Judgments

[2011] All ER (D) 196 (Oct)

Feeney v Oxford City Council and another

[2011] EWHC 2699 (Admin)

QBD, ADMINISTRATIVE COURT

Stephen Morris QC sitting as a Deputy High Court Judge

24 October 2011

Town and country planning - Development - Development plan - Policy - First defendant local authority adopting development plan - Whether development plan would cause harm to special are of conservation - Whether decision to adopt development plan unlawful.

Judgment

JUDGMENT: APPROVED BY THE COURT FOR HANDING DOWN (SUBJECT TO EDITORIAL CORRECTIONS)

MR STEPHEN MORRIS QC:

Introduction

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

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

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

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

The Parties and these proceedings

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

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

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

The Issues

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

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

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

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

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

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

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

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

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

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

The Legal Framework

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

12. Section 15 of the 2004 Act requires a local planning authority to prepare and maintain a scheme to be known as their "local development scheme". The local development scheme must specify the local development documents which are to be "development plan documents" ("DPDs"). The Core Strategy DPD is specified as a DPD in the local development scheme for Oxford. By s.17(8) a document is a "local development document" only in so far as it (a) is adopted by resolution of the local planning authority as such and (b) is approved by the Secretary of State. By section 20, the local planning authority has a duty to refer

every DPD to the Secretary of State for independent examination, to be carried out by a person appointed by the Secretary of State. The purpose of independent examination in respect of a DPD is to determine whether it satisfies specified legal requirements and whether it is "sound": s.20(5)(a) and (b). Any person who makes representations seeking to change a DPD has a right to be heard before the independent inspector: s.20(6). By s.23(2) and (3), the local planning authority has the power to adopt a DPD, with or without modifications, but only as recommended by the inspector. By s.24, local development documents must be in conformity with the regional spatial strategy ("RSS") for the relevant region.

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

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

Regulation 6(3) provides that a document of the description in paragraph (1)(a) is to be referred to as a Core Strategy. Regulation 6(1)(a) refers to any document containing statements of-

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

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

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

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

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

'4.5. It is essential that the Core Strategy makes clear spatial choices about where developments should go in broad terms. This strong direction will mean that the work involved in the preparation of any subsequent DPDs is reduced. It is also means that decisions on planning applications can be given a clear steer immediately.

4.6. Core strategies may allocate specific sites for development. These should be those sites considered central to achievement of the strategy. Progress on the Core Strategy should not be held up by inclusion of non strategic sites'.

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

Challenge under s.113

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

15. Section 113 is the statutory successor to ss.284 and 287 Town and Country Planning Act 1990. The

approach to ss. 284 and 287 of the 1990 Act was the same as that under s.288 of that Act (dealing with appeals from decisions of the Secretary of State). A challenge under s.284 (and s.288) of the 1990 Act (and thus under s.113(2)(a)) can be made only on a question of law. Questions of fact, degree, assessment and judgment are not within the scope of the power. Nevertheless a s.288 challenge (and thus a s.113(2) challenge) can be made on the basis of the judicial review test of *Wednesbury* unreasonableness (i.e. irrationality). However the Court will be astute to ensure that questions of fact are not dressed up as questions of law and, further, not to enter upon the "planning merits" of the decision or document in question. see *Newsmith Stainless Ltd v Secretary of State for Environment, Transport and the Regions* [2001] EWHC 74 §§5-8 and *Hammersmatch Properties Limited v. First Secretary of State* [2005] EWCA Civ 1360 at §§ 32-33.

Strike out and summary judgment

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

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

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

The Habitats Directive

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

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

6.4. If, in spite of a negative assessment of the implications for the site and in the absence of alternative solutions, a plan or project must nevertheless be carried out for imperative reasons of overriding public interest, including those of a social or economic nature, the Member State shall take all compensatory measures necessary to ensure that the overall coherence of Nature 2000 is protected...."

The Conservation of Habitats and Species Regulations 2010

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

21. Part 6 of the Habitats Regulations is entitled "Assessment of Plans and Projects". Under chapter 1 of Part

6, regulation 61 provides:

"61 - Assessment of implications for European sites and European offshore marine sites

(1) A competent authority, before deciding to undertake, or give any consent, permission or other authorisation for, a plan or project which-

(a) is likely to have a significant effect on a European site or a European offshore marine site (either alone or in combination with other plans or projects), and

(b) is not directly connected with or necessary to the management of that site,

must make an appropriate assessment of the implications for that site in view of that site's conservation objectives.

(2) A person applying for any such consent, permission or other authorisation must provide such information as the competent authority may reasonably require for the purposes of the assessment or to enable them to determine whether an appropriate assessment is required.

(3) The competent authority must for the purpose of the assessment consult the appropriate nature conservation body and have regard to any representations made by that body within such reasonable time as the authority specify.

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

(5) In the light of the conclusions of the assessment, and subject to regulation 62 (considerations of overriding public interest), the competent authority may agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the European site or the European offshore marine site (as the case may be).

(6) In considering whether a plan or project will adversely affect the integrity of the site, the authority must have regard to the manner in which it is proposed to be carried out or to any conditions or restrictions subject to which they propose that the consent, permission or other authorisation should be given."

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

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

Where a land use plan--

(a) is likely to have a significant effect on a European site or a European offshore marine site (either alone or in combination with other plans or projects), and

(b) is not directly connected with or necessary to the management of the site,

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

(2) The plan-making authority must for the purposes of the assessment consult the appropriate nature conservation body and have regard to any representations made by that body within such reasonable time as the authority specify.

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

(4) In the light of the conclusions of the assessment, and subject to regulation 103 (considerations of overriding public interest), the plan-making authority or, in the case of a regional strategy, the Secretary of State must give effect to the land use plan only after having ascertained that it will not adversely affect the integrity of the European site or the European offshore marine site (as the case may be).

(5) A plan-making authority must provide such information as the appropriate authority may reasonably require for the purposes of the discharge of the obligations of the appropriate authority under this Chapter."

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

Waddenzee **and** *Commission v UK*

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

"56. It is therefore apparent that the plan or project in question may be granted authorisation only on the condition that the competent national authorities are convinced that it will not adversely affect the integrity of the site concerned.

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

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

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

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

"43. Those statements on the necessary degree of probability related to scientific uncertainty regarding the effects of measures whose implementation was certain. In the case of the plans at issue here, which require further permissions, there is, on the other hand, already uncertainty as to whether they will be implemented at all. It is appropriate, however, to apply comparable criteria in this regard too. Accordingly, the decisive test is whether it cannot be excluded on the basis of objective information that a plan which still requires further permissions in order to be put into effect will have significant effects on the site concerned. That is in any event so if - as laid down in United Kingdom law for the plans at issue here - subsequent decisions are in principle to be in accordance with the plans.

44. It is true that United Kingdom law provides in principle, following a negative assessment of implications, for refusal of permission in the face of the plan or for implementation of the procedure for exceptional cases under Article 6(4). However, the objectives of the Habitats Directive would be jeopardised if the requirements

of site protection could in principle prevail over an opposing plan only at the last moment as an exception to the normal course of procedure. Where there are procedural arrangements of that kind, it would have to be feared that an assessment of implications subsequent to the plan formulation would no longer be carried out with the outcome being open but with the objective of putting the plan into effect.

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

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

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

48. In addition, the early taking into account of the interests of site protection prevents faulty planning that may have to be remedied, if it does not become apparent until the time of the specific permission that the proposal cannot be implemented in that form because areas of conservation are adversely affected. Therefore, the idea developed in respect of Directive 85/337 on the assessment of environmental effects that an impact assessment should be carried out at the earliest possible stage (24) also applies in the context of the Habitats Directive."

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

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

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

Summary

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

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

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

(3) The competent authority may only agree to the plan or project if the competent authority concludes (or ascertains) that it *will not* adversely affect the integrity of the relevant Site; if it does so conclude, then the competent authority has a discretion whether or not to agree to the plan.

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

Three English authorities

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

The Lewis case

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

31. The claimant had advanced a second ground of challenge: that the decision had been taken in breach of regulation 48 of the 1994 Regulations. This was rejected by the judge and by the Court of Appeal (at §§73 to 87 of Pill LJ's judgment). The claimant contended, first, that the council as the competent authority had failed to make the appropriate assessment required and, secondly, had failed to ascertain that there would be no relevant "adverse effect". The council delegated to its own development control manager the task of making the appropriate assessment. She consulted Natural England and the RSPB. The developer employed an ecological consultancy, E3, who produced an assessment report. The development control manager adopted E3's report as her appropriate assessment. After much to-ing and fro-ing between these various bodies, the report was revised and Natural England and RSPB withdrew previously stated objections, subject to a number of safeguarding conditions being attached to any approval of the proposal. The claimant argued that it was for the council itself to make the appropriate assessment and not Natural England, the RSPB or the council's own officer; and that, despite the fact that the position of Natural England and the RSPB had been placed before the council's planning committee in the officers' report, there was no evidence that members of the planning committee had made the assessment themselves. The Court of Appeal unanimously rejected this argument, holding, first, that the planning committee was entitled to rely on Natural England and RSPB's recommendations, which they had seen. The conditions which these bodies had recommended were included in the report submitted to the committee. The grant of permission made specific reference to no adverse effect. Here, the council's officer, rather than the council itself, had been responsible for the appropriate assessment; and the assessment report itself was carried out by a third party expert. Neither of these facts was regarded by the Court of Appeal as constituting breach of the Regulations or the Habitats Directive.

The Akester case

32. The *Akester* case concerned the decision of a ferry operator, Wightlink Limited, to introduce a new larger ferry on the route between Lymington Pier and the Isle of Wight. Owen J held that that decision was unlawful as being in breach of Wightlink's duties as a competent authority under Article 6.3 of the Habitats Directive

and under the 1994 Regulations. In particular Owen J held that no reasonable harbour authority could have concluded that no doubt remained as to whether or not there would be significant adverse effects on the integrity of the SAC in question by the introduction of the new ferries: ie Wightlink's final conclusion of "no harm" was *Wednesbury* unreasonable.

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

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

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

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

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

The Young case

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

LJ commented on the dangers inherent in admitting subsequent explanatory statements from members of a planning authority, and said at §20:

"It is therefore important that the decision-making process is made clear in the recorded decisions of the committee, together with the officers' report to committee and any record of the committee's decisions. Decisions recorded in the minutes should speak for themselves."

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

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

Factual Background

The Core Strategy, including the Northern Gateway

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

"Northern Gateway

The Northern Gateway is allocated as a strategic location to provide a modern employment-led site with supporting infrastructure and complementary amenities. Planning permission will be granted for principally Class B-related activities (55,000m2), which must satisfy at least one of the following criteria:

a. directly relate to Oxford's key sectors of employment of science and technology research, education, biotech and spin-off companies from the two universities and hospitals;

b. provide additional research and development facilities;

c. build on Oxford's established and emerging 'clusters';

d. comprise spin-off companies from the universities or hospitals; or

e. provide an essential service for Oxford, or the knowledge-based infrastructure.

Development for Class-B uses will be brought forward in two phases:

o a maximum of 20,000 m2 to be occupied by 31st March 2016;

o a maximum of55,000m2 to be occupied by 31st March 2026."

Oxford Meadows SAC

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

Chronology

41. Before its adoption, the Core Strategy was put out to extensive consultation and was fully considered by

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

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

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

The First Habitats Regulations Assessment of the Council: September 2008

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

"1. INTRODUCTION

Oxford City Council have undertaken this Habitats Regulations Assessment "in-house", with auditing undertaken by' Levett-Therivel Sustainability Consultants. This report discusses Stage 1 (screening) and Stage 2 (appropriate assessment).

1.1 Requirements of the Habitats Directive

Appropriate assessment of plans that could affect Special Areas of Conservation (SACs), Special Protection Areas (SPAs) and Ramsar sites jointly called 'European sites') is required by article 6(3) of the European Habitats Directive ...

...

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

1.2 Methodology Used for this Habitats Regulations Assessment

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

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

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

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

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

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

...

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

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

" *3. APPROPRIATE ASSESSMENT*

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

o Air pollution

o Water quality

o Water levels

o Recreational pressure

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

Conclusions

The Oxford Meadows SAC is currently judged by Natural England to be in a favourable condition. This screening opinion has concluded that none of the policies in the Oxford 2026 Core Strategy Proposed Submission Document are likely to have significant effects on the Oxford Meadows SAC with regard to the following environmental requirements of the site:

o Maintenance of traditional hay cut and light aftermath grazing

o Absence of direct fertilisation

o Minimal Air Pollution

o Absence of nutrient enrichment of waters; good water quality

o Balanced Hydrological Regime

o Recreational pressures" (*emphasis* added)

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

Submission to the Secretary of State

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

The Second Habits Regulations Assessment: July 2009

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

48. Following a formal response from Natural England and meetings between the Council officers and Natural England, the Council produced a second, updated, HRA in July 2009. This was submitted to the examination as a core document. This second HRA included additional evidence, in particular amendments dealing with

groundwater and the balanced hydrological regime, and further passages in the section concerning "Possible 'in combination' effects" identifying three further distinct proposals in this connection. The Conclusions, in this updated HRA, remained, as before, that none of the policies in the Core Strategy "are likely to have significant effects on the Oxford Meadows SAC".

First set of hearings: July to September 2009

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

The HRA, the Northern Gateway and Natural England

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

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

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

Suspension of the hearings: October 2009

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

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

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

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

56. The hearings, scheduled to resume in July 2010, were further postponed pending government announcements on regional strategies. Regional strategies were revoked on 6 July; both the Inspector and the Council considered the implications, for the Core Strategy, of the revocation of the South East Plan. At a

meeting on 10 September 2010 the full Council approved a combined changes version of the Core Strategy and confirmed that it would like the Inspector to conclude his examination.

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

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

"the northern gateway policy CS6 as currently worded does not provide certainty that adverse impacts on the integrity of the Oxford Meadows SAC will be avoided ...

The Council has recognised that the concerns of the environmental bodies are valid and the following wording is jointly suggested in order to ensure that the plan is compliant with the Habitats Regulations and can therefore legally be adopted if sound."

(*emphasis* added)

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

58. More recently, Natural England and BBOWT have explained their thinking behind their support for the Joint Statement. Mrs Charlotte Frizzell of Natural England wrote in an email dated 29 June 2011 as follows: "We take the position that it is legitimate under the Habitats Regulations to include a caveat in policy which has the effect of requiring subsequent lower tier plans to be subject to its own Habitats Regulations Assessment. In the event that the Habitats Regulations Assessment cannot rule out an adverse effect on integrity on the Oxford Meadows SAC then the higher level policy cannot be met and the lower tier plan would not be in accordance with the Core Strategy". Similarly, BBOWT issued a position statement dated June 2011, stating that the Council will ensure that no development will take place that would lead to harm to the Oxford Meadows SAC.

The resumed examination hearings: September 2010

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

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

Chiltern Railways Transport and Works Act (TWA) Inquiry

61. As a separate matter, between November 2010 and January 2011, a TWA inquiry took place into a proposal by Chiltern Railways in relation to the rail link from Oxford to London Marylebone. The scheme proposes double-tracking the line (and increasing train frequency) along the border of Port Meadow, which is part of the Oxford Meadows SAC. The Claimant appeared at that inquiry. The Council and Natural England raised issues about Oxford Meadows SAC and the Habitats Directive and Regulations in the course of that TWA inquiry. According to the Claimant's evidence, on 5 August 2010 the Council (as an affected landowner) had made a formal objection to the Chiltern Railways TWA inquiry, arguing that the creation of vehicular rights would prejudice the status of Port Meadow as an SSSI. Natural England's statement of case of 6 August 2010 concluded that there was insufficient evidence to rule out harm to Oxford Meadows SAC from the TWA

scheme alone. The Claimant participated but says he did not at that time understand the Habitats Directive or the nature of an "appropriate assessment" by a competent authority.

Inspectors' Final Report: December 2010

62. On 21 December 2010 the Inspectors issued to the Council their final report on the Core Strategy. The Inspectors found the Core Strategy (in its final form) to be sound, pursuant to s.20(5). They recorded the fact that the examination had been one of the longest running of a core strategy in the country. They referred (at page 6) to "robust debate, strong arguments and heated exchanges" and to "distrust, mis-information, confusion and uncertainty at the hearings".

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

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

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

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

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

.....

4.150 Conclusions In conclusion on Northern Gateway, I consider that there are very strong reasons to support, in principle, an employment-led strategic development in this area. The developers are very confident of their ability to deliver an acceptable scheme. I do not underestimate the hurdles that will need to be jumped if an acceptable development is to be achieved. Only further, detailed master-planning, through the AAP, will be able to demonstrate whether an acceptable development can be achieved in practice and what form/scale it could be, together with possible mitigation measures. In the meantime, I conclude that there is a reasonable prospect of this being achieved and given the convincing reasons in support of development here, I believe these strategic proposals should continue to form a central plank of the Council's strategy.

4.151 The Core Strategy contains no contingency should the Northern Gateway proposal not proceed. That is understandable given the lack of options to accommodate development. The Northern Gateway project is a fundamental part of the strategy. Without it, a significant part of the strategy, in terms of the economy and wealth creation, would be undermined, although many other elements would still be relevant. In the event of the Northern Gateway proposals not proceeding, the Council would have little choice but to carry out an early review of the Core Strategy.

4.152 Given that work on site would not be likely to commence before 2013, with delivery mostly in the second half of the plan period, I see no need to phase the development. The relationship with any necessary infrastructure, such as envisaged in the ATO package can best be considered, in the forthcoming AAP. Nor

do I see a need to limit the size of the development at this stage. The AAP will consider the detailed impact and mitigation measures, which will have the effect of setting a ceiling to the scale of the development.

...

4.154 In order to make the Core Strategy sound, the following changes should be made:

(i) The addition of the following to Policy CS6: "Development is dependent upon the securing of measures designed to mitigate the impact on the local and strategic road networks, acceptable to both the Highways Agency and Highways Authority. The mitigation measures must be implemented in accordance with the agreed phasing, with full implementation prior to the occupation of the final development phase." And

(ii) The addition to the policy of the wording in paragraph 3.1 of the additional statement by Natural England, dated 7 September 2009, reference M8NG/CR28/1.

Unless the Proposals Map is amended at adoption by the deletion of the star and its replacement by the indicative AAP boundary as shown on Map A, Policy CS6 will be unsound.

Part (ii) of this recommendation has now been incorporated into the latest version of the Core Strategy (CD16/78 - Appendix A2)."

(*emphasis* added)

66. The Report, at this stage, referred to the 7 September 2009 wording from Natural England rather than the later Joint Statement, because Part One is dealing with matters as they stood as at October 2009. However in Part Two, the Inspectors concluded by recommending, inter alia, incorporation of the Council's proposed additional changes at CD 16/78. CD16/78 itself, at Annex A2 to the Report, sets out the Council's proposed changes as a result of the discussions at the September *2010* hearings. Amongst these changes, at change EC23, it was proposed that the qualifying wording from the Joint Statement (set out in paragraph 74 below) be added to the Core Strategy.

67. In my judgment, on this basis, and in combination with expressing themselves satisfied with legal requirements, the Inspectors were implicitly concluding that, with the inclusion of this additional wording, they were satisfied that Core Strategy would not have adverse effect on Oxford SAC

The Council adopts the Core Strategy: 14 March 2011

68. At a full meeting of the Council on 14 March 2011, the Council (by a vote of 24 to 5 with 12 abstentions) formally adopted the Core Strategy as part of the Oxford Local Development Framework. In the run up to that meeting, the Claimant raised with Mr Roche - effectively for the very first time - concerns that the adoption of the Core Strategy would be contrary to the legislation relating to conservation of habitats and species.

69. The Claimant attended the meeting. He had sent, in advance, written representations, which set out his concerns, as follows: that Council members had personal financial interests; that adoption of the Core Strategy would be contrary to the Habitats Regulations, to the Habitats Directive and to the two ECJ cases; that the *Council's* HRAs were defective because their conclusion of "no harm" was not in conformity with *Waddenzee* and /or were unsupportable because of the use of words "likely or unlikely" in the HRAs; that the qualifying wording made it clear that it was currently unknown whether there would be harm in the future.

70. In advance of the meeting, Mr Peter Sloman, the Council's Chief Executive Officer had circulated a written response to the Claimant's representations. Mr. Sloman stated that the HRAs included an appropriate assessment and had concluded that no part of the policy was likely to have significant impacts on the Oxford Meadows SAC, but that "in accordance with precautionary principle, further confirmatory work will need to be undertaken at a more detailed planning stage for the Northern Gateway strategic area in order to avoid any uncertainty and to ensure that adverse impacts on the Oxford Meadows are avoided." He then referred expressly to the Joint Statement and the qualifying wording, particularly at paragraph 3.4.43. He went on to tell the Council members that the Inspectors had considered the Joint Statement and recommended that the qualifying wording within it be inserted into the final version of the Core Strategy. This has been done. He concluded that "the Core Strategy is therefore considered to be fully compliant with the Habitats Regulations". (I take this to be an expression of the views both of the Inspectors and of himself (and thus Council officers)). In the same document, Mr. Sloman also addressed the Claimant's allegations about personal interests of individual council members.

71. At the meeting itself, the Claimant addressed the Council members. It appears that their attention was

also drawn to Mr Sloman's written response. Mr Roche says in his witness statement, that having heard the Claimant and another individual, "a debate took place". The minutes of the Council meeting record the fact of the Claimant's written and oral representations and Mr Sloman's response (referring expressly to the Habitats Regulations issue) and further that there was "debate" amongst members before the vote, approving the Core Strategy, was taken.

72. The Claimant says that from memory, at the meeting, the Council members did not discuss the concerns about the Oxford Meadows SAC which he had raised; nor was there any direction from officers to elected members as to how they as competent authority, should conduct the appropriate assessment nor any direction as to the standards required by the *Waddenzee* case. Further, he says, that none of the HRAs were presented to the council members. For present purposes I work on the assumption that this particular evidence is correct.

73. In the course of argument before me, Mr Crean QC took instructions from council officers and informed me that, in advance of the meeting, first, a copy of the full Core Strategy document was physically circulated to each Council member - by being put in to the Council member's pigeonhole; and secondly the then existing HRAs were on the website of relevant materials and Council members' attention had been drawn to that website.

The Core Strategy itself (in final form)

74. The adopted Core Strategy indicates that the Northern Gateway strategic site will be brought forward by an AAP. It incorporated the Inspectors' recommendation for added requirements, as part of the delivery and partnership section for the Northern Gateway policy CS6, in the following terms (the qualifying wording):

"3.4.40 The Council will require the Area Action Plan to be supported by a full hydrological risk appraisal to demonstrate that there will be no change in the hydrological regime of Oxford Meadows SAC, in terms of water quantity or quality. This will form part of an Appropriate Assessment which will be undertaken for the Area Action Plan to meet the requirements of the Habitats Regulations. The current groundwater recharge will be maintained, including the incorporation of sustainable urban drainage systems, such as porous surfacing, grassy swales and infiltration trenches.

3.4.41 The Area Action Plan must also be supported by more, detailed air quality modelling and analysis to show that there will not be any localised adverse effects on the integrity of the SAC resultant from construction or increased road trips on roads within 200m of European sites.

3.4.42 The Area Action Plan must also be supported by an assessment to show that there will not be any effect on the integrity of the SAC from recreational pressure arising from the development.

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

Final version of the HRA: April 2011

75. Following the adoption of the Core Strategy, a final version of the HRA was published in April 2011 to bring together the previously published material and to reflect the incorporation of the qualifying wording into the adopted Core Strategy. The following was added in the conclusions section of the HRA:

"The Inspectors referred to the HRA in their report. They summarised the HRA process and noted that the original and updated assessments considered in detail impacts relating to air pollution, water quality, the hydrological regime and increased recreational pressure. The Inspectors recommended the need for some further work at a more detailed planning stage for the Northern Gateway and Summertown strategic areas, to confirm that the Core Strategy would not have a significant impact on the Oxford Meadows SAC.

In relation to the Northern Gateway, the following wording inserted into the adopted Core Strategy ensures that there will be no adverse impacts on Oxford Meadows which cannot be fully mitigated ...".

The HRA then set out in full the qualifying wording.

76. Of course the production of this final version post-dated the Council's actual decision adopting the Core Strategy; nevertheless the added wording does appear to reflect what had in fact already happened in the lead up to the decision.

The Claimant's involvement in the process

77. In summary, in the period between May 2009 and the Council meeting on 14 March 2011, the Claimant participated in the process as follows. He made at least three written statements in advance of hearings. He attended every public hearing. He spoke orally, at most, if not all, of the July 2009 hearing sessions. At a hearing on 24 July 2009, he read out an extract from the Second HRA. He then submitted written statements or representations in January 2010, by 19 February 2010, on 11 March 2010, in April 2010, on 21 May 2010 and a written response to the Inspector's letter of 12 July 2010. He addressed a full Council meeting on 10 September 2010 and put in closing written submissions to the Inspector on 17 September 2010. He made further representations to the Inspector in November and December 2010. He addressed the Council meeting on 14 March 2011 in writing and orally. In the course of this participation, the Claimant raised a wide array of different issues.

Analysis and conclusions

78. Against this factual and legal background, I turn to consider whether the Claimant's claim has a real prospect of success, under the four main headings identified in paragraph 10 above.

Issue 1: Regulations 102(4) and 61(5) - and the safeguard to ensure no harm

79. The Claimant's case, in essence, is that the Council's decision to adopt the Core Strategy was unlawful because there was no sufficient finding that the Core Strategy would not "adversely affect the integrity of" (i.e not cause harm to) the Oxford Meadows SAC. This is said to be breach of regulations 61(5) and 102(4) of the Habitats Regulations, and the duty to apply the precautionary principle and the principles established in the cases of *Waddenzee* and *Commission v UK*. (Ground 1(a) and (b) of the Claim Form and allegations 1 and 2 as identified by Mr. Crean QC fall under this head).

80. The Council submits that the Claimant's argument here amounts to no more than an impermissible attempt to overturn the Council's view of the planning merits and to persuade the Court to reach its own judgment about the likelihood of harm to the Oxford Meadows SAC. This submission by the Council is predicated on the assumption, (as it must be) that the Council did find that there was no harm arising from the Core Strategy and that it was wrong to do so.

81. If this assumption is correct, then in my judgment, the Council's submission is unassailable. If the Council did find that there was no harm to the Oxford Meadows SAC arising from the Core Strategy, then (unless that finding was *Wednesbury* unreasonable) the Claimant can have no ground of challenge under s.113 and the challenge can only be one of planning merits, which is outwith the jurisdiction of this court.

82. However I am not sure that the Council's characterisation of the Claimant's argument here is necessarily correct. The Claimant's position as to what the Council did decide about harm to the SAC is not clear. In fact, at various stages in his written and oral argument, the Claimant appears to put his case on two different, and inconsistent, bases: first, that in fact the Council did *not* find that there would be no harm and thus that it was unlawful to approve the Core Strategy, and secondly that the Council did find that there would be no harm, but that it was wrong to do so. (I consider the second basis and, in particular, the question of whether a conclusion of "no harm" in this case could be said to be *Wednesbury* unreasonable in the context of Issue 3 below)

83. The Claimant's first basis is, or at least might be, that in fact the Council found that there was uncertainty as to whether there would be harm or at the very least did not find that there would be no harm in the future. If that is what the Council did in fact find, then, it seems to me that the Claimant would have a claim (at the very least) that, as a matter of law, it had no power to approve the Core Strategy (and certainly not in the way that it was approved). So the question, under this first basis, comes down to whether the Claimant has a real prospect of success of establishing that the Council did *not* find "no harm" or found uncertainty as to harm.

84. The Claimant contends, first, that the conclusions in all versions of the HRA are expressed in terms of probabilistic language (likely/unlikely to harm) in the screening stage 1 sense and are not deterministic. Despite the fact that the Council pleads that "HRA concluded that the Core Strategy would not adversely affect the integrity of a European Site", I accept the Claimants' contention here. The wording of the HRA, in all versions prior to the March 2011, is in probabilistic language (see paragraphs 45 and 48 above). In particular, the conclusion is only that "none of the policies ... are *likely* to have significant effects on the Oxford Meadows SAC". Further, the Claimant relies upon what he characterises as a finding of fact by the Inspectors (at paragraph 4.148 of their Report) that "adverse effect cannot be ruled out". Again, I agree that, as far as this statement alone goes, it is not a clear finding of "no harm".

85. The Claimant then goes on to argue that this absence of a firm conclusion in the HRA (and at paragraph 4.148 of the Inspectors' Report) is not "cured" by the adoption of the qualifying wording in paragraphs 3.4.40 to 3.4.43 in the adopted Core Strategy. He contends, in effect, that as at the date of the adoption of the Core Strategy on 14 March 2011, the Council was not, and could not be, sure that the Northern Gateway development would not harm the Oxford Meadows SAC. That this is so is demonstrated by the qualifying wording itself which admits of the possibility of such harm arising in the future. Thus, at that time, there remained uncertainty as to harm arising from the Northern Gateway and for that reason alone the Council had no power, under regulations 61(5) and 102(4), to approve the Core Strategy.

86. In response, the Council submits that the qualifying wording *does* rule out the possibility of harm to the Oxford Meadows SAC. Whilst it is not known currently what form precisely the Northern Gateway development will ultimately take, the "safeguarding" effect of the qualifying wording ensures that whatever form it does take, it will not harm the SAC. Mr. Crean QC further submits that the role of an appropriate assessment in the production of a core strategy is to consider the implications, for the SAC, of the general approach in the core strategy as to objectives and strategy. It is not the function of the appropriate assessment at this level to consider the specific, detailed, implications for the SAC of any particular development proposal. The scheme of the Act allows for the consideration of such a detailed assessment at a later stage in the context of a planning application.

87. The Claimant submits effectively, on the other hand, that unless the Council can be sure, even at the Core Strategy stage, that any and every particular future development proposal envisaged by the Core Strategy will clearly not have an adverse effect on the SAC, then the Council is not permitted, in law, to approve the Core Strategy, whether conditionally or unconditionally and is not permitted to defer to a subsequent "appropriate assessment" the specific implications of a particular development proposal. The Claimant further contends that, as the appropriate assessment found uncertainty as to harm, the Core Strategy could and should only have been approved by way of a specific derogation under Article 6.4 of the Habitats Directive.

Conclusions on Issue 1

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

89. The key to this issue is to understand that the "land use plan" (or "plan or project") which is being agreed or approved by the Council, under regulations 102(4) (and 61(5)), is the Core Strategy as a whole and in its final form; it is not, narrowly and specifically, the Northern Gateway development CS6 in its current form as set out within the Core Strategy. The fallacy in the Claimant's argument is that it is directed towards the latter. I accept that it cannot be said that the Northern Gateway development CS6 *in its particular present form* will not cause harm to the SAC. However that was not the relevant land use plan (or project or plan) which the Council approved on 14 March 2011.

90. The Core Strategy in its final form includes the "safeguard" of the qualifying wording. Since there is a safeguard built into and within the Core Strategy as adopted to ensure that there will be no harm in the future, then the adoption of the Core Strategy *as so qualified* will, necessarily, not cause harm. As Mr Crean QC put it in his skeleton argument, "the Core Strategy explicitly excludes development where it cannot be demonstrated that it will not have an adverse effect on the Oxford Meadows SAC".

91. The task of the competent authority is one of making certain, or ensuring, *prospectively* that no harm will arise in the future: see *Waddenzee*, and paragraph 24 above. I accept that there is no express statement, either in the Core Strategy itself, or by the Inspectors or by the Council in adopting the Core Strategy that "with the safeguard in place, I am satisfied that there will be no harm to the SAC". Nevertheless this is the effect of the terms of the Core Strategy in its final adopted form. As explained in the passage from the Joint Statement set out in paragraph 57 above, and in the Inspectors' conclusions, the very purpose of the inclusion of paragraph 3.4.43 of the qualifying wording was to guarantee that there cannot be an adverse effect in the future; "ensuring that the plan is compliant" means certainty as to absence of harm. This point was expressly made by Mr. Sloman in his written response made for the full Council meeting (and also recorded in the April 2011 version of the HRA).

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

assessment must be commensurate to the relative precision of the plans at any particular stage and no more. There does have to be an appropriate assessment at the Core Strategy stage, but such an assessment cannot do more than the level of detail of the strategy at that stage permits. Adv. Gen. Kokott expressly recognises this at §49 of her Opinion in *Commission v UK. Secondly*, if the use of a "safeguard" condition such as the present was impermissible, proposals would have to be ruled out altogether at the core strategy stage, and there could be no scope for subsequent appropriate assessment at a later stage, as specifically envisaged by Adv. Gen. Kokott. If the Claimant's argument were correct, a core strategy could never be approved, where, as is likely, the specific detail of future particular development is not known. No core strategy could ever involve detailed consideration of the impact on SAC of specific development proposals. In this way, the Council cannot be criticised for not making an appropriate assessment at a site specific level; there are currently no detailed proposals. *Thirdly*, I do not accept the Claimant's allegation that the Council failed to have regard to the precautionary principle. The HRA itself expressly refers (at page 2) to the precautionary principle. Further the entire approach of the Council in introducing and approving the qualifying wording, in the context of possible concerns raised by Natural England and BBOWT, was based upon advance consideration of future possibilities. *Fourthly*, following the close of oral argument, the Council provided, and the Claimant did not dispute, a number of examples of core strategies having been approved subject to conditions, of which three have been made expressly subject to conditions as a "safeguard" to address potential harm to SACs under the Habitats Regulations. Moreover, in the specific context of the Habitats Regulations, it is noteworthy that, in the *Lewis* case, the scheme in issue was approved but only subject to conditions which had been specifically suggested by Natural England and the RSPB to address their concerns in relation to the particular sites. There was no suggestion that such prospective, safeguarding, conditions were impermissible under regulation 48(5) of the 1994 Regulations as improperly qualifying the conclusion of "no adverse effect".

93. As to the Claimant's argument concerning Article 6.4, the derogation under Article 6.4 deals only with matters of public interest and arises only if there is both a negative appropriate assessment *and* no alternative solutions. Here, in practice, the qualifying wording was an alternative solution - and that could be, and was, properly approved under Article 6.3 and at a stage *after* the appropriate assessment.

Issue 2: Northern Gateway dependent on future negative appropriate assessment

94. The Claimant further contends that the decision to approve the Core Strategy was *Wednesbury* unreasonable in so far as it related to the Northern Gateway CS6 policy, since the very deliverability of that policy was wholly dependent upon a future negative "appropriate assessment". This is Ground 3 in the Claim Form (and identified as argument 5 by Mr. Crean QC).

95. In essence, the Claimant submits that the Council could not rationally have approved of the Core Strategy and, within that approval, concluded that the Northern Gateway policy was deliverable, in circumstances where it was still unknown as to how much of that policy could go ahead, due to the qualification made as regards a future appropriate assessment in relation to the Oxford Meadows SAC. In his witness statement, the Claimant referred, further, to paragraph 3.4.36 of the adopted Core Strategy, stating that "the Northern Gateway is the main new strategic land allocation which is critical to the development of Oxford's spatial strategy" and submits that, as a result of the qualifying wording, it is unknown if this "critical" main site is deliverable at all.

96. I do not accept this argument. First, the adoption of the Core Strategy itself was not made contingent upon there not being a negative appropriate assessment in the future. Rather, as indicated in paragraph above, the Core Strategy as adopted itself recognises the possibility of future negative appropriate assessment and makes provision for what is to happen in that event. I accept that it is the case that the deliverability of the Northern Gateway CS6 policy *as set out in the Core Strategy* is conditional upon a future appropriate assessment. However, contrary to the Claimant's submission, the Core Strategy does not represent an irrevocable commitment to the Northern Gateway project, in the form there set out. Rather, because of the qualifying wording, it represents a conditional commitment to that project. There is nothing wrong in approving something in principle which may not happen in the future, if the condition is not satisfied. Indeed, at paragraphs 4.150 and 4.151 of their Report, the Inspectors specifically address the prospect that the Northern Gateway, a "fundamental part of the strategy", might not proceed and that there might have to be a review of the Core Strategy, but do not consider this to be a reason not to approve the Core Strategy.

97. This conditional approval recognises that there may be a tension between the competing objectives of, on the one hand, achieving the Northern Gateway in its current form and, on the other hand, protecting the interests of the Oxford Meadows SAC. Conditional approval is the way in which the Council has reconciled these competing objectives; the tension is resolved ultimately in favour of protection of Oxford Meadows SAC.

98. This claim is, in many ways, no more than another facet of the Claimant's main claim under Issue 1. I have found above use of the qualifying wording not to be unlawful (nor *Wednesbury* unreasonable: see

below). It is inherent in this conclusion that, ultimately, aspects of the Northern Gateway may not be implemented. The Claimant's argument here, if correct, would result necessarily in the outright rejection of the entire Northern Gateway project *in any form* on the basis of an adverse impact upon Oxford Meadows SAC which may never materialise and which in any event could not possibly be identified at the stage of the Core Strategy, because of the absence of detailed proposals. It is such an outcome which might be said to be irrational

99. The conditional approval is a permissible and lawful course of action; and there is no basis for concluding that this is an approach which no reasonable council could properly have taken. For these reasons, the Claimant has no real prospect of establishing that the Council's decision to approve the Core Strategy was *Wednesbury* unreasonable in this way.

Issue 3: no appropriate assessment and/or no approval by the Council itself

100. The Claimant's third argument developed only in the course of oral argument, out of his reliance upon the decision of Owen J in the *Akester case*. In its final form in a post hearing note, the argument is as follows. *First*, the elected members of the Council meeting in full council ("the full Council"), as the competent authority, was required to carry out its own appropriate assessment; and it did not do so either at the meeting on 14 March 2011 or otherwise. However, it might be more accurate to formulate the argument here as being that there is no evidence that the full Council itself carried out the "ascertainment of no harm" stage. *Secondly*, in any event, the *full* Council failed to keep a record of its appropriate assessment. *Thirdly*, the HRAs are advisory reports only and there is no evidence that the HRAs or the Inspectors' Report were placed before the full Council on 14 March 2011, nor that the full Council endorsed the HRAs or the Inspectors' Reports. *Fourthly*, the full Council did not deal with or resolve the conflict between the Claimant's position and that of the Council's officers at the meeting on 14 March 2011 (a submission which sought to mirror the "conflict" of evidence in the *Akester* case).

101. It is in this context specifically that the Claimant raises another claim of *Wednesbury* unreasonableness. *Here* he appears to be contending that, by its decision on 14 March 2011, the Council *did* in fact reach a conclusion of "no harm", but that that conclusion was *Wednesbury* unreasonable. The grounds for this contention are not entirely clear; it seems to be that the adoption decision (no harm) was irrational because, at paragraph 4.148 of their report, the Inspectors had said that harm to the SAC could not be ruled out. (To the extent that the Claimant appears also to argue that the decision was *Wednesbury* unreasonable because it did not (as opposed to "should not have") rule out such harm, then such an argument adds nothing to the argument considered in Issue 1 above).

102. In response, the Council submits that *Akester* does not assist the Claimant; that the observations of Owen J, concerning the carrying out of the appropriate assessment and the need for a record, fall to be considered in the context of a clear wider challenge of *Wednesbury* unreasonableness, where there was directly conflicting expert evidence, where the decision maker had rejected the evidence of Natural England and where there was also clear evidence of commercial "tainting".

Conclusions on Issue 3

103. In my judgment, the Claimant has no real prospect of establishing this part of case. *Akester* does not assist. It is both distinguishable on the facts and does not establish all the propositions for which the Claimant contends.

104. First, I do not accept that it is necessary for the *full* Council to carry out the "appropriate assessment" under the Habitats Directive and Regulations. *Akester* is authority for the proposition only that Council itself must carry out the appropriate assessment, and not a third party expert. It is not authority for the proposition that the assessment must be carried out by the full council, rather than by a council officer or employee acting for the council. On the facts of *Akester*, first, it appears that at no stage was the decision maker, Wightlink, ever purporting to make an appropriate assessment at all; secondly, even if there was something which might be regarded as an appropriate assessment, it was carried out by a third party expert, ABPmer and not by anyone within Wightlink. Further, the *Lewis* case is authority for the proposition that the appropriate assessment may be carried out by a council officer, and not by specifically by the full council (see §85). The Court of Appeal held that it was legitimate for the council to adopt the assessment of the council officer and indeed a third party expert. In my judgment, in the present case, the HRA (in its final form as at March 2011) constituted the "appropriate assessment" (as pleaded by the Council in its defence) and this was carried out, properly, by officers of the Council. In any event of course, at the HRA stage the appropriate assessment had not concluded that there would be "no harm", so it is hard to see the nature of the Claimant's complaint as regards the HRA itself.

105. Secondly, in so far as this claim is directed towards the full Council's decision on 14 March 2011 itself -

whether that decision is characterised as the "appropriate assessment" or "the ascertainment of no harm"- then (in clear contradistinction from *Akester*) there is no possible basis for an argument that that decision was *Wednesbury* unreasonable. There is no direct conflict of *evidence* which required resolution. At most the Claimant himself put forward a conflicting counter-argument. The only possible point relied upon by the Claimant is the "probabilistic" language of the HRA and paragraph 4.148 of the Inspectors' Report. But that point has been met by the subsequent inclusion of the qualifying wording. Even if it were *possible* to say that the Claimant's views advanced so late in the day were "arguable", it could not be said that the Council's rejection of them was so extreme as to be *Wednesbury* unreasonable. Indeed for the reasons given under Issue 1 above, I consider that the Claimant's arguments put before the full Council on 14 March 2011 are wrong.

106. Thirdly, as regards the allegation that there was no proper record of the full Council's decision of 14 March 2011, *Akester* does not support the proposition that such a failure is, of itself, an error of law which renders automatically void and unlawful the decision taken (be it a decision of "appropriate assessment" or "ascertainment of no harm"). *Young* is not authority for such a proposition either: see paragraph 38 above. The Commission guidance set out at §113 of Owen J's judgment is just that and not a principle of binding law; and it is addressed specifically to the appropriate assessment and not to the ascertainment of "no harm". The failure to record reasons in the *Akester* case was important and relevant in the specific context of a cogent claim that the competent authority's decision was *Wednesbury* unreasonable. In this way, the absence of recorded reasoning was one constituent element in the judge's ultimate conclusion that the decision was *Wednesbury* unreasonable. It was not a self standing ground of invalidity; and has to be considered firmly in the context of the directly conflicting expert reports (including one from Natural England, the statutory body). By contrast, here, there is no arguable distinct *Wednesbury* challenge.

107. Finally, I do not accept that what took place at the full Council meeting on 14 March 2011 amounted to inadequate consideration of the Habitats Directive issues, nor, in particular, of the HRAs and the Inspectors' Report. Prior to that meeting, there had been a very detailed and lengthy process of consideration of this issue, including varying HRAs, objections raised by Natural England and BBOWT, discussions between the Council and these two organisations leading to the Joint Statement, lengthy and detailed examination hearings culminating in the Inspectors' Report and amendment to the Core Strategy. In *Akester*, the competent authority was a single commercial undertaking; and there had been no process of detailed consultation and examination as required for the Core Strategy. This final version of the Core Strategy was given to each and every member of the Council and the HRAs were fully available. There was then competing written and oral argument before councillors themselves, addressing the very issues which the Claimant now seeks to raise. Against this background, in my judgment, the full Council did endorse the adopted modified Core Strategy as recommended by the Inspectors' Report, which in turn considered and dealt with Habitats Directive issues and recommended the qualifying wording as ensuring that there would be "no harm". It is implicit in the Council's decision that a majority of the full Council members concluded that they preferred the position of the Council's CEO to that put forward by the Claimant.

Issue 4: Bad faith

108. The Claimant contends that the Council and various other persons or bodies had acted in bad faith in differing ways. These allegations are not contained within the Claim Form, but are made, in various ways, in the Claimant's witness statement and in subsequent documents. The allegations are as follows:

First, the Inspectors acted in bad faith in the manner in which they conducted the examination and in particular the hearings into the Core Strategy.

Secondly, each of the Council, Natural England and BBOWT acted in bad faith by failing to communicate to the Inspectors its concerns about the effect of a different proposal, namely Chiltern Railways, on the Oxford Meadows SAC.

Thirdly, the Council as a whole or members of the Council acted in bad faith because it or they each had a private financial interest in the development of certain land.

109. Whilst the consequences of the alleged "bad faith" are not spelled out by the Claimant, I work on the assumption that the Claimant is effectively making allegations of actual or apparent bias or predetermination on the part of each of these bodies. The relevant test for such an allegation is that set out in the *Lewis* case, namely whether, putting oneself in the shoes of a fair minded observer, the body in question made the decision with a closed mind or that the circumstances gave rise to real risk of closed minds or predetermination. I deal with each of these allegations in turn.

The Inspectors' conduct

110. The Claimant contends that the Inspectors conducted the examination in a "biased, unprofessional, hostile and oppressive fashion", and, in particular, showed hostility to the Claimant personally. The Claimant cites, as evidence of this conduct, the following matters. Making a joke at the Claimant's expense at the hearing in July 2009; refusing, on two occasions (on 22 July 2009 and on 9 February 2010, to grant the Claimant an adjournment which he had sought on grounds of failure adequately to consult; on 14 September 2010, the use of a pre-prepared written ruling to reject a further application by the Claimant to adjourn; showing disrespect to residents who objected to the Core Strategy; at the hearings repeatedly using the override on the microphone "to silence me"; at the hearing on 14 September 2010, stating that he would hold objectors in contempt; and describing pejoratively those opposed the Core Strategy as "the scrap the plan brigade".

111. The Council's response is that, for a variety of reasons, there is nothing in these allegations. I agree.

112. First, the Inspectors gave the Claimant every opportunity to present his case to them, both in the course of oral hearings and in writing. As set out above, the Claimant was allowed the fullest participation in the examination process, appearing and speaking at many, if not most, of the oral hearing days, and making around ten different sets of written representations. The Claimant was allowed to make oral representations, even in circumstances, where strictly under the procedural regime in section 20, he was not entitled to be heard. The Inspectors did much to accommodate the Claimant's case, in its many and changing forms over the course of their examination.

113. Secondly, I accept that, from time to time times during the September 2010 hearings, there may well have been a sense of mutual antipathy and irritation between the Inspectors and the Claimant and other objectors. The Inspectors themselves refer to this in their Report (see paragraph 62 above). However I do not accept that these issues arose solely from the Inspectors' conduct or approach nor, more importantly, that it was caused by or demonstrated "bad faith" or bias on the part of the Inspectors. The Claimant's reliance upon Inspector Pratt referring to "holding persons in contempt" is tempered by the terms of an article in the Oxford Mail, cited by the Claimant himself, in which the writer refers to the Inspector "struggling admirably as speakers strayed from his agenda, before finally losing his patience."

114. Thirdly, the Claimant raised these matters in a formal complaint, made shortly after 21 September 2010, to the Planning Inspectorate, alleging bad faith and bias on the part of the Inspectors. This complaint was dismissed in a letter of 10 November 2010, and the Claimant took that matter no further thereafter.

115. Finally, even if it could be said that it is the conclusions of the Inspectors (rather than the Council's subsequent decision) which are the subject of challenge in this application, then in so far as this allegation of "bad faith" is an allegation of actual or alleged bias, in my judgment there is no *evidence* that the Inspectors reached their conclusions with "closed minds or that the circumstances gave rise to a real risk of closed minds or predetermination".

Chiltern Railways

116. The Claimant refers to the fact that the Council, Natural England and BBOWT each raised, before the Chilterns Railways inquiry, concerns it had about the impact of that proposal upon the Oxford Meadows SAC, but "failed to communicate to the Core Strategy examination" these concerns. In so doing, he says, each of these bodies acted in bad faith. He also refers to the fact that the Chiltern Railways project was not one of the "in combination" plans or proposals which were considered in the HRAs for the Core Strategy.

117. By alleging bad faith, the Claimant is necessarily suggesting that each of these bodies (the Council, Natural England, and BBOWT) chose deliberately to withhold, from the Inspectors and, ultimately, the full Council meeting, relevant information about the impact of the Chilterns Railway proposal upon Oxford Meadows SAC. In my judgment, there is no evidence to support such a suggestion; and for that reason alone, this allegation has no real prospect of success.

118. Furthermore, if the Chiltern Railways concerns had really been relevant, it is difficult to understand the motivation of Natural England and BBOWT in seeking to suppress concerns arising from the interrelationship of the Chilterns Railway and the Core Strategy, in circumstances where these two bodies were seeking to protect the Oxford Meadows SAC.

119. As regards not being listed as one of the "in combination" projects in the HRA, it was a matter for judgment of authors of the HRA and for the Inspectors. (In fact Chiltern Railways was listed on the agenda for September 2010 hearings). There is no evidence to support an argument that that omission went beyond a "planning judgment" and was *Wednesbury* unreasonable, nor the result of bad faith.

120. Finally, as pointed out by Mr Crean QC, any effects of the Chilterns Railway proposal can be taken into account in the course of the appropriate assessment to be undertaken at the AAP stage; and the qualifying wording will ensure that if there are adverse effects, the Northern Gateway will not be permitted to proceed.

Private financial interests of the Council and/or its Members

121. The Claimant appears to make two different points here. First, that individual members of the Council have their own personal interest in the approval of the Core Strategy, as a result of being employees or former employees of institutional landowners (such as Oxford University and its colleges) which landowners will financially benefit from the adoption of the Core Strategy. Secondly, that the Council as a whole was acting in its own financial interest in approving the Core Strategy, in so far as it was proposing its own land as a strategic site for housing under the Core Strategy. In each instance, these private financial interests meant that the Council and its members had acted in bad faith (and presumably with actual or apparent bias) in approving the Core Strategy. In my judgment, the Claimant has no real prospect of establishing these claims.

122. As regards personal interests of individual members of the council, there is no evidence at all to support this allegation. This very point was raised by the Claimant at the Council meeting on 14 March 2011 itself. Mr. Sloman's response to this at the time was that there is a procedure and a code for members to declare any personal or prejudicial interest and an independent mechanism for complaints to be made - to the Standards Committee. Despite this being pointed out, at no time since then has the Claimant made such a complaint, or indeed provided any evidence to support his allegation. As Mr. Sloman also pointed out, the Claimant had previously made a similar complaint to the district auditor, in the course or objecting to the Council's accounts for an earlier year. By letter dated 27 January 2011, the district auditor concluded that he had "not found any evidence to support the allegation that members with personal and prejudicial interests took part in" the earlier approval of the Submission Core Strategy. There is no basis for concluding that the position was any different as at 14 March 2011.

123. As regards the Council itself as a landowner, again this is an allegation without any supporting evidence, and, for that reason alone, has no real prospect of success. The suggestion made is rebutted in a witness statement from Mr Michael Crofton Briggs, Head of City Development within the Council's planning offices, in which he say that he has carefully investigated this claim and pointed out that even if development of Council land did produce financial benefits, the money received would be public money and would be used in the public interest. Whilst I do not regard this evidence as necessarily conclusive, the fact remains that the Claimant himself has offered no evidence or support for his allegation.

Conclusion

124. After circulating a draft of this judgment last week, the Claimant invited me to clarify or amplify my reasons, relying upon *The White Book Service 2011* Vol. 1 §40.2.1. In a letter running to over four pages, he raised a variety of points. In reaching my conclusions in this judgment, I have taken account of the material put forward by the Claimant, including those matters which he reiterated in this most recent letter. I have looked at these matters again, and at certain other matters which appear to be raised for the first time in the letter. My conclusions (and reasons) remain as stated above and I do not consider it necessary to clarify or amplify those reasons in response to these particular points. Further, in that letter, the Claimant mentioned the issue of a reference to the European Court of Justice (under Article 267 TFEU). This is not a case for such a reference. The relevant principles of Community law to be applied are clearly established in *Waddenzee* and *Commission v UK* and no further question of interpretation of Community law arises on the facts of this case.

125. In view of my conclusions at paragraphs 88, 99, 103, 111, 117 and 121 above, the Claimant's claims in this action have no real prospect of success and no "other compelling reason" for a trial has been advanced. Accordingly I give summary judgment in favour of the Council and dismiss the claims in their entirety.

126. I will hear submissions on any consequential matters which cannot be agreed. If need be, I propose hearing argument on these matters immediately following the handing down of this judgment. Finally, I should add that I am grateful to both the Claimant and Mr. Crean QC for the assistance they have provided to the Court.