stringent policy on the protection of trees was introduced in the July 2018 edition of the Framework, before granting planning permission in April 2019.

iv) Mr Litton QC submitted that, even if the July 2018 edition of the Framework was a material consideration, section 31(2A) of the Senior Courts Act 1981 applied, and relief should be refused because it was highly likely that the outcome would not have been substantially different if the conduct complained of had not occurred.

v) **Ground 4**. Both the Council and IP1 conceded that an Appropriate Assessment was required, pursuant to the Habitats Directive and the Habitat Regulations 2017. Mr Ormondroyd submitted that, in substance, the OR amounted to an Appropriate Assessment. Both counsel submitted that section 31(2A) of the Senior Courts Act 1981 applied, and relief should be refused because it was highly likely that the outcome would not have been substantially different if the conduct complained of had not occurred.

Planning history

The application for planning permission

8. The Resort is situated within the Green Belt, and it is surrounded by undeveloped land, including woodland and parkland.

9. On 6 June 2017, IP1 applied for planning permission for the proposed development. In a hybrid application, IP1 applied for full planning permission for four projects (projects 1-4) and outline planning permission for an additional four projects (projects 5-8). The projects of direct relevance to this claim are:

i) Project 1: the erection of 65 permanent semi-detached lodges (130 units) and 20 'barrels' with associated amenity facilities block to provide visitor accommodation, a central facilities 'hub' building, sustainable drainage system ("SUDS") ponds, landscaping works (including equipped play areas) and associated infrastructure works ('Phase 1' of the holiday village);

ii) Project 2: Reconfiguration of car parking and internal accesses and associated engineering/infrastructure works;

iii) Project 8: Erection of up to 300 units of visitor accommodation (Phases 2 and 3 of the holiday village) with two associated central facilities 'hub' buildings, SUDS ponds, landscaping, infrastructure works and car parking area.

10. The development site for the holiday village extends beyond the existing Resort, into an area currently occupied by St Leonard's Farm, and open countryside. The development site includes significant and veteran trees.

11. The development site is bordered on three sides by the Windsor Forest and Great Park Site of Special Scientific Interest ("SSSI") and SAC. The primary habitat reason for the SAC designation is the old acidophilous oak woods. It has the largest number of veteran oaks in Britain and probably in Europe. The High Standinghill Woods Ancient Woodland SSSI lies to the south of the development site, and the Holliday's Plain Ancient Woodland SSSI lies on the north side.

12. Prior to the application being submitted, IP1 submitted a scoping request to the Defendant and, on 5 April 2017, the Defendant adopted a scoping opinion. In relation to ecology and nature conservation, the Scoping Opinion stated:

> "The proposed development is adjacent to Windsor Forest and Great Park Special Area of Conservation (SAC) and Site of Special Scientific Interest (SSSI). The EIA should assess the direct and indirect impacts on this internationally designated site during the construction and operational phases of development. This should include the effects of air, water and soil pollution, increased water run off into the site, increased recreational pressure and light pollution. The EIA should address the impacts of the proposed development on the qualifying features of the SAC/SSSI including but not limited to the habitats, invertebrate assemblage, birds and populations of violet click beetle.
>
> …
>
> The EIA should include mitigation measures to prevent and/or reduce the adverse effects on these designated sites and where possible provide measures."

13. The Defendant consulted Natural England ("NE") as statutory consultees concerning the need to undertake an appropriate assessment under the Conservation of Habitats and Species Regulations 2010 ("the Habitat Regulations"). In its response dated 23 February 2017, NE said:

> "Statutory nature conservation sites – no objection
>
> Natural England has assessed this application using the Impact Risk Zones data (IRZs). Natural England advises your authority that the proposal, if undertaken in strict accordance with the details submitted, it is not likely to have a significant effect on the interest features for which Windsor Forest & Great Park SAC has been classified. Natural England therefore advises that your Authority is not required to undertake an Appropriate

> Assessment to assess the implications of this proposal on the site's conservation objectives."

14. As the proposed development came within the scope of the Town and Country Planning (Environmental Impact Assessment) Regulations 2017, IP1 submitted an Environmental Statement ("ES") with the application for planning permission.

15. The ES addressed the potential impact of the proposed development on nature conservation and biodiversity, and proposed mitigation measures to reduce or avoid adverse impacts, both during construction and operation.

16. Chapter C: Site & Scheme Description described the Legoland Resort as being:

> "C2.2 … surrounded to the north (in part), the south, the east and west by undeveloped land including woodland and parkland. The LEGOLAND Resort is surrounded by the Windsor Forest and Great Park (SAC) and the Windsor Forest and Great Park (SSSI) to the west, south and east of the site."

17. Table E5.1 Chapter E: Ecology and Nature Conservation, identified the potential effects during construction on a variety of receptors before mitigation. As regards the SAC, it assessed the potential impact prior to mitigation as an "Adverse impact at UK level". Paragraph E5.2 stated:

> "The designated sites, being so close, could also be severely impacted by construction activities if no mitigation is put in place. Uncontrolled movement of vehicles, inappropriate storage, and pollution incidents could all easily impact adversely on the SAC/SSSI, which is a statutory designation".

18. Table E5.2 identified the potential operational effects on the same receptors prior to mitigation. As regards the SAC these were assessed as "Adverse impact at UK level". Paragraph E5.9 stated:

> "E5.9 However, it is clear that the habitats and species within the site will be under pressure of some kind due to human activity. Without proper mitigation and various controls, damage is likely to be caused to these receptors. Increased human presence could cause degradation of the adjacent SAC/SSSI; litter, erosion, risk of fire through inappropriate use or illegal activity, and even inappropriate lighting could impact adversely on the integrity of the adjacent designated sites."

19. Section E6 set out mitigation and monitoring measures and stated:

> "E6.2 Ecological mitigation, compensation and enhancement are all an integral part of the design, construction and implementation of the proposed development. To deliver these measures, a comprehensive ecological mitigation strategy will be developed in accordance with the landscape and ecology parameters of the detailed proposals. The key to the approach has

been to design biodiversity into the illustrative masterplan for the proposed development as part of an iterative process and to ensure that newly created habitats are managed in the appropriate way to maintain high levels of biodiversity.

…

E6.4 As part of a detailed planning submission, as well as designing biodiversity into the fabric of the development, ecological mitigation will be provided by the production and implementation of a Construction Environmental Management Plan (CEMP) and a Landscape and Ecology Management Plan (LEMP).

E6.5 The CEMP will ensure that ecological and other environmental protection is integrated into the construction process. The CEMP will include details on important ecological areas and how they are protected… The CEMP procedures will be supervised by an Ecological Clerk of Works who will be integrated into the construction team.

E6.6 The LEMP will set out the long-term management of the landscape and habitats that will be created and maintained within the development during its operational phase.

E6.7 Building upon the general strategy described above, specific mitigation requirements for each receptor are detailed below, focusing on the construction stage. Where impacts on ecological receptors have been identified, an assessment after mitigation is made to consider the predicted residual impacts of the proposed development. In most cases it is possible to ensure that any ecological impacts are minimised, but those impacts that are still present following mitigation/compensation are the residual impacts that will act upon the ecology of the Site."

20. Table E6.1 set out the details of the mitigation proposed for the SAC during construction as follows:

Receptor	**Mitigation measures**	**Residual impact**
Windsor Great Park SAC/SSSI	The CEMP will stipulate best working practice and include protection measures for woodland and trees as recommended by industry recognised guidelines such as British Standard *"Trees in Relation to Construction – Recommendation"* (B.S. 5837/2005). Pollution of tree root zones will also be avoided through proper maintenance of machinery and the use of drip trays.	Neutral (from Adverse – UK)

	The 20m buffer of woodland will be designed as part of the LEMP and where no infrastructure will enter the buffer, this will be fenced off to prevent heavy plant and material storage in these areas	

21. In respect of the impact during operation and after mitigation, Table E6.2 provided:

Receptor	Mitigation measures	Residual impact
Designated Sites	The increase of public and development pressure may disturb wildlife and degrade sections of ground flora in the long term. The planting regime will enhance the buffer by protecting the site from public access on a significant scale. However, with the mitigation set out above and with the production of a LEMP, these proposals can go towards mitigating these impacts. The buffer of the woodland will create ecotones that will encourage a wider range of invertebrates such as butterflies and bird species. The design of the buffers and management regime will be included within the LEMP and will aim to enhance biodiversity within these areas. The LEMP will include the ecological function of the buffers. The foul drainage system will be specifically designed to ensure that peak flows do not exceed the greenfield run-off rate, with the use of hydrobrakes and reduced diameter outfalls, removing the risk of pollution or hydrological impacts upon the SAC.	Neutral (from Adverse UK)

22. An Arboricultural Impact Assessment, which carried out a tree survey, and assessed the potential risk to trees, was included as an appendix to the ES.

23. On 9 August 2017, Natural England provided its consultation response, as follows:

> "SUMMARY OF NATURAL ENGLAND'S ADVICE
>
> FURTHER INFORMATION REQUIRED TO DETERMINE IMPACTS ON DESIGNATED SITES

> As submitted, the application could have potential significant effects on Windsor Forest and Great Park Site of Special Scientific Interest (SSSI) and Special Area of Conservation (SAC). Natural England requires further information in order to determine the significance of these impacts and the scope for mitigation.
>
> The following information is required:
>
> Avoidance and mitigation measures to ensure the proposals do not have an impact on the Windsor Forest and Great Park SSSI and SAC to specifically include changes to hydrology, construction impacts, and buffer zone planting and management.
>
> Detailed woodland, hedgerow and scrub management proposals for both construction and operational phases of the development to ensure retention of, and avoidance of impact to, mature and veteran trees and their potential to support bat commuting, foraging and roosting.
>
> Detailed lighting proposals to ensure impacts to roosting, commuting or foraging bats within the site are avoided.
>
> Without this information, Natural England may need to object to the proposal.
>
> Please re-consult Natural England once this information has been obtained.
>
> Natural England's advice on other issues is set out below.
>
> Additional Information required
>
> The Ecology and Nature Conservation chapter of the Environmental Statement identifies adverse impacts during both construction and operation to numerous receptors including SSSI, SAC, Bats, Hedgerows, and Mature/Veteran trees. However only very limited information has been provided as to how these impacts will be avoided and/or mitigated.
>
> The Environmental Statement states that the production and implementation of a Construction Environmental Management Plan (CEMP), and a Landscape and Ecology Management Plan (LEMP) will ensure ecological and environmental protection. A CEMP has been submitted but it does not set out details of how the construction programme will avoid impacts to the receptors highlighted above. The LEMP does not appear to have been submitted as part of the application."

24. The further information requested by Natural England was provided by IP1 on 11 September 2016. NE responded on 11 October 2017, stating as follows:

"SUMMARY OF NATURAL ENGLAND'S ADVICE

FURTHER INFORMATION REQUIRED TO DETERMINE IMPACTS ON DESIGNATED SITES

As submitted, the application could have potential significant effects on Windsor Forest and Great Park Site of Special Scientific Interest (SSSI) and Special Area of Conservation (SAC). Natural England requires further information in order to determine the significance of these impacts and the scope for mitigation.

The following information is required:

Avoidance and mitigation measures to ensure the proposals do not have an impact on the Windsor Forest and Great Park SSSI and SAC to specifically include changes to hydrology, construction impacts, and buffer zone planting and management.

Detailed woodland, hedgerow and scrub management proposals for both construction and operational phases of the development to ensure retention of, and avoidance of impact to, mature and veteran trees and their potential to support bat commuting, foraging and roosting.

Without this information, Natural England may need to object to the proposal.

Please re-consult Natural England once this information has been obtained.

Natural England's advice on other issues is set out below.

Additional Information

Avoidance and Mitigation measures for Windsor Forest and Great Park SSSI and SAC

Windsor Forest and Great Park SSSI and SAC is adjacent to the development site, the proposals have the potential to impact the SAC through changes to hydrology associated with the SUDS scheme, planting near the SAC boundary and by access or construction operations within the root protection zone.

As Windsor Forest and Great Park is a European designated site it is necessary to have certainty that the site will not be impacted prior to any planning permission being granted. It is therefore necessary to request this information ahead of determination rather than through conditions."

25. In January 2018, IP1 provided the Defendant with an Updated Supplementary Environmental Statement ("SES"). Under the heading "Additional Mitigation Measures during Construction", it provided as follows:

> "3.10 At Appendix 7 of this SES (January 2018), a series of plans (ref. IP01-IP07) have been included to identify the measures being undertaken to mitigate against the very limited impacts identified on trees on the site. By way of the summary, the plans identify the following:
>
> 1 IP01, Existing Trees, Woodlands and Hedgerows – identifies the location of the woodland, groups, individual trees and hedgerows across the holiday village and car parks parts of the site.
>
> 2 IP02, Proposed Protection Areas, Buffers and Reserves – identifies the protection areas around each trees and defined by the nationally adopted guidance for trees and development used by local authorities and the Planning Inspectorate (BS5837:2012:Trees in relation to design, demolition and construction – Recommendations). The drawing also shows a 15m buffer to the ancient woodland, in line with guidance from Natural England. The proposed 'veteran tree reserves' are identifies [*sic*] as a further enhancement.
>
> 3 IP03, Proposed Building and Car Park Conflict with Trees – this plan 'simplifies' the buffers/protection areas identified on Plan IP02 so that the extent of the buffers is clear. This plan identifies the conflicts with the trees and buffer areas that arise as a result of the buildings and car park proposals. Conflicts which can be resolved through specialist construction techniques are shown in yellow, and those which result in tree removal in red. It can be seen that the only conflicts that result in tree loss are limited to the loss of young trees in the car parks.
>
> 4 IP04, Proposed Road, Footpath and Utility Conflict with Trees – this plan then identifies the conflicts which result from the proposed roads, footpaths and utilities. As per Plan IP03, it is evident that the tree loss is very limited.
>
> 5 IP05, Existing Trees and Woodland – identifies the whole Park and its existing tree and woodland cover.
>
> 6 IP06, Proposed Tree Removal – shows the proposed tree removal across the whole of the Park as a result of the development proposals. Tree loss compared to

tree retention can readily be identified on this Plan and is it evident that tree retention far outweighs the proposed tree loss.

7 IP07, Proposed New Planting – the proposed new planting and landscaping is shown on this plan alongside the proposed tree removal. In addition to that currently shown in the planning application, further areas for planting are also indicated; in the 'NW' field to create wood pasture (reflecting the historic field pattern/landscape) and along the northern edge of the 'buffer' adjacent to Badger Hill to increase the tree cover along the boundary of the Park. Although the current level of proposed planting clearly exceeds that which it is proposed to remove, the additional areas have been highlighted to clearly identify the further scope for new tree planting, should the Council consider this necessary.

3.11 The plans described above identify the proposed buffers, tree loss and new planting in the proposed development. They demonstrate that appropriate buffers/protection areas to existing trees, woodland and hedgerows have been incorporated in the development in line with national guidance and adopted best practice. The tree loss has been minimised, and in the context of the whole site is very limited.

3.12 Future impacts on mature trees, standing and fallen deadwood will be avoided at the Holiday Village site by ensuring that public access tracks, footpaths and infrastructure avoid areas that could be detrimental to public health and safety (for example through falling branches). This will ensure that no future removal or remedial work will be required, and avoid adverse impact on the trees or deadwood.

…

3.18 Table E6.1 of the ES describes the basis and outline for the mitigation proposals to avoid impacts on designated sites during construction:

"Trees in relation to Construction – Recommendation " (B.S. 5837 2005). Pollution of tree root zones will also be avoided through proper maintenance of machinery and the use of drip trays.

The 20m buffer of woodland will be designed as part of the LEMP and where no infrastructure will enter the

> *buffer, this will be fenced off to prevent heavy plant and material storage in these areas.*
>
> 3.19 The key concept here is the buffer, which will be planted to provide additional protection
>
> 3.20 From operational phase impacts. 20m is in excess of Natural England's own guidance pertinent to ancient woodland and, in this case, where there is no large scale residential development and a limited scope for regular pollution, littering or excessive recreational impact, is adjudged to be appropriate for the avoidance of negative impacts towards the designated sites."

26. Following exchanges between NE and the Defendant between September 2017 and March 2018, NE gave further advice on 13 March 2018, withdrawing its objections to the proposed development, subject to appropriate mitigation being secured. It stated:

> "SUMMARY OF NATURAL ENGLAND'S ADVICE
>
> NO OBJECTION – SUBJECT TO APPROPRIATE MITIGATION BEING SECURED
>
> We consider that without appropriate mitigation the application would have an adverse effect on the integrity of Windsor Forest and Great Park Special Area of Conservation, and would damage or destroy the interest features for which Windsor Forest and Great Park Site of Special Scientific Interest has been notified.
>
> In order to mitigate these adverse effects and make the development acceptable, the following mitigation measures should be secured:
>
> A lighting strategy and plan for the development site
>
> A Construction Environment Management Plan for the development
>
> A planting scheme for the development site, specifically including the buffer zone adjacent the SAC and SSSI.
>
> Detailed management proposals for mature and veteran trees, and hedgerows within the site.
>
> Detailed layout plans for phases two and three of the Holiday Village which avoid development in close proximity to mature and veteran trees, and hedgerows.
>
> We advise that appropriate planning conditions or obligations are attached to any planning permission to secure these measures.

Natural England's advice on the detail of the required measures is set out below.

Proposed Conditions

…

Construction Environment Management Plan

In our previous response we highlighted that due to the proximity of elements of the development proposal to the Windsor Forest Great Park SSSI and SAC care will need to be taken to ensure works do not have an impact on the designated site. This is particularly relevant to the SUDS ponds, a number of which are located close to the SSSI and SAC boundary. We would therefore suggest a condition which requires the production of a CEMP that clearly sets out how any impact to the SSSI, SAC and the root protection zone of any mature or veteran trees within or adjacent the site will be avoided.

CEMP condition:

A CEMP which sets out how construction of the development and all associated infrastructure will avoid impact to the adjacent SSSI and SAC and the root protection zone of any mature and veteran trees within or adjacent to the development should be agreed prior to works commencing.

Reason for condition:

To ensure that the construction of the development does not impact the designated site adjacent the site boundary, or the mature and veteran trees within and adjacent the development.

Buffer zone planting

The buffer zone around the perimeter of the site (adjacent the SSSI and SAC) is proposed to be planted, however no details are currently included as to the species mix to be used.

Condition:

A Planting scheme for the development, and particularly the buffer zone adjacent the Windsor Forest and Great Park SSSI and SAC should be submitted and agreed prior to development commencing.

Reason for condition:

Given that the buffer area is adjacent to the designated site it is important that the planting is appropriate to avoid any inappropriate species being introduced to the SSSI/SAC, and

also has the opportunity to enhance the SSSI/SAC should appropriate pollinator species be included, as this will provide enhanced supporting habitat for invertebrates associated with the mature woodland of the designated site."

27. On 20 April 2018, the Defendant's Arboricultural Co-ordinator, Ms Helen Leonard, sent an email to the Defendant's planning officer confirming the advice she had given previously on the potential impact of the proposed development on trees, as follows:

i) The Council's Landscape Character Assessment classifies the site as 'Farmed Parkland'. It is an historic landscape much of which is included in the Register of Historic Parks and Gardens. It has woodland copses, some of ancient origins, and mature parkland and field trees, some of which are veteran trees.

ii) The site is within an 'Area of Special Landscape Importance' which requires that development proposals do not detract from the special landscape qualities including loss of tree cover and hedgerows.

iii) Tree roots, which are essential for the survival, functioning and health of the tree, are vulnerable to damage. They form a network of small-diameter woody roots which extend radially for a distance much greater than the height of the tree. BS5837:2012 'Trees in relation to design, demolition and construction - Recommendation' gives information on determining a root protection area ("RPA") which is the minimum area around a tree where the protection of the roots and soil structure is treated as a priority.

iv) <u>Projects 1 and 8 – Holiday Village Phases 1, 2 and 3</u>

a) According to the British cascade chart for tree quality assessment, trees of high quality ('A' rated) are "trees, groups or woodland of significant conservation, historical, commemorative or other value (e.g. veteran trees or wood-pasture); trees, groups or woodland or particular visual importance as arboricultural and/or landscape features …..". In the British Standard tree survey submitted on behalf of IP1, there are a number of veteran trees on the site (and adjacent to it) which have not all been given an 'A' category rating, although they are deserving of it. The lines of trees marking the field boundaries could all be classified as 'A' category if assessed as groups.

b) A veteran oak tree growing between nos. 154 and 155k has been omitted from the tree survey.

c) Given many trees along the woodland edge of the SAC and those growing along the historic field boundaries are veteran trees, it is imperative that they are given due protection, which in turn should protect the hedgerows.

d) Veteran trees are likely to have cavities, dead and fractured branches, decay and peeling bark, which make them unsafe to visitors. If visitors are allowed close to the trees, detrimental pruning or even tree removal may be carried out on safety grounds. Therefore, an exclusion zone is

needed, so that any tree which fails, wholly or partially, will not impact on a visitor area. Also, to protect historic hedge-lines from trampling pressure. A conservative estimate of the height of the oaks is 22 metres. If a tree fails, it would not cause damage if the exclusion zone was 24 metres from the stem of the tree or mid-point of the hedge line. Details of how trees are to be safeguarded in this way will need to be submitted. This will require adjustment to the layout, as currently a number of lodges and amenity spaces are within these zones.

e) Proposed access road and paths through the hedge lines are distorting the integrity of the field boundaries and resulting in vegetation loss.

f) Indicative planting around the lodges and barrels is unlikely to succeed as a buffer to the SAC as it is too close to the buildings and may have to be pruned back, and may also be subject to trampling from visitors.

g) Some lodges are up to or very close to the hedge line and its trees, which will result in pressure to prune them back.

h) In light of the above, this part of the proposal fails to comply with policies N6, N7 and DG1, and refusal is recommended.

v) Project 2 – car parking

a) Some paths/road are proposed through the RPA's of important trees. BS5837 at 7.4 states that, in the case of veteran trees, no construction, including the installation of new hard surfacing, should occur within the RPA. There is encroachment of at least 3 veteran trees, nos 291, 293 and 180, likely resulting in their loss.

b) Exclusion zones are required for veteran trees as described above.

c) The vast majority of trees on the perimeter of car parks A and B are to be removed. Whilst these trees have been planted as part of a formalised landscape, presumably under a planning condition for a previous consent, they contribute to the appearance of the site, act as a green corridor, provide shade etc. Wholesale tree loss is not acceptable, and would further undermine the farmed parkland character.

d) In light of the above, this part of the proposal fails to comply with policies N6, N7 and DG1, and refusal is recommended.

Officer's Report

28. The OR, prepared for members of the Defendant's Panel, recommended that planning permission be refused for two reasons:

> "1. The proposal constitutes inappropriate development in the Green Belt. The proposal would have a significant impact on the openness of the Green Belt and would result in significant encroachment into the countryside. There is also harm arising to

> significant trees. A case of Very Special Circumstances does not exist which would outweigh this harm.
>
> 2. It has not been adequately demonstrated that the quantum of development proposed in Holiday Villages 1, 2 and 3 (outline), and the layout shown in Holiday Village 1 (full) could be achieved without causing harm to significant trees."

29. Reason no. 2 above related to the risk of harm to trees on the development site, and its boundary, not to the risk of harm to oaks and veteran trees in the SAC.

30. Section 7.10 of the OR set out the planning officer's advice in relation to the potential impact on trees within the development site, as follows:

    i) The professional opinion of the Tree Officer was that the rating in IP1's tree survey was incorrect, and some 31 trees should have been categorised as veteran trees, attracting the protection of paragraph 118 of the Framework and Policy NR2 of the emerging Borough Local Plan ("BLP"), which is afforded significant weight.

    ii) Holiday Village 1. Many trees along the woodland edge of the SAC, and those growing along the historic field boundaries were considered by officers to be veteran trees. An exclusion zone of 24 metres was needed to avoid harm or damage if a tree failed, which would result in pressure to prune or remove trees, and to avoid trampling pressure. A number of lodges and associated amenity space were proposed to be sited within the exclusion zone which was unacceptable and contrary to Policy NR2 of the BLP.

    iii) In relation to the car park reconfiguration, the proposed access road would come within the root protection area of a veteran oak, tree no. 180, contrary to British Standard advice, and would be likely to result in its loss, despite the applicant's arboriculturist's proposed technical solution.

    iv) The proposed service connection between tree numbers 291 and 293, which are veteran oaks, would intrude into the root protection area, contrary to British Standard guidance, and would be likely to result in their loss, contrary to policy.

    v) In Holiday Villages 2 and 3, the layout is purely indicative, but the number of units proposed would mean that some lodges, amenity space and part of the car park would be within the 24 metres exclusion zone.

    vi) In Holiday Village 3, a proposed path, wide enough for access vehicles, would intrude into the root protection area of veteran trees 257 and 260, contrary to British Standard advice, and likely to result in the loss of those trees, contrary to policy.

    vii) A proposed path between Holiday Villages 2 and 3 would intrude into the root protection area of veteran trees 241 and 242, contrary to BS advice, and likely to result in the loss of those trees, contrary to policy. There is no other suitable location for the path which would not also cause harm to significant trees.

viii) The quantum of development proposed (i.e. the number of units) could not be achieved without causing harm to significant trees, and the applicant has not demonstrated that this could be achieved whilst incorporating the 24 metre buffer and providing paths without causing harm to significant trees, contrary to policies N6 and emerging policy NR2, as well as guidance set out in the Framework.

31. In section 7.5, the OR considered the impact of the proposed development on the adjacent SSSI and SAC, in particular, the woodland. The OR advised the Panel that:

i) NE had advised that without appropriate mitigation, the application would have an adverse effect on the integrity of Windsor Forest and Great Park SAC, and would damage or destroy the interest and features of the Windsor Forest and Great Park SSSI;

ii) NE had advised that, in order to mitigate these adverse effects and make the development acceptable, mitigation measures should be secured including:

a) a Construction Environmental Management Plan ("CEMP");

b) a planting scheme for the development site, specifically including the buffer zone adjacent to the SAC and SSSI;

c) a lighting strategy;

d) detailed management proposals for mature and veteran trees, and hedgerows, within the site.

iii) Due to the proximity of the adjacent SSSI/SAC, "care would need to be taken to ensure works do not have an impact on this designated site" with particular reference to SUDS ponds, a number of which are proposed to be sited close to the boundary of the SSSI/SAC.

iv) A detailed CEMP that sets out clearly how any impact to the SSSI, SAC and the root protection zone of any mature or veteran trees within, or adjacent to the site, would be avoided was necessary to secure adequate protection. No detailed CEMP had been provided as yet, but it was considered this could be secured by planning condition.

v) The SES shows a buffer zone is proposed around the perimeter of the site, adjacent to the SSSI and SAC. Subject to a satisfactory LEMP being secured by planning condition, it is considered that the adjacent SSSI and SAC would be adequately protected during construction and operational phases.

32. Finally, at section 17.18 of the OR, headed "Planning Balance and Conclusion", the officer set out her conclusion that very special circumstances did not exist to justify the grant of planning permission for the proposed development (paragraph 17.18.3) and it had not been "demonstrated that the quantum of development proposed in Holiday Villages can be achieved without causing harm to significant trees, including veteran trees." (paragraph 17.18.4).

33. Paragraph 17.18.2 stated as follows:

"17.18.2 It is therefore important to identify the harm that would arise from the proposed development and identify the weight attributed to this harm, so that this can be considered in the balancing exercise. The table below summarises the identified harm that would arise from the proposed development, and the weight attributed to that harm.

Harm	Can VSC/mitigation overcome harm?	Weight attributed to harm
Inappropriate development in the Green Belt	No	Substantial
The harm to the Green Belt by reason of the loss of openness and through encroachment into the countryside	No	Significant
Impact on significant and veteran trees	No	Significant
Impact on PROW, through visual change and disturbance	Yes, through sensitively worded planning conditions to secure appropriate mitigation.	N/A
Impact on adjacent SSSI and SAC	Yes, through securing a detailed CEMP and LEMP through appropriate planning conditions	N/A
Impact on ecology	Yes, through securing mitigation by appropriate planning condition	

"

34. The planning officer also provided a further report to the Panel, entitled "Panel Update" addressing, *inter alia*, issues raised by IP1 in correspondence.

35. On 9 May 2018, IP1 sent a letter to the Defendant, taking issue with the OR. Amongst other matters, it repeated its representations, made in earlier correspondence, that the proposed 24 metre exclusion zone was in excess of the 15 metres recommended in NE's general advice and was not justified. The letter stated that a 20 metre exclusion zone had been provided and the proposed veteran tree reserves (protecting trees within the site as well as on the boundary) would further enhance the protection provided.

36. In fact, the proposed 20 metre exclusion zone was only intended to apply to the construction phase, not the operational phase. Table E6.1 of the ES set out mitigation measures proposed during construction and stated that "[t]he 20m buffer of the woodland will be designed as part of the LEMP and where no infrastructure will enter the buffer, this will be fenced off to prevent heavy plant and material storage in these areas." Correspondence from IP1 (25 September 2017) and Baker Consultants (16 October 2017) to the Council indicated that only a 15 metre buffer would be provided during the operational stage. This was later confirmed in the SES, at paragraph 3.10, which referred to Plan IP02 which "shows a 15m buffer to the ancient woodland, in line with guidance from Natural England".

Planning Committee (Development Management Panel) meeting

37. At the Panel's meeting on 10 May 2018 the planning officers displayed a set of PowerPoint slides which accompanied the presentation of the application and the Officers' advice. One slide showed a plan of the application site and identified "Areas of conflict with Veteran trees".

38. The minutes of the Panel meeting held on 10 May 2018 record that the Panel:

> "…voted to APPROVE the application against the recommendations of the Head of Planning, with the conditions and Legal Agreement to be delegated to the Head of Planning, acting in consultation with the Chairman of the Panel (Cllr Burbage), the Proposer of the Motion (Cllr Quick), the seconder of the Proposal and Ward Councillor (Cllr Bicknell), with a time limit of two months. The application would return to Panel if the Legal Agreement and Conditions could not be produced and agreed in time and the application was also subject to referral to the National Planning Casework Unit and subject to the Secretary of State not calling the application in to him for decision.
>
> The Legal Advisor to the Panel noted that reasons for approval that were considered by the Panel to amount to Very Special Circumstances to clearly outweigh the harm to the Green Belt and other harm were the economic benefits which were given substantial weight and that significant weight was given to changes to the parking and traffic arrangements as well as to the creation of accommodation."

The grant of permission

39. Nearly a year later, on 10 April 2019 the Defendant issued a Decision Notice granting full planning permission for four projects ("projects 1-4") and outline planning permission for an additional four projects ("projects 5-8"), subject to 30 conditions. Conditions 3, 8, 10 and 11 made detailed provision for the protection of significant and veteran trees, in line with the ES and SES. The delay was largely caused by the referral of the application to the Secretary of State to consider whether to call it in for his own determination (which he declined to do).

40. The parties entered into a section 106 Agreement which made provision, among other matters, for a LEMP to give effect to the tree protection measures described in the ES and SES.

Legal framework

(i) Judicial review of planning decisions

41. In a claim for judicial review, the Claimant must establish a public law error on the part of the decision-maker. The exercise of planning judgment and the weighing of the various issues are matters for the decision-maker and not for the Court: *Seddon Properties Ltd v Secretary of State for the Environment* (1981) 42 P & CR 26. An application for judicial review is not an opportunity for a review of the planning merits: *Newsmith v Secretary of State for the Environment, Transport and the Regions* [2001] EWHC Admin 74.

(ii) Decision-making

42. The determination of an application for planning permission is to be made in accordance with the development plan, unless material considerations indicate otherwise. Section 70(2) of the TCPA 1990 provides that the decision-maker shall have regard to the provisions of the development plan, so far as material to the application.

43. Section 38(6) of the Planning and Compulsory Purchase Act 2004 ("PCPA 2004") provides:

> "If regard is to be had to the development plan for the purpose of any determination to be made under the planning Acts, the determination must be made in accordance with the plan unless material considerations indicate otherwise."

(iii) The National Policy Planning Framework

44. National policy expressed in the Framework is a material consideration. The references below are from the 2012 edition as it was in force at the date of the resolution to grant planning permission, in May 2018.

45. In section 11, entitled "Conserving and enhancing the natural environment", paragraph 118 provided that, when determining planning applications, local planning authorities should aim to conserve and enhance biodiversity by applying the principles set out, which included:

> "planning permission should be refused for development resulting in the loss or deterioration of irreplaceable habitats, including ancient woodland and the loss of aged or veteran trees found outside ancient woodland, unless the need for, and benefits of, the development in that location clearly outweigh the loss;"

46. In section 9, entitled "Protecting Green Belt land", paragraph 79 provided:

> "The government attaches great importance to Green Belts. The fundamental aim of Green Belt policy is to prevent urban sprawl by keeping land permanently open; the essential characteristics of Green Belts are their openness and their permanence."

47. National policy on proposals affecting the Green Belt provided as follows (so far as is material):

> "87. ….inappropriate development is, by definition, harmful to the Green Belt and should not be approved except in very special circumstances.
>
> 88. When considering any planning application, local planning authorities should ensure that substantial weight is given to any harm to the Green Belt. 'Very special circumstances' will not exist unless the potential harm to the Green Belt by reason of inappropriateness, and any other harm resulting from the proposal, is clearly outweighed by other considerations.
>
> 89. A local planning authority should regard the construction of new buildings as inappropriate in the Green Belt. Exceptions to this are: *[not applicable here]*"

Ground 2: failure to give adequate reasons

48. A local planning authority's statutory duty to give reasons for its decisions on applications for planning permission is set out in article 35 of the Town and Country Planning (Development Management Procedure) (England) Order 2015 (SI 2015/595) ("the 2015 Order"), which provides, so far as is material:

> "35. Written notice of decision or determination relating to a planning application
>
> (1) When the local planning authority give notice of a decision or determination on an application for planning permission or for approval of reserved matters—

> (a) where planning permission is granted subject to conditions, the notice must state clearly and precisely their full reasons—
>
> (i) for each condition imposed; and
>
> (ii) in the case of each pre-commencement condition, for the condition being a pre-commencement condition;
>
> (b) where planning permission is refused, the notice must state clearly and precisely their full reasons for the refusal, specifying all policies and proposals in the development plan which are relevant to the decision;
>
> ……”

49. In 2013, the Secretary of State, pursuant to his duties under the TCPA 1990, removed the duty on local planning authorities to give “summary reasons” for the grant of planning permission (Town and Country Planning (Development Management and Procedure)(England)(Amendment) Order 2013 (SI 2013/1238)).

50. However, even in cases where there is no statutory duty to give reasons, and a public body has not volunteered reasons, at common law a duty to give reasons may be implied in order to meet the requirements of fairness.

51. The Supreme Court, in *R* (*CPRE Kent) v Dover District Council* [2017] UKSC 79, [2018] 1 WLR 108 described the common law duty in the following terms, per Lord Carnwath at [59] – [60]:

> “59 … However it should not be difficult for councils and their officers to identify cases which call for a formulated statement of reasons, beyond the statutory requirements. Typically they will be cases where, as in *Oakley* and the present case, permission has been granted in the face of substantial public opposition and against the advice of officers, for projects which involve major departures from the development plan, or from other policies of recognised importance (such as the “specific policies” identified in the NPPF - para 22 above). Such decisions call for public explanation, not just because of their immediate impact; but also because, as Lord Bridge pointed out (para 45 above), they are likely to have lasting relevance for the application of policy in future cases.
>
> 60 Finally, with regard to Sales LJ's concerns about the burden on members, it is important to recognise that the debate is not about the necessity for a planning authority to make its decision on rational grounds, but about when it is required to disclose the reasons for those decisions, going beyond the documentation that already exists as part of the decision-making process. Members are of course entitled to depart from their officers' recommendation for good reasons, but their reasons for doing so need to be capable of articulation, and open to public scrutiny.

> There is nothing novel or unduly burdensome about this. The Lawyers in Local Government Model Council Planning Code and Protocol (2013 update) gives the following useful advice, under the heading "Decision-making":
>
> > "Do make sure that if you are proposing, seconding or supporting a decision contrary to officer recommendations or the development plan that you clearly identify and understand the planning reasons leading to this conclusion / decision. These reasons must be given prior to the vote and be recorded. Be aware that you may have to justify the resulting decision by giving evidence in the event of any challenge." (their emphasis)"

52. Lord Carnwath set out the legal principles to be applied in respect of the standard of reasons at [35] to [37] and [42]:

> "35. A "broad summary" of the relevant authorities governing reasons challenges was given by Lord Brown in *South Buckinghamshire District Council v Porter (No 2)* [2004] 1 WLR 1953, para 36:
>
> > "The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the 'principal important controversial issues', disclosing how any issue of law or fact was resolved. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision. The reasoning must not give rise to a substantial doubt as to whether the decision-maker erred in law, for example by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds. But such adverse inference will not readily be drawn. The reasons need refer only to the main issues in the dispute, not to every material consideration. They should enable disappointed developers to assess their prospects of obtaining some alternative development permission, or, as the case may be, their unsuccessful opponents to understand how the policy or approach underlying the grant of permission may impact upon future such applications. Decision letters must be read in a straightforward manner, recognising that they are addressed to parties well aware of the issues involved and the arguments advanced. A reasons challenge will only succeed if the party aggrieved can satisfy the court that he has genuinely been substantially

> prejudiced by the failure to provide an adequately reasoned decision."

36. In the course of his review of the authorities he had referred with approval to the "felicitous" observation of Sir Thomas Bingham MR in *Clarke Homes Ltd v Secretary of State for the Environment* (1993) 66 P & CR 263, 271-272, identifying the central issue in the case as:

> "… whether the decision of the Secretary of State leaves room for genuine as opposed to forensic doubt as to what he has decided and why. This is an issue to be resolved as the parties agree on a straightforward down-to-earth reading of his decision letter without excessive legalism or exegetical sophistication."

37. There has been some debate about whether Lord Brown's words are applicable to a decision by a local planning authority, rather than the Secretary of State or an inspector. It is true that the case concerned a statutory challenge to the decision of the Secretary of State on a planning appeal. However, the authorities reviewed by Lord Brown were not confined to such cases. They included, for example, the decision of the House of Lords upholding the short reasons given by Westminster City Council explaining the office policies in its development plan (*Westminster City Council v Great Portland Estates plc* [1985] AC 661, 671-673). Lord Scarman adopted the guidance of earlier cases at first instance, not limited to planning cases (eg *In re Poyser and Mills' Arbitration* [1964] 2 QB 467, 478), that the reasons must be "proper, adequate and intelligible" and can be "briefly stated" (p 673E-G). Similarly local planning authorities are able to give relatively short reasons for refusals of planning permission without any suggestion that they are inadequate."

…..

"42. There is of course the important difference that, as Sullivan J pointed out in *Siraj*, the decision-letter of the Secretary of State or a planning inspector is designed as a stand-alone document setting out all the relevant background material and policies, before reaching a reasoned conclusion. In the case of a decision of the local planning authority that function will normally be performed by the planning officers' report. If their recommendation is accepted by the members, no further reasons may be needed. Even if it is not accepted, it may normally be enough for the committee's statement of reasons to be limited to the points of difference. However the essence of the duty remains the same, as does the issue for the court: that is, in the words of Sir Thomas Bingham MR, whether the information so provided by the authority leaves room for "genuine doubt … as to what (it) has decided and why."

53. In my judgment, the Council was under a common law duty to give express reasons for the grant of planning permission, for the following reasons. The Planning Committee decided not to follow the recommendation in the OR to refuse planning permission, and its reasons for granting permission could not be discerned from the OR. There was a public interest in the decision since, as the OR advised, this was a major new development in the Green Belt, which did not fall within any of the exceptions in the Framework, and, applying paragraph 87, it was to be treated as inappropriate development, which was by definition harmful to the Green Belt, and not to be approved except in very special circumstances. The impact on the adjacent Ancient Woodland, SAC and SSSI had to be considered, as well as the impact on the large number of veteran trees on the site boundary and within the site.

54. Similar considerations arose in *Oakley v South Cambridgeshire District Council* [2017] EWCA Civ 71, in which the Court of Appeal held that the common law duty arose because:

    i) "The decision in this case involved a development on the Green Belt …. Public policy requires strong countervailing benefits before such a development can be allowed, and affected members of the public should be told why the committee considers the development to be justified notwithstanding its adverse effect on the countryside…" (per Elias LJ at [60]);

    ii) "the fact that the committee is disagreeing with a careful and clear recommendation from a highly experienced officer on a matter of such potential significance to very many people suggests that some explanation is required … the dictates of good administration and the need for transparency are particularly strong here …" per Elias LJ at [61].

55. In *CPRE Kent*, Lord Carnwath approved the Court of Appeal's decision in *Oakley* and cited it as an illustration of the circumstances in which the common law duty to give reasons arose.

56. Furthermore, in this case, the Panel was advised by its officers that it was required to give reasons for its decision (transcript line 1.252), and its Legal Adviser expressly set out the reasons in the Minutes. Those reasons then had to meet the required standard.

57. The approved minute set out the reasons as follows:

> "The Legal Advisor to the Panel noted that reasons for approval that were considered by the Panel to amount to Very Special Circumstances to clearly outweigh the harm to the Green Belt and other harm were the economic benefits which were given substantial weight and that significant weight was given to changes to the parking and traffic arrangements as well as to the creation of accommodation."

58. There was no express reference to trees, and there were differing views as to whether the words "other harm" referred to the potential harm to trees identified in the OR.

59. The Claimant conceded that the Council was entitled to rely upon the transcript of the proceedings in the meeting when assessing the adequacy of the reasons given. In the

debate, it was clear that the Panel viewed the economic benefits of the proposed development (employment, increase of visitors to Windsor) as very substantial, and the majority of members were very keen to support the application. On a close analysis of the transcript, it is apparent that the majority of members did not accept the advice given in the OR (based on the Tree Officer's advice) that there was a risk of harm to significant and veteran trees on the development site which would not be overcome by the proposed mitigating measures. The majority of Members concluded that IP1 would adequately protect the aged and veteran trees on the development site, by means of the various mitigating measures proposed. The Members did not have the benefit of a draft set of conditions nor a draft section 106 Agreement at the meeting. However, they would have been able to see the detailed mitigation measures set out in the ES. The Council and IP1 submitted that the text of the conditions and the section 106 Agreement should be considered as part of the reasons for the decision to grant planning permission. I agree with that submission as a matter of general principle, although it was unfortunate that these documents were not published until 11 months later on this occasion.

60. In light of the expression of views at the Panel meeting, where the majority were not persuaded that there would be any harm to significant and veteran trees, I do not consider that the words "other harm" in the reasons given in the minutes can have been intended to refer to harm to significant and veteran trees.

61. I am satisfied that the resolution, when supplemented by the transcript of the meeting, the conditions and section 106 Agreement, gives reasons for the decision which are adequate and intelligible and meets the standard set out by Lord Brown in the *South Bucks* case.

62. However, I observe that, as a matter of good practice, local planning authorities should set out adequate reasons in the Minutes (or an annexe thereto), and not rely on a transcript of the meeting as the source of their reasons. It is often difficult for members of the public to discern the reasons from a lengthy transcript, in which Members are expressing different views, particularly when, as in this case, only an audio recording is posted on the planning website.

63. For the reasons set out above, Ground 2 does not succeed.

Ground 3: failure to reconsider the decision in light of the revised policy on veteran trees in the July 2018 edition of the Framework

64. It was common ground that the revision to the policy on veteran trees introduced by the July 2018 edition of the Framework significantly strengthened the protection afforded to aged or veteran trees.

65. The policy in paragraph 118 of the Framework (2012) stated:

> "planning permission should be refused for development resulting in the loss or deterioration of irreplaceable habitats, including ancient woodland and the loss of aged or veteran trees found outside ancient woodland, unless the need for, and

> benefits of, the development in that location clearly outweigh the loss."

66. It was replaced by paragraph 175(c) of the Framework (2018) which states:

> "development resulting in the loss or deterioration of irreplaceable habitats (such as ancient woodland and ancient or veteran trees) should be refused, unless there are wholly exceptional reasons and a suitable compensation strategy exists."

67. The Glossary to the Framework defines ancient or veteran trees as being:

> "A tree which, because of its age, size and condition, is of exceptional biodiversity, cultural or heritage value. All ancient trees are veteran trees. Not all veteran trees are old enough to be ancient, but are old relative to other trees of the same species. Very few trees of any species reach the ancient life-stage."

68. In *R (Kides) v South Cambridgeshire District Council* [2002] EWCA Civ 1370 the Court of Appeal said, per Jonathan Parker LJ, at [126]:

> "In practical terms, therefore, where since the passing of the resolution some new factor has arisen of which the delegated officer is aware, and which might rationally be regarded as a "material consideration" for the purposes of section 70(2), it must be a counsel of prudence for the delegated officer to err on the side of caution and refer the application back to the authority for specific reconsideration in the light of that new factor. In such circumstances the delegated officer can only safely proceed to issue the decision notice if he is satisfied (a) that the authority is aware of the new factor, (b) that it has considered it with the application in mind, and (c) that on a reconsideration the authority *would* reach (not *might* reach) the same decision."

69. In *Wakil v LB Hammersmith and Fulham* [2013] EWHC 2833, Lindblom J. said, at [94], "what is required is not merely some obvious change in circumstances but a change that might have had a material effect on the authority's deliberations had it occurred before the decision was made".

70. Thus, a material change in policy is not, of itself, enough for the Claimant to succeed on this ground. The Claimant has to satisfy the Court that the new policy in the Framework (2018) on veteran trees was material to the decision the Panel took in April 2018 in the sense that it may have had a material effect on the Panel's deliberations had it been in place in April 2018.

71. Both paragraph 118 of the Framework (2012) and paragraph 175(c) of the Framework (2018) concern the "loss or deterioration" of irreplaceable habitats, including veteran trees. As I have already found, on this application the Council concluded that the mitigating measures to be included in the planning conditions and the section 106 Agreement would ensure that there was no harm to veteran trees. Therefore, these policies did not apply to this application, and they were not material considerations.

The change in the policy in July 2018 could not have led to a different conclusion on this application.

72. For these reasons, Ground 3 does not succeed.

Ground 4: failure to undertake an appropriate assessment

73. The Habitats Directive makes provision in article 6 for the conservation of special areas of conservation, which are sites of Community importance designated by Member States.

74. Article 6(3) provides:

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

75. The Habitats Directive is implemented into domestic law by the Habitats Regulations 2017. Regulation 63 provides, so far as is material:

> "(1) A competent authority, before deciding to undertake, or give any consent, permission or other authorisation for, a plan or project which—
> (a) is likely to have a significant effect on a European site or a European offshore marine site (either alone or in combination with other plans or projects), and
> (b) is not directly connected with or necessary to the management of that site,
> must make an appropriate assessment of the implications of the plan or project for that site in view of that site's conservation objectives.
>
> (2) A person applying for any such consent, permission or other authorisation must provide such information as the competent authority may reasonably require for the purposes of the assessment or to enable it to determine whether an appropriate assessment is required.
>
> (3) The competent authority must for the purposes of the assessment consult the appropriate nature conservation body and

> have regard to any representations made by that body within such reasonable time as the authority specifies.
>
> (4) It must also, if it considers it appropriate, take the opinion of the general public, and if it does so, it must take such steps for that purpose as it considers appropriate.
>
> (5) In the light of the conclusions of the assessment, and subject to regulation 64, the competent authority may agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the European site or the European offshore marine site (as the case may be).
>
> (6) In considering whether a plan or project will adversely affect the integrity of the site, the competent authority must have regard to the manner in which it is proposed to be carried out or to any conditions or restrictions subject to which it proposes that the consent, permission or other authorisation should be given.
>
> ….."

76. Pursuant to Regulation 70 of the Habitats Regulations 2017, regulation 63 applies to the grant of planning permission under Part 3 of the TCPA 1990. Regulation 70 provides, so far as is material:

> "(1) The assessment provisions apply in relation to—
> (a) granting planning permission on an application under Part 3 of the TCPA 1990 (control over development); …
>
> (2) Where the assessment provisions apply, the competent authority may, if it considers that any adverse effects of the plan or project on the integrity of a European site or a European offshore marine site would be avoided if the planning permission were subject to conditions or limitations, grant planning permission, or, as the case may be, take action which results in planning permission being granted or deemed to be granted, subject to those conditions or limitations.
>
> (3) Where the assessment provisions apply, outline planning permission must not be granted unless the competent authority is satisfied (whether by reason of the conditions and limitations to which the outline planning permission is to be made subject, or otherwise) that no development likely adversely to affect the integrity of a European site or a European offshore marine site could be carried out under the permission, whether before or after obtaining approval of any reserved matters.
>
> (4) In paragraph (3), "outline planning permission" and "reserved matters" have the same meanings as in section 92 of the TCPA 1990 (outline planning permission)."

Regulation 61 of the Habitats Regulations 2017 defines "the assessment provisions" as including regulation 63.

77. Thus, by regulation 70(3) of the Habitats Regulations 2017, UK domestic law expressly requires an authority to undertake an appropriate assessment before granting outline planning permission, in those applications for planning permission where the assessment criteria in regulation 63 of the Habitats Regulations 2017 are met. There is no equivalent provision in the Habitats Directive, probably because the UK's two-stage consent procedure (outline planning permission followed by approval of reserved matters) does not exist in other EU Member States.

78. Guidance on the interpretation of article 6(3) of the Habitats Directive has been given by the CJEU in Case C-127/02 *Landelijke Vereniging tot Behoud van de Waddenzee v Staatsscretaris van Lanbouw (Coöperatieve Producentenorganisatie van de Nedelandse Kokkelvisserji UA intervening)* [2005] All ER (EC) 353. The court described the threshold for likely significant effects at [41]:

> "… the triggering of the environmental protection mechanism provided for in Article 6(3) of the Habitats Directive does not presume—as is, moreover, clear from the guidelines for interpreting that article drawn up by the Commission of the European Communities, entitled 'Managing Natura 2000 Sites: The provisions of article 6 of the "Habitats" Directive (92/43/EEC)'—that the plan or project considered definitely has significant effects on the site concerned but follows from the mere probability that such an effect attaches to that plan or project."

79. The court considered the content of an appropriate assessment in the following passages of its judgment:

> "52. As regards the concept of 'appropriate assessment' within the meaning of Article 6(3) of the Habitats Directive, it must be pointed out that the provision does not define any particular method for carrying out such an assessment.
>
> 53. None the less, according to the wording of that provision, an appropriate assessment of the implications for the site concerned of the plan or project must precede its approval and take into account the cumulative effects which result from the combination of that plan or project with other plans or projects in view of the site's conservation objectives.
>
> 54. Such an assessment therefore implies that all the aspects of the plan or project which can, either individually or in combination with other plans or projects, affect those objectives must be identified in the light of the best scientific knowledge in the field. Those objectives may, as is clear from Articles 3 and 4 of the Habitats Directive, in particular article 4(4), be established on the basis, inter alia, of the importance of the sites for the maintenance or restoration at a favourable conservation status of

> a natural habitat type in annex I to that Directive or a species in annex II thereto and for the coherence of Natura 2000, and of the threats of degradation or destruction to which they are exposed …..
>
> 56. It is therefore apparent that the plan or project in question may be granted authorisation only on the condition that the competent national authorities are convinced that it will not adversely affect the integrity of the site concerned."

80. In Case C-258/11 *Sweetman v An Bord Pleanála (Galway County Council intervening)* [2014] PTSR 1092 the CJEU described the two stages envisaged by article 6(3), at [29] and [31]:

> "29. That provision thus prescribes two stages. The first, envisaged in the provision's first sentence, requires the member states to carry out an appropriate assessment of the implications for a protected site of a plan or project when there is a likelihood that the plan or project will have a significant effect on that site …..."
>
> "31. The second stage, which is envisaged in the second sentence of Article 6(3) of the Habitats Directive and occurs following the aforesaid appropriate assessment, allows such a plan or project to be authorised on condition that it will not adversely affect the integrity of the site concerned, subject to the provisions of Article 6(4)."

81. In Case C-461/17 *Holohan v An Board Pleanala*, the CJEU set out the requirements of a lawful appropriate assessment under article 6(3) of the Directive in the following terms:

> "33. Under Article 6(3) of the Habitats Directive, an appropriate assessment of the implications of a plan or project for the site concerned implies that, before the plan or project is approved, all the aspects of the plan or project which can, either individually or in combination with other plans or projects, affect the conservation objectives of that site must be identified, in the light of the best scientific knowledge in the field. The competent national authorities are to authorise an activity on the protected site only if they have made certain that it will not adversely affect the integrity of that site. That is so when there is no reasonable scientific doubt as to the absence of such effects (judgment of 8 November 2016, *Lesoochranárske zoskupenie VLK*, C-243/15, EU:C:2016:838, paragraph 42 and the case-law cited).
>
> 34. The assessment carried out under that provision may not have lacunae and must contain complete, precise and definitive findings and conclusions capable of dispelling all reasonable scientific doubt as to the effects of the proposed works on the protected area concerned (judgment of 25 July 2018, *Grace and*

> *Sweetman*, C-164/17, EU:C:2018:593, paragraph 39 and the case-law cited).
>
> …..
>
> 43. In accordance with the case-law cited in paragraphs 33 and 34 of the present judgment, an appropriate assessment of the implications of a plan or project for a protected site entails, first, that, before that plan or project is approved, all aspects of that plan or project that might affect the conservation objectives of that site are identified. Second, such an assessment cannot be considered to be appropriate if it contains lacunae and does not contain complete, precise and definitive findings and conclusions capable of dispelling all reasonable scientific doubt as to the effects of the plan or project on that site. Third, all aspects of the plan or project in question which may, either individually or in combination with other plans or projects, affect the conservation objectives of that site must be identified, in the light of the best scientific knowledge in the field.
>
> 44. Those obligations, in accordance with the wording of Article 6(3) of the Habitats Directive, are borne not by the developer, even if the developer is, as in this case, a public authority, but by the competent authority, namely the authority that the Member States designate as responsible for performing the duties arising from that directive.
>
> 45. It follows that that provision requires the competent authority to catalogue and assess all aspects of a plan or project that might affect the conservation objectives of the protected site before granting the development consent at issue."

82. In Case C-323/17 *People over Wind v Collte Teoranta* [2018] PTSR 1668, the CJEU held, at [36]:

> "36…..a full and precise analysis of the measures capable of avoiding or reducing any significant effects on the site concerned must b carried out not at the screening stage, but specifically at the stage of the appropriate assessment."

83. In *R (Champion) v North Norfolk DC* [2015] 1 WLR 3710 at [41]), Lord Carnwath held that, while a high standard of investigation was required, the assessment had to be appropriate to the task in hand, and it ultimately rested on the judgment of the local planning authority:

> "41. The process envisaged by article 6(3) should not be over-complicated. As Richards LJ points out, in cases where it is not obvious, the competent authority will consider whether the "trigger" for appropriate assessment is met (and see paras 41-43 of *Waddenzee*). But this informal threshold decision is not to be confused with a formal "screening opinion" in the EIA sense.

> The operative words are those of the Habitats Directive itself. All that is required is that, in a case where the authority has found there to be a risk of significant adverse effects to a protected site, there should be an "appropriate assessment". "Appropriate" is not a technical term. It indicates no more than that the assessment should be appropriate to the task in hand: that task being to satisfy the responsible authority that the project "will not adversely affect the integrity of the site concerned" taking account of the matters set in the article. As the court itself indicated in Waddenzee the context implies a high standard of investigation. However, as Advocate General Kokott said in *Waddenzee* [2005] All ER (EC) 353, para 107:
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> > "the necessary certainty cannot be construed as meaning absolute certainty since that is almost impossible to attain. Instead, it is clear from the second sentence of article 6(3) of the Habitats Directive that the competent authorities must take a decision having assessed all the relevant information which is set out in particular in the appropriate assessment. The conclusion of this assessment is, of necessity, subjective in nature. Therefore, the competent authorities can, from their point of view, be certain that there will be no adverse effects even though, from an objective point of view, there is no absolute certainty."
>
> In short, no special procedure is prescribed, and, while a high standard of investigation is demanded, the issue ultimately rests on the judgment of the authority."

84. It was common ground before me that an appropriate assessment should have been undertaken to assess the impact of the proposed development on the SAC. NE was mistaken when it initially advised otherwise.

85. The Council submitted that an Appropriate Assessment had, in substance, been undertaken by the process of engagement between its planning officers, NE, and IP1's consultants, which culminated in the OR's assessment.

86. I accept the Claimant's submission that section 7.5 of the OR was too brief and lacking in detail to meet the requirement of an Appropriate Assessment, on its own. Although IP1 has produced a number of detailed assessments in support of its application, it is an essential feature of an Appropriate Assessment that is carried out by the competent authority i.e. the local planning authority, rather than by the developer who stands to gain from the success of the application.

87. I conclude, therefore, that the Council failed to carry out an Appropriate Assessment, in breach of the Habitats Directive and the Habitats Regulations 2017

88. The Council and IP1 submitted that section 31(2A) of the Senior Courts Act 1981 applied, and relief should be refused because it was highly likely that the outcome

would not have been substantially different if the conduct complained of had not occurred.

89. I was assisted by Dove J.'s review of the authorities on the exercise of the discretion to refuse relief in *Canterbury City Council v Secretary of State for Housing, Communities and Local Government* [2019] EWHC 1211 (Admin), at [78] to [83]. He concluded, at [84]:

> "84. To attempt to draw the threads together, it is beyond argument that in cases where there has been a breach of European environmental law the court retains a discretion not to quash that decision on the grounds of that illegality. It is for the decision-taker, in this case the Defendant, to demonstrate that the decision reached would inevitably been the same absent the legal error. In doing so the court must be careful to avoid trespassing into the "forbidden territory" of evaluating the substantive merits of the decision. Ultimately the court is not, unlike some other tribunals or jurisdictions, provided with the complete "case file" or all of the material before the decision-taker, and therefore it is not afforded the same scope for its consideration of the case as the original decision-taker; it is therefore not equipped to remake the decision in the event that illegality is found. If the court is satisfied that the decision would necessarily have been the same without the error of law which infects it then the court can exercise its discretion not to quash the decision. That judgment must be reached on the basis of the facts and matters as known at the time of the decision being taken. These principles are of equal application to a case involving a breach of European law obligations where the case-law endorses the withholding of substantive relief in cases where the decision in question would not have been different without the procedural defect invoked by the Claimant. In making the evaluation it would be relevant to consider, amongst other matters, the seriousness of the breach of European law and whether or not that breach has deprived the public of a guarantee introduced with a view to allowing the public access to environmental information and "to be empowered to participate in decision making"."

90. Dove J. went on to conclude in *Canterbury City Council* that the decision would have been the same if no error of law had occurred, applying the test in *Simplex Holdings (GE) v Secretary of State for the Environment* (1989) 57 P & CR 306, because the questions in Article 6(3) of the Directive were answered in the extensive material provided; there had been extensive consultation; and no concerns were raised in relation to impacts upon European sites.

91. Applying the test under section 31(2A) of the Senior Courts Act 1981, applicable to judicial review claims, I am satisfied that it is highly likely that the outcome would not have been substantially different if an Appropriate Assessment had been undertaken, for the following reasons:

i) IP1 carried out extensive, detailed assessments, first identifying an adverse impact on the integrity of the SAC, and then assessing the effectiveness of proposed mitigation measures.

ii) NE, the statutory consultee, sought further information from IP1 and was eventually satisfied, following submission of the SES, that the adverse effect on the integrity of the SAC could be mitigated, so as to make the development acceptable.

iii) The proposals were the subject of extensive consultation and there was no disagreement by anyone, including the Claimant, with NE's assessment.

iv) The planning officers considered IP1's proposals and NE's advice, and concluded that the impact on the adjacent SAC could be mitigated by securing an appropriate CEMP and LEMP by means of planning conditions. Although the CEMP and LEMP had not been drafted at the date of the OR, the proposed mitigation, which would be incorporated into the CEMP and LEMP were substantially set out in the ES and SES

v) The approach adopted by IP1, NE and the Council was consistent with the requirements of the Habitats Directive, as set out above.

vi) The Panel appears to have accepted the OR's advice on this issue.

92. Plan IP02, showing the 15 metre buffer for the operational phase, was referred to in the SES and submitted as part of the planning application. Therefore both NE and the Council must have been aware of the depth of the proposed buffer when concluding that the mitigation measures proposed by IP1 were sufficient to mitigate the adverse effect of the proposed development on the SAC.

93. For these reasons, Ground 4 succeeds, but no relief will be granted pursuant to section 31(2A) of the Senior Courts Act 1981.

Conclusion

94. For the reasons set out above, the claim for judicial review is dismissed.