Judgments

R (on the application of Lee Valley Regional Park Authority) v Epping Forest District Council and another

Town and country planning – Development – Permission – Claimant's application for judicial review of respondent local authority's grant of planning permission for development proposed by interested party being dismissed – Claimant appealing – Whether authority misinterpreting and misapplying relevant national and local policy – Whether authority failing to perform decision-maker's duty to determine application in accordance with development plan unless material considerations indicating otherwise and misunderstanding and misapplying relevant policy for 'presumption in favour of sustainable development' – Whether authority properly discharging duty to consider whether necessary to undertake 'appropriate assessment' of implications of development – Planning and Compulsory Purchase Act 2004, s 38(6) – Conservation of Habitats and Species Regulations 2010, SI 2010/490, reg 61 – Council Directive (EEC) 92/43, art 6.

[**2016**] **EWCA Civ 404**, (Transcript: WordWave International Limited)

CA, CIVIL DIVISION

TREACY, UNDERHILL, LINDBLOM LJJ

27, 28 JANUARY, 22 APRIL 2016

22 APRIL 2016

G Jones Q.C. and D Graham for the Appellant

M Thomas for the Respondent

P Village Q.C. and N Helme for the Interested Party

Lee Valley Regional Park Authority; Epping Forest District Council; Duffield Harrison LLP

LINDBLOM LJ:

INTRODUCTION

[1] This appeal requires the court to consider, among other things, the meaning and effect of the Government's planning policy in England for the construction of agricultural buildings in the Green Belt.

[2] With permission granted by Laws L.J., the appellant, Lee Valley Regional Park Authority, appeals against the order of Dove J., dated 13 April 2015, dismissing its claim for judicial review of the planning permission granted on 21 August 2014 by the respondent, Epping Forest District Council, for development proposed by the interested party, Valley Grown Nurseries Ltd., next to their nursery at Paynes Lane, Nazeing, in Essex. The proposal was to extend the nursery by the construction of a very large glasshouse –

some 92,000 square metres in area – for the growing of tomatoes and peppers. The site is about 18 hectares of farmland and restored mineral workings in the Metropolitan Green Belt, within the Lee Valley Regional Park, and less than one kilometre (0.98km) from the Lee Valley Special Protection Area ("the Lee Valley SPA") and Ramsar site. The Regional Park Authority objected to the proposal on several grounds, including the harm it said the development would cause to the Green Belt, alleged conflict with policy in the National Planning Policy Framework ("the NPPF") and in the development plan, and the effects the development might have on the SPA. Dove J. rejected the claim on all grounds. In this appeal the Regional Park Authority seeks to persuade us that in three respects his decision was wrong.

THE ISSUES IN THE APPEAL

[3] The issues in the appeal are these. First, was the judge wrong to conclude that the council had not misinterpreted and misapplied relevant national and local policy, including policies relevant to the "openness" of the Green Belt (ground 1)? Secondly, was he wrong to reject the argument that the council failed to perform the decision-maker's duty, under s 38(6) of the Planning and Compulsory Purchase Act 2004, to determine the application for planning permission in accordance with the development plan unless material considerations indicated otherwise, and that it also misunderstood and misapplied NPPF policy for the "presumption in favour of sustainable development" (ground 2)? And thirdly, was he wrong to conclude that the council had properly discharged its duty, under art 6 of Council Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora ("the Habitats Directive") and reg 61 of the Conservation of Habitats and Species Regulations 2010 ("the Habitats regulations"), to consider whether it was necessary to undertake an "appropriate assessment" of the implications of the development for the Lee Valley SPA (ground 3)?

THE PROPOSAL AND THE COUNCIL'S DECISION

[4] Valley Grown Nurseries had submitted two previous applications for similar proposals, in June 2011 and in December 2011. The council had refused both, against the recommendation of its officers. Valley Grown Nurseries' appeal to the Secretary of State against the refusal of the first was dismissed by an inspector in a decision letter dated 6 June 2012. The proposal with which we are concerned was submitted to the council on 27 November 2013. The proposed glasshouse would extend partly into Langridge Scrape – a shallow artificial lake at the south-western end of the site, created when the land was restored after being worked for minerals, with a larger lake called Holyfield Lake next to it. These lakes are used by wintering wildfowl, including two species of surface-feeding duck referred to in the designation description for the Lee Valley SPA – the Gadwall (Anas strepera) and the Shoveler (Anas clypeata). Ecological mitigation was proposed; Langridge Scrape was to be reshaped and a new pond created to the north of the site, providing a net increase in habitat for Gadwall and Shoveler. As on the previous two occasions, Natural England, when consulted by the council under reg 61 of the Habitats regulations, did not object to the proposal and recommended the imposition of conditions to secure the ecological mitigation.

[5] The application was considered by the council's District Development Control Committee on 20 March 2014, in the light of a report prepared by Ms Jill Shingler, a Principal Planning Officer. She acknowledged that the proposal was "contrary to the adopted policies of the Local Plan" (para 1 of her report). Having listed many policies in the Epping Forest District Local Plan and Alterations (adopted by the council in 2006), and also several saved polices of the Epping Forest District Local Plan (adopted in 1998), she said the "above policies are broadly consistent with [the NPPF] and are therefore afforded full weight" (para 13). She then identified 11 "main considerations", considered each in turn, and in her "Conclusion" weighed the benefits of the proposed development for the local economy against its conflict with the development plan and the harm it would cause to the Lee Valley Regional Park and to the landscape. She concluded that the proposal should be approved, and recommended that planning permission be granted. The committee accepted that recommendation and resolved to grant conditional planning permission, subject to a planning obligation

under s 106 of the Town and Country Planning Act 1990. The application was then referred to the Secretary of State, who, on 2 May 2014, indicated that he did not wish to intervene. The planning permission granted by the council on 21 August 2014 was subject to 26 conditions. Four of these – conditions 7, 8, 11 and 12 – related to the proposed ecological mitigation measures, as did cl 5 of the s 106 obligation.

NATIONAL POLICY FOR THE GREEN BELT

[6] In England, the Government's policies for the Green Belt are in paras 79 to 92 of the NPPF, which was published in March 2012. These policies replaced Planning Policy Guidance 2: “Green Belts” of January 1995 (“PPG2”).

[7] Paragraph 79 of the NPPF says that “[the] fundamental aim of Green Belt policy is to prevent urban sprawl by keeping land permanently open”, and that “the essential characteristics of Green Belts are their openness and their permanence”. The concept of “openness” here means the state of being free from built development, the absence of buildings – as distinct from the absence of visual impact (see, for example, the judgment of Sullivan J., as he then was, in *R. (on the application of Heath and Hampstead Society) v Camden London Borough Council* [2007] EWHC 977 (Admin), at paras 21, 22, 37 and 38; and the first instance judgment of Green J. in *R. (on the application of Timmins) v Gedling Borough Council* [2014] EWHC 654 (Admin), at paras 26 and 68 to 75). Paragraph 80 of the NPPF says the Green Belt serves five purposes, the first of which is “to check the unrestricted sprawl of large built-up areas”, the third “to assist in safeguarding the countryside from encroachment”. Paragraph 81 says “local planning authorities should plan positively to enhance the beneficial use of the Green Belt, such as looking for opportunities to provide access; to provide opportunities for outdoor sport and recreation; to retain and enhance landscapes, visual amenity and biodiversity; or to improve damaged and derelict land”.

[8] The following paragraphs contain a series of policies for plan-making and development control. Paragraphs 87 to 92 are largely concerned with the making of decisions on proposals for development in the Green Belt. Paragraphs 87, 88 and 89 state:

> “87. As with previous Green Belt policy, inappropriate development is, by definition, harmful to the Green Belt and should not be approved except in very special circumstances.
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> 88. When considering any planning application, local planning authorities should ensure that substantial weight is given to any harm to the Green Belt. 'Very special circumstances' will not exist unless the potential harm to the Green Belt by reason of inappropriateness, and any other harm, is clearly outweighed by other considerations.
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> 89. A local planning authority should regard the construction of new buildings as inappropriate in Green Belt. Exceptions to this are:
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> • buildings for agriculture and forestry;
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> • provision of appropriate facilities for outdoor sport, outdoor recreation and for cemeteries, as long as it preserves the openness of the Green Belt and does not conflict with the purposes of including land within it;

> • the extension or alteration of a building provided that it does not result in disproportionate additions over and above the size of the original building;
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> • the replacement of a building, provided the new building is in the same use and not materially larger than the one it replaces;
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> • limited infilling in villages, and limited affordable housing for local community needs under policies set out in the Local Plan; or
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> • limited infilling or the partial or complete redevelopment of previously developed sites (brownfield land), whether redundant or in continuing use (excluding temporary buildings), which would not have a greater impact on the openness of the Green Belt and the purpose of including land within it than the existing development."

Paragraph 90 says "[certain] other forms of development are also not inappropriate in Green Belt provided they preserve the openness of the Green Belt and do not conflict with the purposes of including land in Green Belt". These are "mineral extraction", "engineering operations", "local transport infrastructure which can demonstrate a requirement for a Green Belt location", "the re-use of buildings provided that the buildings are of permanent and substantial construction", and "development brought forward under a Community Right to Build Order". There is no difference between the concept of development being not "inappropriate" and the concept of its being "appropriate" (see, for example, the judgment of Keene L.J. in *Kemnal Manor Memorial Gardens Ltd. v First Secretary of State* [2006] 1 P. & C.R. 10, at paras 24 to 28; and the judgment of Richards L.J. in this court's decision in *Timmins* [2015] P.T.S.R 837, at para 31).

[9] Policy in PPG2 was expressed rather less succinctly than in the NPPF. Paragraph 3.1 said that "[the] general policies controlling development in the countryside apply with equal force in Green Belts but there is, in addition, a general presumption against inappropriate development within them", and that "such development should not be approved, except in very special circumstances". Paragraph 3.2 said:

> "Inappropriate development is, by definition, harmful to the Green Belt. It is for the applicant to show why permission should be granted. Very special circumstances to justify inappropriate development will not exist unless the harm by reason of inappropriateness, and any other harm, is clearly outweighed by other considerations. In view of the presumption against inappropriate development, the Secretary of State will attach substantial weight to the harm to the Green Belt when considering any planning application or appeal concerning such development."

Paragraph 3.4 said that "[the] construction of new buildings inside a Green Belt" was "inappropriate" unless it was for one of five specified purposes, the first of which was "agriculture and forestry … ". Paragraph 3.15, under the heading "Visual amenity", stated:

> "The visual amenities of the Green Belt should not be injured by proposals for development within or conspicuous from the Green Belt which, although they would not prejudice the purposes of including land in Green Belts, might be visually detrimental by reason of their siting, materials or design."

LOCAL PLAN POLICY RELEVANT TO THE PROPOSAL

[10] The policies for the Green Belt in the 2006 local plan were modelled on government policy in PPG2. The supporting text says that "PPG2 makes it clear that the quality of the rural landscape is not a material factor in Green Belt designations or in their continued protection …" (para 5.6a); that "[the] general policies controlling development in the countryside apply with equal force in the Green Belt, but there is, in addition, a general presumption against inappropriate development" (para 5.8a): and that "[the] Guidance also makes it clear that the visual amenities of the Green Belt should not be injured by development either within or conspicuous from the Green Belt" (para 5.9a). Policy GB2A – "Development in the Green Belt" says that "[planning] permission will not be granted for the use of land or the construction of new buildings or the change of use or extension of existing buildings in the Green Belt unless it is appropriate in that it is" in one of eight specified categories. These include "(i) for the purposes of agriculture, horticulture, or forestry", and "(iv) for other uses which preserve the openness of the Green Belt and which do not conflict with the purposes of including land in the Green Belt". Paragraph 5.19a in the supporting text refers to several examples of "inappropriate development" in the Green Belt, and says that "[all] such proposals will need to demonstrate very special circumstances that outweigh the harm to the Green Belt". Under the heading "Conspicuous urban development", Policy GB7A – "Conspicuous Development" states:

> "The council will refuse planning permission for development conspicuous from within or beyond the Green Belt which would have an excessive adverse impact upon the openness, rural character or visual amenities of the Green Belt."

Policy GB10 – "Development in the Lee Valley Regional Park" applies "[within] the area of Green Belt which lies in the Lee Valley Regional Park". It supports "uses which are necessary to enhance the function and enjoyment of the park for its users". Policy GB11 – "Agricultural Buildings" states:

> "Planning permission will be granted for agricultural buildings provided that the proposals:
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> (i) are demonstrably necessary for the purposes of agriculture within that unit;
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> (ii) would not be detrimental to the character or appearance of the locality or to the amenities of nearby residents;
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> (iii) would not have an unacceptable adverse effect on highway safety or, with regard to water quality and supply, any watercourse in the vicinity of the site;
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> (iv) would not significantly threaten any sites of importance for nature conservation.

[11] Policy E13A – "New and Replacement Glasshouses" states:

> "Planning permission will be granted for new and replacement horticultural glasshouses within areas identified for this purpose on the Alterations Proposals Map. Glasshouses will not be permitted outside the areas subject to this policy unless the proposed development is either:
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> (i) a replacement of, or a small-scale extension to, a glasshouse or nursery outside the areas identified on the Alterations Proposals Map; or
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> (ii) necessary for the modest expansion of a glasshouse or existing horticultural undertaking on

> a site at the edge of an area identified on the Alterations Proposals Map which is unable to expand because all the available land in that designated area is occupied by viable glasshouse undertakings, and where there is no suitable land (including redundant glasshouse land) in this or the other glasshouse areas identified on the Alterations Proposals Map;

and in all cases the proposal will not have an adverse effect on the open character or appearance of the countryside."

[12] Saved policy DBE4 states that "[within] the Green Belt, new buildings will be required to ensure" that "(i) their location respects the wider landscape setting of the site …" . Saved policy RST24 states that "[all] developments within or adjacent to the Lee Valley Regional Park should", among other things, "(ii) safeguard the amenity and future development of the park" and "(iii) conserve and, where possible, enhance the landscape of the park or its setting". It adds that "[developments] which are likely to result in a significant adverse impact on the character or function of the park will not be permitted".

THE APPEAL INSPECTOR'S APPROACH TO THE GREEN BELT ISSUE

[13] In the 2012 appeal the inspector accepted that the proposal before her was not inappropriate development in the Green Belt (para 11 of the decision letter). But she went on to conclude that the "huge volume and bulk" of the proposed development "must diminish the openness of the Green Belt and the purposes of including land within it such as safeguarding the countryside from encroachment", that the proposal "must conflict with national policy as expressed in the NPPF and LP policy", and that this harm should be given "significant weight" (para 14). After the appeal was dismissed Valley Grown Nurseries received advice from Mr Peter Village Q.C. on the inspector's approach. Mr Village's "Note of Advice", dated 4 June 2013, was appended to the "Planning Statement" for the proposal with which we are concerned. Mr Village advised that the inspector's approach was "fundamentally wrong and legally erroneous" because "[in] short, for agricultural development there is no requirement [in para 89 of the NPPF] to demonstrate that the development preserves the openness of the Green Belt or does not conflict with the purposes of including land within it" (para 6 of the "Note of Advice").

GROUND 1 – THE "OPENNESS" OF THE GREEN BELT

[14] Although in argument Mr Gregory Jones Q.C., for the Regional Park Authority, divided this ground into two parts – "ground 1(a)" and "ground 1(b)", I think it is best dealt with as a single ground. It embraces submissions on the council's interpretation and application of national and local policy for the construction of agricultural buildings in the Green Belt, and of local plan policies not specifically related to development in the Green Belt. Mr Jones submitted that the inspector's approach in the 2012 appeal was correct. The expression "any planning application" in the first sentence of para 88 of the NPPF means any application for planning permission for development in the Green Belt, whether "inappropriate" or not, and the words "any harm to the Green Belt" mean every possible kind of harm to the Green Belt, including harm to its "openness" and to the purposes of including land in the Green Belt, even if the development is not "inappropriate". The policies in paras 79, 80 and 81 of the NPPF are relevant in decision-making on proposals for agricultural buildings in the Green Belt, even though such buildings are not "inappropriate" development. Under the NPPF "definitional harm" to the Green Belt is distinct from the "actual harm" caused by a development. Paragraph 88 refers to "harm by reason of inappropriateness and any other harm". Even if there is no "definitional harm" – because the proposed building is in principle appropriate – it does not follow that there is no "actual harm" to the openness of the Green Belt, or to the purposes of including land in it. Under the policy in para 88, such harm should be given "substantial weight". This approach applies to proposals for agricultural buildings, even though they are appropriate development in the Green Belt. It was

not, however, the approach adopted by the council in this case.

[15] I cannot accept that argument. As Ms Megan Thomas for the council and Mr Village for Valley Grown Nurseries submitted, it does not represent the correct interpretation of the policies in paras 87, 88 and 89 of the NPPF, read properly in their context.

[16] The interpretation of planning policy is ultimately the task of the court, not the decision-maker. Policies in a development plan must be construed "objectively in accordance with the language used, read as always in its proper context", and "not … as if they were statutory or contractual provisions" (see the judgment of Lord Reed in *Tesco Stores Ltd. v Dundee City Council* [2012] UKSC 13, with which the other members of the Supreme Court agreed, at paras 18 and 19). The same principles apply also to the interpretation of national policy, including policies in the NPPF (see, for example, the judgment of Richards L.J. in *Timmins*, at para 24).

[17] The first sentence of para 88 of the NPPF must not be read in isolation from the policies that sit alongside it. The correct interpretation of it, I believe, is that a decision-maker dealing with an application for planning permission for development in the Green Belt must give "substantial weight" to "any harm to the Green Belt" properly regarded as such when the policies in paras 79 to 92 are read as a whole (consistent with the approach taken, for example, in the judgment of Sullivan L.J., with whom Tomlinson and Lewison L.JJ. agreed, in *Redhill Aerodrome Ltd. v Secretary of State for Communities and Local Government* [2015] P.T.S.R. 274, at para 18). Reading these policies together, I think it is quite clear that "buildings for agriculture and forestry", and other development that is not "inappropriate" in the Green Belt, are not to be regarded as harmful either to the openness of the Green Belt or to the purposes of including land in the Green Belt. This understanding of the policy in the first sentence of para 88 does not require one to read into it any additional words. It simply requires the policy to be construed objectively in its full context – the conventional approach to the interpretation of policy, as the Supreme Court confirmed in *Tesco v Dundee City Council*.

[18] A fundamental principle in national policy for the Green Belt, unchanged from PPG2 to the NPPF, is that the construction of new buildings in the Green Belt is "inappropriate" development and should not be approved except in "very special circumstances", unless the proposal is within one of the specified categories of exception in the "closed lists" in paras 89 and 90. There is "no general test that development is appropriate provided it preserves the openness of the Green Belt and does not conflict with the purposes of including land within the Green Belt" (see the judgment of Richards L.J. in *Timmins*, at paras 30 and 31). The distinction between development that is "inappropriate" in the Green Belt and development that is not "inappropriate" (i.e. appropriate) governs the approach a decision-maker must take in determining an application for planning permission. "Inappropriate development" in the Green Belt is development "by definition, harmful" to the Green Belt – harmful because it is there – whereas development in the excepted categories in paras 89 and 90 of the NPPF is not. The difference in approach may be seen in the policy in para 87. It is also apparent in the second sentence of para 88, which amplifies the concept of "very special circumstances" by explaining that these will not exist "unless the potential harm to the Green Belt by reason of inappropriateness, and any other harm, is clearly outweighed by other considerations". The corresponding development plan policy in this case is policy GB2A of the local plan.

[19] The category of exception in para 89 with which we are concerned, "buildings for agriculture and forestry", is entirely unqualified. All such buildings are, in principle, appropriate development in the Green Belt, regardless of their effect on the openness of the Green Belt and the purposes of including land in the Green Belt, and regardless of their size and location. Each of the other five categories is subject to some proviso, qualification or limit. Two of them – the second, relating to the "provision of appropriate facilities for outdoor sport, outdoor recreation and for cemeteries", and the sixth, relating to the "limited infilling or the … redevelopment of previously developed sites …" – are qualified by reference both to "the openness of the

Green Belt" and to the "purposes of including land within it". The five categories of development specified in para 90 are all subject to the general proviso that "they preserve the openness of the Green Belt and do not conflict with the purposes of including land in the Green Belt".

[20] As Dove J. said (in para 61 of his judgment), the fact that an assessment of openness is "a gateway in some cases to identification of appropriateness" in NPPF policy indicates that "once a particular development is found to be, in principle, appropriate, the question of the impact of the building on openness is no longer an issue". Implicit in the policy in para 89 of the NPPF is a recognition that agriculture and forestry can only be carried on, and buildings for those activities will have to be constructed, in the countryside, including countryside in the Green Belt. Of course, as a matter of fact, the construction of such buildings in the Green Belt will reduce the amount of Green Belt land without built development upon it. But under NPPF policy, the physical presence of such buildings in the Green Belt is not, in itself, regarded as harmful to the openness of the Green Belt or to the purposes of including land in the Green Belt. This is not a matter of planning judgment. It is simply a matter of policy. Where the development proposed is an agricultural building, neither its status as appropriate development nor the deemed absence of harm to the openness of the Green Belt and to the purposes of including land in the Green Belt depends on the judgment of the decision-maker. Both are inherent in the policy.

[21] If the policy in the first sentence of para 88 of the NPPF meant that "substantial weight" must be given to the effect a proposed agricultural building would have on the openness of the Green Belt and on the purposes of including land within the Green Belt, the policy in para 89 categorizing such buildings as appropriate development in the Green Belt, regardless of such effects, would be negated. This cannot have been the Government's intention.

[22] It would be, in any event, an important but unheralded change from "previous Green Belt policy" in the third sentence of para 3.2 of PPG2 – the equivalent policy in PPG2 to the policy in the first sentence of para 88 of the NPPF. Paragraph 3.2 of PPG2 was quite explicit. In view of the presumption against "inappropriate development" the Secretary of State would, it said, attach "substantial weight to the harm to the Green Belt" when considering proposals for "such development" — i.e. "inappropriate development", as opposed to all development whether "inappropriate" or not. If the Government had meant to abandon that distinction between "inappropriate" and appropriate development, one would have expected so significant a change in national policy for the Green Belt to have been announced. I agree with what Sullivan L.J. said to similar effect in *Redhill Aerodrome Ltd.* (at paras 16, 17, 21 and 23 of his judgment, which were noted by Richards L.J. in para 24 of his judgment in Timmins). Leading counsel for the respondent in that case had been right not to submit that there was any material difference between paras 3.1 and 3.2 of PPG2 and paras 87 and 88 of the NPPF. As Sullivan L.J. said (in para 17):

> "… The text of the policy has been reorganised … , but all of its essential characteristics – "inappropriate development is, by definition, harmful to the Green Belt", so that it "should not be approved except in very special circumstances", which "will not exist unless the harm by reason of inappropriateness, and any other harm, is clearly outweighed by other considerations", and the "substantial weight" which must be given to "harm to the Green Belt" – remain the same."

[23] But I also think that the argument Mr Jones founded on his distinction between "definitional harm" and "actual harm" fails on its own logic. It means that the construction of agricultural buildings in the Green Belt, though always appropriate, must nevertheless always be regarded as harmful both to the openness of the Green Belt and to the purposes of including land within the Green Belt – despite such harm being irrelevant to their appropriateness. And if applied to the second and sixth categories of exception identified in para 89, it would also mean that, for example, a proposed building for outdoor sport or recreation or a proposed redevelopment of a previously developed site could qualify as appropriate development – because it was found to preserve the openness of the Green Belt and not to conflict with the purposes of including land

within the Green Belt – and yet still be regarded as substantially harmful to the Green Belt – because it reduced the openness of the Green Belt and conflicted with the purposes of including land within it. I do not think that can be right.

[24] The true position surely is this. Development that is not, in principle, "inappropriate" in the Green Belt is, as Dove J. said in para 62 of his judgment, development "appropriate to the Green Belt". On a sensible contextual reading of the policies in paras 79 to 92 of the NPPF, development appropriate in – and to – the Green Belt is regarded by the Government as not inimical to the "fundamental aim" of Green Belt policy "to prevent urban sprawl by keeping land permanently open", or to "the essential characteristics of Green Belts", namely "their openness and their permanence" (para 79 of the NPPF), or to the "five purposes" served by the Green Belt (para 80). This is the real significance of a development being appropriate in the Green Belt, and the reason why it does not have to be justified by "very special circumstances".

[25] That was the basic analysis underlying the judge's conclusion, with which I agree, "that appropriate development is deemed not harmful to the Green Belt and its [principal] characteristic of openness in particular …". Dove J. saw support for this conclusion in the judgment of Ouseley J. at first instance in *Europa Oil and Gas v Secretary of State for Communities and Local Government* [2013] EWHC 2643 (Admin) (at paras 64 to 78). I think he was right to do so. Ouseley J. captured the point well when he said (in para 66 of his judgment) that under the policies in paras 89 and 90 of the NPPF "considerations of appropriateness, preservation of openness and conflict with Green Belt purposes are not exclusively dependent on the size of building or structures but include their purpose", and that "… two materially similar buildings[,] one a house and one a sports pavilion, are treated differently in terms of actual or potential appropriateness". Thus, as Ouseley J. said:

> "The Green Belt may not be harmed by one but is harmed necessarily by another. The one it is harmed by because of its effect on openness, and the other it is not harmed by because of its effect on openness. These concepts are to be applied … in the light of a particular type of development."

That reasoning was adopted and applied by H.H.J. Pelling Q.C., sitting as a deputy judge of the High Court, in *Fordent Holdings Ltd. v Secretary of State for Communities and Local Government* [2013] EWHC 2844 (Admin) (at paras 33 to 35 of his judgment). An appeal against Ouseley J.'s decision was later dismissed by this court ([2014] EWCA Civ 825). In that appeal Richards L.J. (at paras 35 to 41 of his judgment, with which Moore-Bick and Kitchin L.JJ. agreed) expressly endorsed the "general thrust" of Ouseley J.'s reasoning in the passage of his judgment referred to by Dove J., including the observations I have quoted from para 66 (see, in particular, para 37 of Richards L.J.'s judgment).

[26] That is not to say, of course, that proposals for the erection of agricultural buildings in the Green Belt will escape other policies in the NPPF, and in the development plan, including policies directed to the visual effects of development and the protection of the countryside or the character of the landscape. Policies of this kind will bear not only on proposals for development that is inappropriate in the Green Belt but also on proposals for development that is appropriate. When such policies are applied, the size and bulk of the building, and its "siting, materials [and] design" (the factors referred to in para 3.15 of PPG2), are likely to be important considerations. Establishing the status of a proposed development – inappropriate in the Green Belt or appropriate – remains only the first step for the decision-maker (see, for example, the judgment of Stuart-Smith L.J. in *Pehrsson v Secretary of State for the Environment* [1990] 3 P.L.R. 66, at p.72; and Sullivan J.'s judgment in *Heath and Hampstead Society*, at para 33, where he described this as a "threshold question"). As para 88 of the NPPF makes plain, inappropriate development can prove to be acceptable if "very special circumstances" are shown to exist, because "the potential harm to the Green Belt by reason of inappropriateness, and any other harm, is clearly outweighed by other considerations" (see generally the decisions of this court in *Doncaster Metropolitan Borough Council v Secretary of State for the Environment,*

Transport and the Regions [2002] J.P.L. 1509, and *R. (on the application of Basildon District Council) v First Secretary of State* [2005] J.P.L. 942). And development that is not inappropriate, because it is within one of the exceptional categories in paras 89 and 90 and thus not potentially harmful to the Green Belt "by reason of inappropriateness", may still be unacceptable for other planning reasons. In this case, however, that was not so.

[27] I do not think Mr Jones' argument gains any strength from the Court of Appeal's decision in *Redhill Aerodrome Ltd.* or from the judgment of Sullivan J. in *R. (on the application of Hall Hunter Ltd.) v First Secretary of State* [2007] 2 P. & C.R. 5 (in particular at paras 46 to 52). In neither of those cases, nor in any of the others to which counsel on either side referred, was the court faced with the argument now put forward by Mr Jones. In *Redhill Aerodrome Ltd.* the development (the construction of a hard runway to replace the existing grass runways at the aerodrome) was "inappropriate" in the Green Belt. The court rejected the argument that, in the case of such development, the concept of "any other harm" in the second sentence of para 88 of the NPPF meant merely "any other harm to the Green Belt". In *Hall Hunter Ltd.* Sullivan J. had to consider, among other issues, whether an inspector, in an enforcement appeal concerning the erection of polytunnels and the stationing of caravans on land in the Green Belt, and having accepted that the polytunnels were not inappropriate development in the Green Belt, had erred in his application of a number of local plan policies, including one that referred to the openness of the Green Belt, in coming to the conclusion that "… agricultural needs would be far outweighed by the harm to the countryside arising out of the scale and appearance of the polytunnels" (see paras 46 to 52 of Sullivan J.'s judgment). That case did not raise the issues on the interpretation of national Green Belt policy with which we are concerned here, nor are we dealing with the same local plan policies.

[28] In her report to the council's committee the Principal Planning Officer dealt with the "Green Belt" in paras 16 to 20. She said:

> "16. The proposed development is required for the purposes of horticulture and is therefore "appropriate" in the Green Belt in terms of national guidance and Policy GB2A of the adopted Local Plan and Alterations. The applicant does not therefore need to demonstrate very special circumstances in order to justify the development. The visual impact, and impact on amenity, the environment and on highway safety do however also need to be addressed in accordance with [policies GB7A] and GB11 of the Plan and these matters are considered below.
>
> 17. In considering the previous appeal the Inspector concluded that the development would be harmful to openness of the Green Belt and the purposes of including land within it. The NPPF however, whilst generally setting retention of openness at the heart of its Green Belt Policy, is strangely worded with regard to agricultural buildings. …"

She then quoted the first sentence of para 89 of the NPPF, and the categories of exception relating to "[buildings] for agriculture and forestry", the "[provision] of appropriate facilities for outdoor recreation and for cemeteries …" and "[the] extension or alteration of a building …", and went on to say:

> "18. This wording clearly implies that unlike other forms of appropriate development, buildings for agriculture and forestry do not have to preserve openness and can conflict with the purposes of including land within it. This is actually quite logical as many agricultural buildings are by their very nature large and intrusive and will have a significantly adverse impact on openness.
>
> 19. The applicants have submitted with their application Counsel advice with regard to the Inspector's suggestion that despite being appropriate development this does not set aside the fundamental requirement of keeping land permanently open. The Legal Opinion of Peter

> Village QC is that this is “fundamentally wrong and legally erroneous”[.]
>
> 20. This is of course only an opinion and Planning case law is full of examples of opinions and legal precedents which provide conflicting views, on almost any issue but it is in [officers'] view a logical interpretation of the wording in the NPPF and despite the fact that the previous appeal inspector placed weight on the openness of the Green Belt, it is not considered that this would be grounds to refuse the application. The Council['s] Policy GB11 relating to agricultural buildings (and is considered to be in accord with the NPPF) does not require that such buildings maintain openness.”

[29] Mr Jones submitted that those four paragraphs of the officer's report betray a flawed approach. Both NPPF policy for the Green Belt and policy GB7A of the local plan required the committee to give substantial weight to the effect of the proposed development on the openness of the Green Belt, even though it was appropriate development in the Green Belt. Yet the officer clearly treated that consideration as irrelevant.

[30] I do not accept that submission. The officer's report shows that she understood both NPPF and local plan policy for development in the Green Belt correctly and applied the relevant policies lawfully. In accepting her advice and recommendation, the members may be taken to have adopted her interpretation and application of the relevant policies. The judge's conclusions to this effect, in paras 59 to 65 of his judgment, are in my view sound.

[31] It is well established that planning officers' reports to committee must be read not in an unduly critical way, but fairly and as a whole. Councillors on planning committees can be expected to be reasonably familiar with local circumstances and with relevant policies at national and local level, and to understand what statute requires of them when determining an application for planning permission. If criticism is directed at an officer's report as a means of attacking an authority's grant of planning permission, the question for the court will always be whether the officer has failed to guide the members sufficiently, or has actually misled them, on a matter essential to their decision. Where the officer's advice is founded on planning judgment it will be unassailable unless demonstrably bad as a matter of law. There is ample authority to this effect (see, for example, the judgments of Pill L.J. and Judge L.J., as he then was, in *Oxton Farms, Samuel Smith's Old Brewery (Tadcaster) v Selby District Council*, 18 April 1997, 1997 WL 1106106).

[32] No such submission can be made here. It is not in dispute that the officer was right to advise the committee that the proposed development, a building required for horticulture, was appropriate development in the Green Belt, both under national policy and under policy GB2A, and therefore did not have to be justified by “very special circumstances”. She was also right to say that policies GB7A and GB11 required the members to consider the likely “visual impact” of the proposed development and the impact it would have on “amenity” and “the environment” – as well as on “highway safety”. She said these matters would be considered later in her report, which they were. She did not mention Policy GB10. But that policy did not bear on this proposal because it relates to development “necessary to enhance the function and enjoyment of the Regional Park for its users”, which this development was not.

[33] Policy GB7A, the policy for “Conspicuous Development”, was obviously based on the policy relating to “[the] visual amenities of the Green Belt” in para 3.15 of PPG2. Faithful to national policy in that paragraph of PPG2 and now in the NPPF, it treats “openness” as a concept distinct from the concepts of “rural character” and “visual amenities”. It does not override policy GB2A, which identifies development “for the purposes of agriculture, horticulture, or forestry” as a category of “appropriate” development in the Green Belt entirely unqualified by any reference to the “openness” of the Green Belt. Read in the context of the other Green Belt policies in the local plan, including policies GB2A and GB11, and consistently with government policy in

paras 88 and 89 of the NPPF, policy GB7A does not make the impact of a proposed agricultural building "upon the openness … of the Green Belt" a consideration relevant to the status of that development as appropriate development. And if agricultural buildings are in principle appropriate in the Green Belt regardless of their impact on "openness", and are thus not to be regarded as harmful to "openness", their impact on "openness" cannot be an "excessive adverse impact". This does not mean, however, that such buildings cannot have an "excessive adverse impact" upon the "rural character" or upon the "visual amenities" of the Green Belt.

[34] In the advice she gave to the committee the officer did not ignore the reference to the "openness" of the Green Belt in policy GB7A. She confronted it, in paras 16 to 20 of her report. She acknowledged what the 2012 appeal inspector had said about the implications of the appeal proposal for the "openness" of the Green Belt and the purposes of including land within it. However, she saw the force of leading counsel's opinion that the inspector's approach had been wrong, and she found the interpretation of NPPF policy put forward by Valley Grown Nurseries "logical". She therefore concluded, in para 20, that the effect of this proposed development on the "openness" of the Green Belt, the development being an agricultural building, was "not … grounds to refuse the application". In her "Conclusion", in para 62, she returned to this matter, advising the committee that Valley Grown Nurseries' argument was a "strong" one. This echoed the advice she had already given in para 20.

[35] I see no error there. In my view the officer's advice on the relevance and application of policy GB7A to this proposal for an agricultural building in the Green Belt was legally correct. As she clearly appreciated, a scheme for a form of development that under national and local policy is, in principle, not harmful to the "openness" of the Green Belt, could hardly be turned away as contrary to policy GB7A on the grounds of "an excessive adverse impact on the openness … of the Green Belt". But as she also very clearly acknowledged, in para 16 of her report, the "visual impact" of the development – in policy GB7A, its impact on "rural character" and "visual amenities" – was nevertheless a matter that had to be considered. She dealt with that matter fully in later sections of her report.

[36] The advice she gave on policy GB11, the local plan policy for "Agricultural Buildings", was also sound in law. Because it relates specifically to agricultural buildings, this policy was of particular relevance to the proposed development. In para 16 of her report the officer identified the specific considerations that arose under it, including "impact on amenity … and on highway safety". As she did with the issue of "visual impact" under policy GB7A, she considered those matters elsewhere in her report. But as she also observed, in para 20, policy GB11 is "in accord with" government policy for the Green Belt in the NPPF in that it "does not require that [agricultural] buildings maintain openness". Here she plainly had in mind the policy in para 89 of the NPPF. Her understanding of policy GB11 was in my view correct, as was her recognition that it is consistent with national policy for the Green Belt.

[37] Mr Jones submitted that Dove J. was wrong to hold, in paras 64 and 65 of his judgment, that the officer dealt properly with policy E13A, and also with other policies relevant to the likely visual effects of the development. Again, I disagree. In my view the judge was right to conclude that the officer neither misunderstood nor misapplied policy relating to the effects of the development on the countryside, the visual amenity of the Green Belt and of the Lee Valley Regional Park. I do not think the advice she gave on these matters was in any way deficient or misleading.

[38] Her advice in the section of her report headed "Containment of the Glasshouse Industry", where she considered policy E13A, was, I think, perfectly good. She quoted the policy in its entirety (in para 21). She acknowledged (in para 22) that the existing nursery was within an area identified for glasshouse development under policy E13A, but that the site of the proposed development was not. She also very clearly acknowledged that the development could not be described as a "modest extension", and that it would have "an adverse impact on the character of the countryside in this location due to its sheer scale".

She said the proposal was “therefore clearly at odds with this policy, although it is open to dispute whether the … requirement not to have an adverse impact on the “open” character is … actually in compliance with the NPPF for the reasons set out in the Green Belt section above”. She was focusing here on the final sentence of policy E13A, which applies “in all cases”. She asked herself, as the policy requires, whether the development would have “an adverse effect on the open character or appearance of the countryside”. She found that it would. It is plain that she recognized this conflict with policy E13A. But was she wrong to add the caveat about “compliance with the NPPF”? I do not believe that she was. The caveat took nothing away from her advice that there would indeed be harm to the “open character” of the countryside. But, as she had already said, on a true understanding of Green Belt policy in the NPPF and in the local plan, the effect of the development on the “openness” of the Green Belt did not, in itself, weigh against the proposal being approved.

[39] The officer went on, in para 23, to point out that the council's policy for glasshouses was based on a study carried out in 2003 and did not address “the current needs of the industry”. A report on the future of the glasshouse industry in the district had been completed and adopted in July 2012 as part of the evidence base for the new local plan. Valley Grown Nurseries had “satisfactorily demonstrated that there are no suitable sites available for this development within the current adopted policy E13 areas”. If the application were refused on “policy grounds”, said the officer, “the consequences may be that the growers will seek to find suitable sites outside the District, leaving the potential problem of a large derelict site” and a loss of existing and potential future jobs. These were “important concerns”, and the decision on the application had “the potential for significantly adverse consequences” (para 25). In the absence of a suitable site within “the existing identified glasshouse areas” she did not think the proposal could be rejected “simply because it is outside the scope of policy E13A” (para 26). At the end of her report, in the “Conclusion”, she did not reduce the weight she gave to policy E13A because of any conflict between it and government policy for the Green Belt in the NPPF. She reduced its weight because it was no longer an effective policy to provide for further glasshouse development in the district, and was therefore out of date (paras 63 and 66 of the report). None of these planning judgments are vulnerable in a claim for judicial review.

[40] The same may be said of the officer's advice on “Landscape Impact” and “Impact on [the] Lee Valley Regional Park”. She acknowledged that the proposal did not accord with the requirement of policy DBE4 that, within the Green Belt, development should “[respect] the wider landscape setting”, though “given the long tradition of glasshouse development in the area the scheme could be regarded as respecting local character” (para 30). “[Due] to its vast scale”, she said, the development would “have an impact on the visual character and amenity of the immediate area …”. But the council's “Tree and Landscape Officer” was of the view that the “key landscape character of the area [would] not be compromised” (para 31). The proposal was also “contrary to aims (ii) and (iii) of [policy RST24] – i.e. safeguarding the amenity and conserving the landscape of the [Lee Valley Regional Park]” (para 33). In the Regional Park Authority's view the development “would be significantly harmful to the aims of the Park” and “may set a dangerous precedent if approved for other such development within the [Park] boundaries”. The appeal inspector had “placed significant weight on the harm to the character and appearance of the Park” (para 35).

[41] These considerations featured again in the balancing exercise in the officer's “Conclusion”, where she explicitly gave weight to the “harm to the landscape” (para 69) and “the limited harm to the character and amenity of the area and to the [Lee Valley Regional Park] …” (para 70). Again, I can see no error of law in the advice she gave.

[42] Having considered, as she said she would, the likely “visual impact” of the development, which she had identified as a relevant matter under policy GB7A in para 16 of her report, the officer did not find that the effect of the development on the “rural character” of the Green Belt or on its “visual amenities” would be unacceptable. If she had found that there would be, in either of these respects, “an excessive adverse impact” such as to offend policy GB7A, she would have said as much. On a fair reading of her report as a whole, it cannot be said that she failed to grapple with the considerations arising under that policy. She very

clearly did so.

[43] In my view, therefore, Mr Jones' argument on ground 1 of the appeal must be rejected. The judge was right. The council did not in any respect misinterpret relevant national and local policy, or apply it unlawfully.

GROUND 2 – PRESUMPTIONS

[44] In England the statutory "presumption in favour of the development plan", as it was described by Lord Hope of Craighead in *City of Edinburgh Council v Secretary of State for Scotland* [1997] 1 W.L.R. 1447 (at p.1449F), is now contained in s 38(6) of the 2004 Act. Several paragraphs of the NPPF refer to it. Paragraph 11, in the section of the NPPF headed "The presumption in favour of sustainable development", acknowledges it, as does para 196 in the section headed "Determining applications". Paragraph 12 confirms that the NPPF "does not change the statutory status of the development plan as the starting-point for decision making".

[45] However, the NPPF introduced another presumption, a policy presumption – the "presumption in favour of sustainable development". This presumption is to be applied "[in] assessing and determining development proposals" (para 197), except "where development requiring appropriate assessment under the Birds or Habitats Directives is being considered, planned or determined" (para 119) – which is in dispute here, in ground 3 of the appeal. Paragraph 14 says that the presumption "should be seen as a golden thread running through both plan-making and decision-taking". It explains that "[for] decision-taking" this means "approving development proposals that accord with the development plan without delay", and, "where the development plan is absent, silent or relevant policies are out-of-date, granting permission unless" either "any adverse impacts of doing so would significantly and demonstrably outweigh the benefits, when assessed against policies in this Framework taken as a whole" or "specific policies in this Framework indicate development should be restricted".

[46] One of the "core land-use planning principles" set out in para 17 of the NPPF is that planning should "proactively drive and support sustainable economic development …". In the section headed "Building a strong, competitive economy", para 19 says the Government is "committed to ensuring that the planning system does everything it can to support sustainable economic growth", and that "significant weight should be placed on the need to support economic growth through the planning system". This policy is elaborated in the following paragraphs, including para 20, which says that "local planning authorities should plan proactively to meet the development needs of business and support an economy fit for the 21st century". Paragraph 28, in the section headed "Supporting a prosperous rural economy", says that "[planning] policies should support economic growth in rural areas in order to create jobs and prosperity by taking a positive approach to sustainable new development".

[47] No criticism is made of the officer's conclusion, in paras 27 to 29 of her report under the heading "Sustainability", that the proposed development would be "sustainable". Nor is there any complaint about her conclusion, in para 58 under the heading "Employment/Economic Development", to the effect that the development would assist government policy for "[building] a strong competitive economy" – in particular the policies in paras 20 and 28 of the NPPF, or her conclusion, in para 59, that the new jobs the development would generate – for "a further 40 full time nursery workers, rising to over 50 at peak picking periods" in addition to the existing workforce of between 80 and 100 – were "a significant consideration", and that "a development of this scale is a significant local investment that will help to ensure that the existing businesses continue to be competitive in a market that increasingly requires large sites in order to remain competitive".

[48] In her "Conclusion" the officer said, in para 62, that it was necessary to "balance a number of competing

issues and make a judgement as to which should carry most weight". The 2012 appeal decision was "a material consideration that must be taken into account". But "[countering] this", she said, "the applicant has submitted a strong argument that the weight the Inspector placed on maintaining the openness of the Green Belt was erroneous". She went on to say in para 63:

> "The development is clearly contrary to policy E13A which seeks to contain the glasshouse area, but this policy is outdated and the Council will not have a new policy until a new local plan is adopted, which is still some time away. Whilst the study on the future of the glasshouse industry has provided an evidence base it has not, nor was it intended to set out a way forward, this will need to be part of the local plan process."

In the 2012 appeal the inspector had supported the argument "that to approve the development contrary to the adopted policy could have a significant impact on land use policy and set a dangerous precedent making glasshouses more difficult to resist elsewhere, and changing policy by default rather than through the proper plan process", and had urged the council to resolve "the difficult local balance" (para 64). The officer then said this:

> "65. Now nearly 2 years further on unfortunately despite best efforts, we are still in the same position. This leaves the applicants in a state of complete impasse, with no certainty about how to best ensure the continuation and expansion of their business. Government policy seeks to prevent delay and to push forward suitable sustainable development and the policies of the NPPF are supportive of economic development and the rural economy[. It] is considered that with the passage of time the ability to resist development on the basis of Policy E13 has been undermined.
>
> 66. On the basis therefore that the openness argument and the [policy] E13 argument are not as strong as they were in 2012 we need to weigh up whether the harm from the development is such as to outweigh the presumption in favour of sustainable economic development."

The officer referred again to the Regional Park Authority's objection, and identified "essentially two related issues", which were "the scale of the development being incompatible with the function of the park and that the glasshouse would adversely affect the landscape setting of the site to the detriment of visitor amenity" (para 67). She said "[the] question is really whether this impact is such that the use of this area of the park for recreation is undermined". The appeal inspector had concluded that the proposal was "contrary to policy RST24" (para 68). The officer accepted that "the development does not enhance the park and that there is harm to the landscape", which was "inescapable for a development of this size". But this was, she said, "just one of the competing factors that need to be balanced" (para 69). Her final conclusions were these:

> "70[.] Officers are of the view that even taking account the previous appeal decision and that there are policies that could be used to refuse this application, the potential benefits of the development in terms of economic development, and sustainability outweigh the limited harm to the character and amenity of the area and to the [Lee Valley Regional Park] that would result. It is unlikely that a more suitable location, with less visual impact and impact on wildlife, landscape and residential amenity could be found within the District. If the District is to continue to enable the growth of the Glasshouse industry that has been such an important part of its heritage and not push growers to find sites further afield then development of this nature which provides suitable landscaping, ecological mitigation and transport plans and can not be located within [policy] E13 areas should be considered favourably. It is acknowledged that this could set a precedent for other large horticultural development in the District, but such applications would also need to be considered on their individual merits.

> 71. Therefore, particularly in the light of the emphasis in the NPPF that "significant weight should be placed on the need to support economic growth through the planning system", officers again consider that the balance is in favour of the development. The revised application is therefore recommended for approval …".

Because this recommendation was "contrary to the adopted Policies of the Local Plan", the proposal would need to be referred to the Secretary of State "[as] a departure from the plan" (para 72). If the members took a different view, planning permission could be refused "as it is contrary to current adopted policies", but the council "could … face criticism at appeal on the basis that the current plan is not up to date and we have as yet no clear strategy to meet the future needs of the Glasshouse Industry" (para 73).

[49] Mr Jones submitted that the balance the officer struck in the "Conclusion" of her report was a false one. It was the balance between the harm the development would cause and "the presumption in favour of sustainable economic development". This was not the "presumption in favour of sustainable development" referred to in the NPPF, but a "presumption" of the officer's own creation. In any event, as the proposal was contrary to several policies in the local plan, including policy for the Green Belt, and those policies were not "out-of-date", the "presumption in favour of sustainable development" did not apply to it. And the presumption in s 38(6), reinforced by the policies in paras 11 and 12 of the NPPF, was against planning permission being granted. Yet the officer never brought her mind to that statutory presumption. In particular, she failed to ask herself whether there were considerations sufficient to outweigh the manifest conflict of the proposal with policy relating to the "openness" of the Green Belt in the development plan.

[50] I cannot accept that argument. In para 69 of his judgment Dove J. referred to Mr Jones' submissions on this ground as "essentially an impermissible over-reading of the contents of the officers' report". That, I think, is right.

[51] Given the conclusion in para 63 of her report that policy E13A – the policy of the local plan specifically relevant to glasshouse development – was now an "outdated" policy, I think the officer would have been entitled to apply the "presumption in favour of sustainable development" in the way that para 14 of the NPPF says it should be applied where "relevant policies" of the development plan are "out-of-date". She did not do that. Instead, as Dove J. said in para 69 of his judgment, she undertook a balancing exercise consistent with the requirements of s 38(6). She acknowledged the conflict with the development plan in that the proposal was contrary to policies E13A and RST24 (paras 63, 68, 69 and 72 of the report), and that there would be "harm to the landscape" (para 69) and "limited harm to the character and amenity of the area and to the [Lee Valley Regional Park]" (para 70). But she concluded that these considerations were outbalanced by "the potential benefits of the development in terms of economic development, and sustainability", and the unlikelihood of finding a "more suitable location, with less visual impact and impact on wildlife, landscape and residential amenity" in the district (also para 70). This was a straightforward application of the decision-maker's duty under s 38(6). In my view there is nothing legally wrong with it.

[52] It was in the course of this exercise that the officer said what she did about the "presumption in favour of sustainable economic development" (para 66). She was not attributing to the NPPF a presumption it does not contain – or, as Dove J. put it in para 69 of his judgment, reinventing the "presumption in favour of sustainable development". But the "presumption in favour of sustainable development" can operate in favour of "sustainable economic development" – strongly promoted in para 17 of the NPPF – just as it applies to other kinds of sustainable development. And the officer's reference to a "presumption in favour of sustainable economic development" makes good sense in its context. It followed from what she said about government policy seeking "to prevent delay and push forward suitable sustainable development", and its support for "economic development and the rural economy" (para 65). This advice reflected what she had already said about the importance of new jobs and economic growth (paras 58 and 59).

[53] Taking the officer's "Conclusion" together with the analysis in the preceding sections of her report, one can see how she formed the crucial planning judgment – that despite the proposal's conflict with the local plan and the harm the development would cause, its benefits as "sustainable economic development" were sufficient to justify the grant of planning permission. She gave to each consideration, on either side of the balance, the weight she thought it should have. Weight was a matter for her, and, in the light of her advice, the members (see Lord Hoffmann's speech in *Tesco Stores Ltd. v Secretary of State for the Environment* [1995] W.L.R. 759, at p.780E-G). The reasons she gave for her conclusions and recommendation are, I think, cogent and clear. As one can see in para 71 of her report, the consideration that carried particular force in her planning judgment was "the emphasis in the NPPF that significant weight should be placed on the need to support economic growth through the planning system" – clearly a reference to the policy in para 19 of the NPPF.

[54] In my view, therefore, the officer's use of the phrase "the presumption in favour of sustainable economic development" was, at the worst, infelicitous. It does not expose a wrong or misleading approach. It comes nowhere near being the kind of error that might lead the court to strike down a planning permission granted on the strength of advice given to members in a committee report. The proposal was not given the full benefit of the policy "presumption in favour of sustainable development" in the NPPF, but the officer's advice in her "Conclusion", and throughout her report, was loyal to the statutory presumption in favour of the development plan in s 38(6).

[55] I would therefore reject ground 2 of the appeal.

THE HABITATS DIRECTIVE AND THE HABITATS REGULATIONS

[56] Article 6(3) of the Habitats Directive provides that "[any] plan or project not directly connected with or necessary to the management of the [protected] 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 …". Article 7 of the Habitats Directive applies the protections of art 6 to Council Directive 79/409/EEC on the conservation of wild birds. The Habitats Directive is transposed into domestic law by the Habitats regulations. Regulation 61 provides:

> "(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 … (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.
>
> …
>
> (3) The competent authority must for the purposes of the assessment consult the appropriate nature conservation body and have regard to any representations made by that body within

> such reasonable time as the authority specify.
>
> …
>
> (5) In the light of the conclusions of the assessment, and subject to reg 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 …
>
> (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."

Regulation 5(1)(b)(i) defines "the appropriate nature conservation body" for England as Natural England. Regulation 7 defines "competent authority" to include local authorities and other public bodies.

THE CONSULTATION OF NATURAL ENGLAND ON THE FIRST TWO PROPOSALS

[57] The supporting material for the June 2011 application included the "Phase 1 Habitat and Ecological Scoping Report" dated 21 March 2011, revision C of the "Habitat Enhancement & Landscaping" plan dated 17 May 2011, and the "Wetland Bird Survey" dated July 2011. The scheme for habitat management included measures for protecting and increasing habitat for Gadwall and Shoveler. When consulted by the council under reg 61 of the Habitats regulations, Natural England did not object to the proposal. In their letter to the council dated 6 July 2011 they noted that the survey on 17 March 2011 had "recorded the presence of 30 Gadwall: which equates to 6.6% of the population of the Lee Valley SPA and Ramsar site at the time of its designation as an SPA and Ramsar site; or 10% of the minimum number required to qualify a site for selection as an SPA". The survey had also recorded the presence of five Shoveler, but this number was "not considered to [be] of particular significance in terms of the population of the SPA and Ramsar site". The application site was, therefore, "undoubtedly of considerable importance as a supporting habitat which is used by the SPA bird interest". And "in the absence of mitigation", they said, the development was "likely to have a significant effect on the European site" and had the potential to "adversely affect the integrity of the European site". However, the proposed mitigation measures, they said, "should be capable of providing an adequate extent and continuity of supporting habitat, in order to ensure that there would not be a detrimental impact upon those bird species which are designated interest features of the Lee Valley SPA and Ramsar site". If "fully implemented and adequately maintained", these mitigation measures would be "sufficient to prevent the proposal having a significant effect on the European and international site". Natural England's conclusion was this:

> "Based on the information provided, Natural England has no objection to the proposed development subject to the inclusion of our recommended conditions and the proposal being carried out in strict accordance with the details of the application. The reason for this view is that subject to the inclusion of our recommended conditions, the proposed development, either alone or in combination with other plans or projects, would not be likely to have a significant effect on the Lee Valley SPA and Ramsar site."

The recommended conditions were then set out. Natural England maintained and amplified that view in further correspondence with the council and with the Royal Society for the Protection of Birds ("the RSPB").

[58] When the second application for planning permission was made in December 2011 the same ecological material was relied on, with the addition of a "Phase 1 Habitat Survey Report" dated November 2011, which relied on counts of Gadwall and Shoveler on the site made between May and August 2011. On 6 January 2012 Natural England responded to consultation under reg 61 in terms similar to their response on the first application, again stating that they had no objection to the proposal provided the recommended conditions were imposed on the planning permission.

THE APPEAL INSPECTOR'S DOUBT

[59] In her decision letter dismissing the appeal on the first proposal the inspector referred to the RSPB's view that Langridge Scrape was "functionally linked to the [Lee Valley] SPA since species for which [it] has been designated are dependant on this habitat". It was therefore "necessary to consider the ecological importance of the lake habitat in supporting a proportion of these species" (para 27). She said (in para 28) it was "interesting that these species have taken so readily to the lake and [this] indicates that, all other circumstances being similar, they might take readily to the re-modelled lake". But in this proposal, she said, it was intended "to bring greater numbers of people right up to the [water's] edge and over it on timber walkways" and to re-route the public footpath "[immediately] adjacent to it", and "the picnic area and glasshouses would be within a few metres". The "re-modelled lake would not be the relatively secluded and distant body of water it is at present and the species associated with the [Lee Valley] SPA may not use it to the same extent". Finally, she said this:

> "While I note that Natural England raised no objection I am not satisfied, on the basis of the evidence I have, that the scheme would not adversely affect the integrity of the European site."

THE CONSULTATION OF NATURAL ENGLAND ON THIS PROPOSAL

[60] The ecological reports submitted with the two previous applications were again relied upon in support of the proposal with which we are concerned, together with additional material including an "Ecological Walkover and Update Site Assessment", dated 10 September 2013, an "Outline Landscape Management Plan", and a "Letter of Intention and Specification of Mitigation Works" dated 14 February 2012. A new "Wetland Bird Survey", dated April 2012, had also been prepared, setting out survey results for the period between May 2011 and March 2012. This further survey had been undertaken because the previous one had not included the winter months and so did not show how many over-wintering birds were using Langridge Scrape.

[61] The April 2012 "Wetland Bird Survey" was not submitted to the council. But it was referred to in the "Planning Statement", which said that "[the] results indicate that the water bird counts in the gravel pit pond (application area) are considerably lower than counts made on Holyfield Lake", that "[there] is a notable size difference between the two water bodies and the gravel pit pond is therefore of lower habitat value", and that "[Twig Group], the Consultancy who undertook the survey work, is satisfied that the application demonstrates a low impact on optimal habitat for listed species provided that works take place outside the breeding season and the operations do not disturb bird populations utilising key areas of the site" (para 5.24). The proposed "Habitat Enhancement" works were described as including "extensive habitat enhancement measures … for the reconfigured splash, the overall surface area of which will remain the same as existing …" (para 5.26), the creation of "a new island area in the splash …, the banks of the splash … regraded to provide shallow waters suitable for Gadwall", and "[the] rerouted footpath [to] run parallel with the northern and eastern edges of the splash and … separated from the water by a mixture of wetland grass" (para 5.27). The aim of these works was then stated (in para 5.30):

> "With regard to the habitat proposals and in particular the design of the splash area, every

> effort is being made to enhance the ecology within the area. The overall ambition is to make the area of sufficient interest from a habitat and ecological perspective in order to attract visitors to what is at present, an under used area of the Lee Valley [Regional] Park. … ."

[62] When Natural England were consulted again under reg 61(3), they had available to them all of the documents submitted to the council with the application for planning permission, including the "Planning Statement", to which the appeal inspector's decision letter was appended. They did not have the April 2012 "Wetland Bird Survey". In their letter to the council dated 3 December 2013, they said they had "no objection". Their reason for not objecting was simply stated:

> "Based upon the information provided, Natural England advises the Council that the proposal is unlikely to affect any statutorily protected sites or landscapes but also refers you to our previous response … issued on 06 January 2012."

GROUND 3 – DID THE COUNCIL FAIL TO DISCHARGE ITS DUTIES UNDER THE HABITATS DIRECTIVE AND THE HABITATS REGULATIONS?

[63] The council's planning officer considered the possible effects on biodiversity in a section of her report headed "Wildlife and Conservation". She said the ecological survey reports submitted with the previous applications "all date back to 2011 … and are therefore not up to date". But "a daytime ground based Ecological Walkover and updated site assessment carried out in September 2013" had also been submitted, which "concludes that the phase 1 habitat survey is still accurate and can therefore still be relied upon, and identifies suitable mitigation measures to ensure impacts on wildlife are minimised" (para 47). She recorded Natural England's response to consultation on this proposal (para 48), their view that the proposed development "would not directly impact on the European or Ramsar Site", the reasons why they had not objected (para 49), and their consultation responses on the previous two proposals (paras 50 and 51). She then referred to the concern expressed by the 2012 appeal inspector about the possible consequences of "bringing the public into the site with walkways and picnic areas", so that "the lake would no longer be a distant and secluded feature and that the species associated with the [Lee Valley] SPA may not use it to the same extent", and to her having said she was "not satisfied, on the basis of the evidence [she had] that the scheme would not adversely affect the integrity of the European Site" (para 52). The officer went on to say (in para 53):

> "This leaves us in a difficult position, Natural England is the Statutory Consultee with regard to impact on Statutory Nature Conservation sites and they have concluded from the information provided that there is unlikely to be an adverse impact. The thrust of recent government guidance for dealing with planning applications is to avoid delay in the determination of applications and not to request excessive supporting information. On balance it is considered that despite the concerns raised by the Planning Inspector and the LVRPA with regard to potential impact on wildlife, adequate information has been provided and any likely impact will be suitably mitigated and not so great as to warrant refusal."

She reminded the members that the previous applications were not refused "on grounds of harm to wildlife or habitats" (in para 54). The inspector's decision letter was appended to the report.

[64] Mr Jones submitted that Dove J. was wrong to conclude that the council had lawfully determined the question of whether the development was likely to have a significant effect on the integrity of the Lee Valley SPA. It was for the council, as competent authority, to decide that question. But it had delegated the decision to Natural England, or allowed Natural England to dictate to it what the decision should be without

considering the matter for itself. No reasons were given for departing from the decision of the inspector, as "competent authority", on a proposal very similar to this. The council's decision was one that no reasonable authority would have made on the evidence before it. Dove J. ought to have accepted that the number of Gadwall and Shoveler using the application site was relevant and important. Wetland bird counts for Holyfield Marsh (Holyfield Lake and Langridge Scrape) made by the British Trust for Ornithology on seven days between September 2010 and March 2011 showed that on two occasions there had been more than 30 Gadwall on Langridge Scrape (53 and 62), and on another three, more than five Shoveler (14, 23 and eight). These counts demonstrated that the 2011 survey data – for a single day in March of that year – was out-of-date, insufficient to show the number of Gadwall and Shoveler using Langridge Scrape and the pattern of their activity on the site, and an unreliable basis for judging the adequacy of the proposed replacement habitat. There was no analysis of the likely disturbance of birds by recreational visitors to the site. As the European jurisprudence has emphasized, the Habitats Directive embodies a "preventative and precautionary approach". It "cannot be held that an assessment is appropriate when information and reliable updated data concerning the birds in [the] SPA are lacking" (see the judgment of the Court of Justice of the European Union in *Nomarchiaki Aftodioikisi Aitoloakarnanias and others v Ypourgos Perivallantos, Chorotaxias kai Ergon Dimosion and others* [2013] Env. L.R. 21, at paras 112 to 115, applying the jurisprudence in *Landelijke Vereniging tot Behoud van de Waddenzee v Staatssecretaris van Landbouw, Natuurbeheer en Visserij* [2005] 2 C.M.L.R. 31, at paras 32, 36, 44 and 59 of the judgment, and in *Sweetman v An Bord Pleanola* [2013] 3 C.M.L.R. 16, at paras 28 to 33, 41 and 44 of the judgment).

[65] I cannot accept those submissions. In my view Dove J. was right to conclude, in paras 74 to 83 of his judgment, that the council had lawfully discharged its duties under the Habitats Directive and the Habitats regulations, and had properly concluded that there was no need for an "appropriate assessment" to be undertaken in this case. It must be remembered, as Sullivan J. said in *R. (on the application of Hart District Council) v Secretary of State for Communities and Local Government* [2008] 2 P. & C.R. 16 (in para 72 of his judgment), that the Habitats Directive is "intended to be an aid to effective environmental decision making, not a legal obstacle course". Judging whether an appropriate assessment is required in a particular case is the responsibility not of the court but of the local planning authority, subject to review by the court only on conventional *Wednesbury* grounds (see the judgment of Sales L.J., with whom Richards and Lewison L.JJ. agreed, in *R. (on the application of Dianne Smyth) v Secretary of State for Communities and Local Government* [2015] EWCA Civ 174, at paras 78 to 81). I cannot see how the council's decision on the need for appropriate assessment in this case could be said to be in any way vulnerable on that standard of review.

[66] As Ms Thomas and Mr Village submitted, the context in which we have to consider Mr Jones' argument on this ground is important. The site of the proposed development was not in, or adjoining, a European site, but some distance from it. The proposed mitigation measures were not novel or complicated: the re-shaping and enlargement of Langridge Scrape, with no loss of surface water area, and the creation of additional habitat for Gadwall and Shoveler. As the judge said, the "ecological works" proposed were "clearly mitigation, not compensation", having been "designed to eliminate, avoid or reduce the impact on the protected nature conservation interest in the first place" (paras 79 to 81 of the judgment). When consulted on this proposal, Natural England, as "appropriate nature conservation body", maintained the position they had taken throughout: that, with the proposed mitigation in place, there would be no "significant effect" on the Lee Valley SPA and the Ramsar site. Their advice was accepted by the council as "competent authority". It was now informed by the further material before them when consulted on this application. Once again, it was wholly unambiguous.

[67] There is nothing in the submission that the council simply delegated its decision on the question of the need for appropriate assessment to Natural England, or allowed them to tell it what to decide. That is not what happened. Nor did Dove J. find that it had. He referred, in para 83 of his judgment, to "other cases where, in effect, a local planning authority delegates their decision on such an issue to Natural England, upon whose views, on the recent authorities, they are entitled to rely …". That observation must be read in the light of what the judge had already said about Natural England's statutory remit. He had acknowledged the role of Natural England as "an important consultee" under reg 61(3) of the Habitats regulations (para 58

of the judgment). In doing so, he mentioned relevant authority, including the Supreme Court's decision in *R. (on the application of Morge) v Hampshire County Council* [2011] UKSC 2 (see, in particular, para 30 of the judgment of Lord Brown of Eaton-under-Heywood, and para 45 of the judgment of Baroness Hale of Richmond). He concluded that the council had "adopted and relied upon the conclusions of Natural England", which it was entitled to do (para 74). And he found that Natural England had reached their conclusion on the possibility of there being any "significant effect" on the Lee Valley SPA in accordance with the "correct legal tests" (para 75). I agree.

[68] As Dove J. concluded (in para 77 of his judgment), none of the material before the court on the numbers of Gadwall and Shoveler using Langridge Scrape disproves Natural England's judgment based on the count of 30 Gadwall in the "Phase I Habitat and Ecological Scoping Report". In fact, the April 2012 Wetland Bird Survey lent some support to the earlier data on which Natural England had relied. All of the counts of Gadwall in that document show numbers at 30 or below, the highest numbers recorded being 30, 24 and 22 on days in January, February and March 2012. The counts of Shoveler were all below five, except on two days in December 2011, when eight and six were recorded. And the data put before the court by the Regional Park Authority did not show that the information before Natural England was an inadequate basis for their response to consultation under reg 61. The British Trust for Ornithology counts were generally consistent with the information on which Natural England had relied. In only two of them did the number of Gadwall on Langridge Scrape exceed 30 – the average number being 26, and in three there were more than five Shoveler – with an average of seven. As the judge said (in para 77 of his judgment), the data showing that the numbers of Gadwall and Shoveler were sometimes higher than the number used by Natural England was "unsurprising given the transitory character of the nature conservation interest concerned and the fact that counts will therefore vary from time to time" and "[did] not come close to rendering the factual basis for Natural England's conclusions unsound".

[69] What Natural England had to consider here, as the judge said (at para 78), was not whether there was a "sufficient abundance of [Gadwall and Shoveler] to give rise to the potential for a likely significant effect", but rather, in view of their conclusion that a significant effect could arise "in the absence of mitigation", whether the mitigation measures proposed were adequate to preclude any such effect. Was this development, with the proposed mitigation measures in place, "likely to have a significant effect on a European site" so that an "appropriate assessment" under the Habitats Directive and the Habitats regulations was required? That was the essential question for Natural England and the council in this case. Natural England's answer to it – and the council's in reliance on their advice – was a clear "No".

[70] I do not read Dove J.'s analysis in this part of his judgment as imposing a burden on the Regional Park Authority to demonstrate that the answer ought to have been "Yes". And, like the judge, I do not accept that the conclusion reached by Natural England, and accepted by the council in making its determination as "competent authority" under reg 61, was other than soundly based on the information before them by this stage, or that it fell short of what the "preventative and precautionary approach" required. It certainly cannot be said to be unreasonable or, in the light of the case law on which Mr Jones relied, unlawful. There was, in my view, sufficient material before Natural England and the council to justify the decision the council made (see paras 112 to 115 of the court's judgment in *Nomarchiaki*). I reject Mr Jones' submission that it would only have been possible to conclude that there was no likelihood of a "significant effect" on the Lee Valley SPA and Ramsar site if further work had been done to investigate how Langridge Scrape was being used by Gadwall and Shoveler and whether this might be affected by visitors to the site, and to test the adequacy of the proposed replacement habitat. Had Natural England seen any need for further work to be done, they would have asked for it.

[71] Lastly on this issue, I come to the submission that the council's decision under reg 61 was vitiated by Natural England's failure to comment, in their response to consultation, on what the 2012 appeal inspector had said in para 28 of her decision letter, and to explain why they disagreed. The judge was not persuaded by this submission. And I think he was right.

[72] Because of her doubts about the possible disturbance of birds by recreational activity on the site, the inspector was “not satisfied” that there would be no harm to “the integrity of the European site”. She did not, however, express any view of her own, let alone a clearly reasoned view, about the likely efficacy of the proposed mitigation measures, which was, of course, the crucial consideration in Natural England's judgment that there was not likely to be any “significant effect” on the Lee Valley SPA and Ramsar site. That, it should be remembered, was not a contentious matter in the appeal before her. She acknowledged that she had come to her view on the basis of the evidence she had. When the time came for Natural England and the council to consider this third proposal, there was material before them that had not been before her when considering the first.

[73] Dove J. accepted the submission that Natural England, having considered the inspector's view, was “simply not impressed” by it, and did not need to go further than repeating their own conclusion, which had not changed. It was, he said, “unfortunate that Natural England did not provide reasons for rejecting [her] conclusions, which would have dealt with this point conclusively”. In other cases that might have mattered. But in the circumstances of this case, in his view, it was enough to conclude that Natural England “had the inspector's view and … were undeterred by it”. He was “satisfied that Natural England had access to the appeal decision and that it clearly did not in any way impact upon their conclusion that the approach they had taken in respect of the earlier two applications was one which remained legally valid” (para 83 of the judgment).

[74] That, in my view, was correct. Conscious of the inspector's doubt, and conscious of the proposed habitat enhancement works and arrangements for attracting visitors to the application site described very clearly in the “Planning Statement” for this application, Natural England, when consulted again as “appropriate nature conservation body”, had adhered to the conclusion they had previously stated. It was not incumbent on them to explain why they did not share the inspector's misgivings about the possible effect of the development on “the integrity of the European site”, even though she had been the “competent authority” when she had expressed those misgivings. The divergence of her view from theirs was highlighted in the officer's report. The officer's advice was suitably cautious, and clear. She did not spell out the legal test to be applied – and she did not have to (see the judgment of Pill L.J. in *R. (on the application of Lewis) v Redcar and Cleveland Borough Council and Persimmon Homes Teesside Ltd.* [2009] 1 W.L.R. 83, at paras 84 to 86). But she did give the members adequate guidance on the matters the council needed to consider as “competent authority” under reg 61 (see the judgment of Pill L.J. in *R. (on the application of Lowther) v Durham County Council* [2001] EWCA Civ 781). She reminded them of precisely what the inspector had said in para 28 of her decision letter. And she set against the inspector's doubt, and the Regional Park Authority's objection, Natural England's considered and expert view that, with the proposed mitigation, the development was not likely to have a “significant effect” on the Lee Valley SPA and Ramsar site, and her own conclusion that that expert view should again be accepted.

[75] The officer's conclusion and advice on this question were scarcely surprising. The view of Natural England, when consulted under reg 61 of the Habitats regulations, will generally merit the weight one would expect to be given to the opinion of such a body, with the responsibilities it has for nature conservation and the expertise available to it. A local planning authority, as “competent authority”, must make the decisions for which it is responsible under reg 61. But when it has consulted Natural England as the “appropriate nature conservation body” it would need to have convincing reasons for departing from their view on the likelihood of development having a significant effect on a European site (see the judgment of Sullivan J. in *Hart*, at para 49). In this case the council concluded that there was no good reason to disagree with the view Natural England had expressed as “appropriate nature conservation body”. That was a conclusion well within the bounds of a lawfully made decision under reg 61.

[76] In my view, therefore, the council complied with its duties under art 6 of the Habitats Directive and reg

61 of the Habitats regulations, and it follows that the appeal should not succeed on ground 3.

CONCLUSION

[77] For the reasons I have given, I would dismiss this appeal.

UNDERHILL LJ:

[78] I agree.

TREACY LJ:

[79] I also agree.

Appeal dismissed.