



Neutral Citation Number: [2020] EWHC 44 (Admin)

Case No: CO/2847/2019

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15/01/2020

Before :

SIR DUNCAN OUSELEY
Sitting as a High Court Judge

Between :

THORPE HALL LEISURE LTD	<u>Claimant</u>
- and -	
SECRETARY OF STATE FOR HOUSING, COMMUNITIES AND LOCAL GOVERNMENT	<u>Defendant</u>
-and-	
TENDRING DISTRICT COUNCIL	<u>Interested Party</u>

RUPERT WARREN QC (instructed by **HOLMES AND HILLS LLP**) for the **Claimant**
JACQUELINE LEAN (instructed by **THE GOVERNMENT LEGAL DEPARTMENT**)
for the **Defendant**
ROBERT WILLIAMS (instructed by the **SOLICITOR TO TENDRING DISTRICT
COUNCIL**) for the **Interested Party**

Hearing dates: 3 and 4 December 2019

Approved Judgment

SIR DUNCAN OUSELEY:

1. Thorpe Hall Leisure Ltd, THLL, the Claimant, applied to Tendring District Council, for planning permission to develop some 22 hectares of land around the Lifehouse Hotel in Thorpe-le-Soken for up to 200 dwellings, a 3 hectare park, landscaping and associated infrastructure. Permission was refused. THLL appealed. An Inquiry was held by an Inspector appointed by the Secretary of State; it was largely held in November 2018, but was adjourned until mid-April 2019. During that time events moved on, but were considered at the resumed Inquiry. The Inspector dismissed the appeal in her Decision Letter, DL, dated 11 June 2019.
2. THLL questions the validity of that decision under s288 Town and Country Planning Act 1990 on the grounds that it was not within the powers of the Secretary of State or that the reasons given were legally inadequate, to its prejudice. More specifically, THLL contends that the Inspector, in concluding that permission could not be granted, erred in law in finding that she could not conclude that there would be no adverse effect on the Hamford Water Special Protection Area, SPA, or on the Hamford Water Special Area of Conservation, SAC, some 2.4k to the north of the appeal site, on Essex's estuarine coast. She reached that conclusion, relying on an erroneous interpretation of Natural England's interim advice about how the risk of harm to a range of Essex Coastal European designated areas should be mitigated by off-site measures. The Secretary of State denies the error. THLL also contends that the Inspector was wrong to conclude that the possible adverse effects could not be overcome at least in part by a condition, which she could and should have imposed.
3. In ground 2, THLL contends that the Inspector erred in law in reducing the weight she gave to the affordable housing element of the proposal, by taking immaterial factors into account. She had also taken the absence of evidence about the anticipated tenure split into account, without alerting THLL to the criticism she was to make. This omission was unfair. The Secretary of State contends that this is a misreading of the DL; the Inspector was merely disagreeing with THLL's overstatement of its case. Ground 3 contends that the Inspector misinterpreted paragraph 80 of the National Planning Policy Framework, the Framework, and so gave less weight than she ought to have done, to the advantage that the development would have in extending the commercial life of the Lifehouse Hotel, to the advantage of the local economy. The Secretary of State denies the misinterpretation.
4. Mr Williams for Tendring DC adopted the submissions of Ms Lean for the Secretary of State, but with some variations. He also submitted that if the Inspector had erred in respect of Ground 1, the DL made it clear that she would still have dismissed the appeal, and so any error should not lead to the quashing of the DL in the exercise of my residual discretion under s288. He suggested that this was true of the other Grounds as well.

Ground 1: The Conservation of Habitats and Species Regulations 2017 SI No. 1012 and proof of no adverse effect

5. The background to this issue lies in the extensive group of estuarine and marsh sites of internationally important nature conservation interest on the 350 miles of Essex coastline; almost all of the Essex coast is protected by an international designation for nature conservation interest. The Hamford Water SAC, SPA and Ramsar site is the

nearest to the appeal site. The relevant harm for this case is the risk of increasing recreational use from new housing development, on top of the disturbance which is already occasioned by existing residents. The concept of recreational Zones of Influence, ZoI, within which residential development could generate recreational disturbance has been developed by Natural England, in conjunction with the Essex planning authorities. It is anticipated that there would be some 80,000 new homes in these ZoIs over the period 2018-2038. Natural England, Essex County Council, and the eleven local planning authorities responsible for development planning and control in these ZoIs, are preparing a strategy to deal with this, to be known as the Essex Coast Recreational disturbance Avoidance and Mitigation Strategy, RAMS. They recognised that effective mitigation measures could be taken against the effect of additional recreational disturbance. There were two general types of measure: the provision on the development site of suitable alternative natural green space, SANG, but it was recognised that this would not prevent all increase in recreational disturbance on the designated nature conservation sites. To prevent any adverse effect from such increase in recreational disturbance as would still occur, the strategy would provide for developer contributions, at a set amount per dwelling, to be paid to Councils and pooled for expenditure by them or nature conservation bodies, in or around the designated sites, rather than on the development sites. This pool would be spent on mitigation measures such as on-site wardens.

6. The draft RAMS was before the Inspector at the time of the resumed Inquiry. It had not been adopted by all of the relevant local planning authorities, including Tendring DC.
7. I now turn to how the issue developed, noting at the outset the quite narrow basis for the legal error upon which Ground 1 is based. There was no suggestion that the Inspector had misdirected herself in law as to what the Habitat Regulations 2017 required. This is what she said about the sites and the evolution of the RAMS:

“108. The site is located within the recreational zones of influence (ZoI) relating to the Essex Coast RAMS and associated European designations. The closest is Hamford Water SAC/SPA/RAMSAR Site. The other sites within the ZOI are Colne Estuary SPA/RAMSAR, Stour and Orwell estuaries SPA and RAMSAR, Blackwater Estuary SPA/RAMSAR, Dengie SPA/RAMSAR and the Essex Estuaries SAC.

109. The purpose of these designations is to protect internationally important numbers of breeding and non-breeding birds, their coastal habitats and wetland areas....[They] support internationally important species and populations of migratory wildfowl and waders, as well as nationally important bird species. More specifically Hamford Water SPA supports a breeding population of Little Tern. The qualifying feature of Hamford Water SAC is Fisher’s Estuarine Moth. The Essex Estuaries SAC is important for its subtidal sandbanks, estuaries, intertidal mud flats and sand flats, Atlantic salt meadows, cord grass swards, glasswort and other

annuals colonising mud and sand and Mediterranean saltmarsh scrub.

110. The Essex coastline is a major destination for recreational use, such as walking, dog walking, bird watching, sailing and jet skiing. Surveys have shown that the majority of this activity is by people who live in Essex. In preparing Local Plans recreational disturbance was identified as an issue for all the Coastal Habitats sites.

111. A strategic approach has been developed by 11 Essex Local Planning Authorities with the help of Natural England to deal with recreational disturbance impacts from residential development on coastal European sites (the Essex Coast RAMS). A draft Supplementary Planning Document (SDP), is being prepared that describes the mitigation necessary to protect the wildlife of the Essex coast from increased visitor pressure associated with new residential development and how the mitigation will be funded.

112. In August 2018 Natural England provided revised interim advice to ensure any residential planning applications coming forward ahead of the Essex Coast RAMS which have the potential to impact on coastal European designated sites are compliant with the Habitats Regulations. In the interim period before the RAMS is adopted financial contributions should be directed to fund strategic off-site measures in and around the relevant European site(s). The measures should be targeted towards increasing the sites' resilience to recreational pressure. A suitable delivery mechanism must be agreed to ensure the measures are implemented from the first occupation of dwellings. An alternative that may be acceptable is to secure full adherence with the emerging Essex Coast RAMS at the reserved matters stage."

8. The first stage for the Inspector to consider was whether significant effects would be likely on the designated sites, before any mitigation measures were considered. She concluded at DL115 that:

"... significant effects on Hamford Water SPA/RAMSAR site would be likely to arise from the appeal proposal alone, as well as in combination with other plans or projects by reason of increased recreational visits to the designated area. There is also a risk that significant effects on Hamford Water SAC and the other designated sites would be likely to arise as a result of the proposal in combination with other plans or projects. This conclusion is consistent with the direction in Natural England's interim advice."

9. Accordingly, the Inspector as the competent authority for the purposes of the Habitats Regulations, reg 63, had to make an appropriate assessment of the implications of the

project for the European sites with their conservation objectives in mind. The point of the assessment would be to ascertain whether the proposal would adversely affect their integrity. It was her task to consider the effects and ascertain that the proposal would not adversely affect their integrity before granting permission, DL117: “That would be the case if no reasonable scientific doubt remains as to the absence of such effects. The bar is set very high.”

10. The adverse impact from the development alone on Hamford Water SPA was recreational pressure: direct disturbance of breeding and non-breeding birds. The adverse impact in combination with other developments on that SPA, on the related SAC, and on the other designated sites she had identified, was also the direct disturbance of breeding and non-breeding birds. For the SACs, the adverse impacts included the damage or degradation of the habitat from walking, dog walking and associated nutrient enrichment. THLL proposed the provision of suitable alternative natural green space, SANG, on the development site and adjoining land, and funding towards strategic off-site measures in and around the European sites. Planning conditions were proposed to secure this mitigation.
11. The Inspector had expressed concern in November 2018 about this proposed approach:

“and in particular the wording of one of the proposed conditions. During the adjournment the Essex Coast RAMS document was submitted, together with the draft SPD, referred to above. Planning obligations and a planning condition were put forward to secure mitigation measures as part of the proposal.”
12. By the time of the DL, she was satisfied that the provision of the SANG, directed to the potential impact on Hamford Water SPA/RAMSAR from the proposal, was satisfactorily secured, both as to completion and as to timing for first occupation of dwellings. She accepted evidence, cited in the RAMS, that people could be drawn away from visiting the coast by attractive open space near to the home. However, SANG would not deflect all trips away from the coast and so a contribution to mitigation measures at the European sites was necessary. The financial contribution, based on an amount per dwelling, would go towards funding off-site visitor management measures in line with the emerging Essex Coast RAMS. It would address potential impacts from the development alone at Hamford Water SPA, and the potential in combination impacts at the other identified European sites. She continued:

“125. Natural England has confirmed that the approach followed in the Lifehouse scheme is consistent with the strategic approach adopted towards residential proposals to date. It is satisfied that the proposal may proceed. I attach substantial weight to its advice because it is the national body charged with responsibility for advising in relation to such issues and it has been closely involved with the preparation of the Essex Coast RAMS and SPD. The Council confirmed in its closing submissions that in ecology and habitat terms the proposal could, following appropriate assessment, be granted

without causing harm to any protected site. The Essex Wildlife Trust confirmed that it is satisfied that the proposals for open space and a circular dog walking route will provide sufficient mitigation for likely significant effects on European ecological designations. No third party has pursued an objection on this issue in light of the revised proposals. Therefore on the European sites issue the proposal is not challenged by any participant to the decision making process.”

13. The Inspector accepted that the combination of SANG and financial contribution was well established for a number of European sites, and there was no evidence to suggest that, as an approach, it was inappropriate for Essex coastal European sites. Although the RAMS document had not been considered by the majority of the participating local authorities, each had made a commitment to a developing a strategic solution, Natural England had supported its preparation, and those authorities which had considered it, had received it positively. Accordingly, she gave the draft SPD and the strategy “significant weight”.

14. DL129-132 are the critical paragraphs:

“129. As decision maker, as opposed to a consultee, I have the responsibility of scrutinising the detailed wording of the final Deed with the benefit of the document. In the Fifth Schedule on ecological mitigation the covenants address two scenarios. In the event the RAMS has been formally adopted before the scheme begins, the financial contribution would be paid before the commencement of development, the sum being for works and improvements identified by the RAMS to mitigate any increased use as a result of the development. This is in accordance with Natural England’s interim advice.

130. In the alternative, if the RAMS has not been formally adopted by the Council, the financial contribution would be paid before the commencement of development. However, the planning obligation falls short because it fails to identify the specific visitor management measures. Also, there is no requirement that first occupation of the dwellings does not occur before the additional resilience measures are implemented. When considered in detail the planning obligation does not accord with Natural England’s interim advice. For this reason I have doubts as to the absence of adverse effects, more especially on Hamford Water SPA/RAMSAR.

131. Therefore I am unable to conclude that the proposal would not adversely affect the integrity of the European sites. A consequence is that the presumption in favour of sustainable development, the tilted balance, does not apply.

132. Moving on to the final stages of the process, there are likely to be alternative solutions that that would have no (or a

lesser) effect on the site's integrity. One alternative would be to have a greater commitment to mitigation through a more rigorous planning obligation.”

15. The Fifth Schedule is the Fifth Schedule to the final unilateral undertaking from THLL under s106 of the 1990 Act which the Inspector had before her. I need to focus on its terms, as she did. Clause 2 provides:

“2. The Owners hereby covenant:

2.1 If at the date of the Commencement of Development a RAMS has been formally adopted ... by the Council the Owners shall pay to the Council the RAMS Contribution prior to Commencement of Development and the Owners shall not Commence Development... until the RAMS Contribution has been paid to the Council and the obligation to pay the Natura 2000 Contribution pursuant to paragraph 2.2 below shall cease to apply.

2.2 If at the date of the Commencement of Development a RAMS has not been formally adopted...by the Council the Owners shall pay to the Council prior to Commencement of Development the Natura 2000 Contribution and the Owners shall not Commence Development...until the Natura 2000 Contribution has been paid to the Council....”

16. The pre-RAMS adoption Natura 2000 Contribution was £122.30 per dwelling to be put “towards the funding of additional visitor management measures relating to the Essex Coast Natura 2000 Designations (in particular Hamford Water SAC/SPA/RAMSAR...[and the other sites referred to by the Inspector]”). If RAMS had been formally adopted, approved or finalised by the Council when development commenced, the RAMS Contribution meant “a sum of money to be calculated in accordance with a RAMS payable towards works and improvements identified by the RAMS to mitigate any increased use as a result of the Development at Essex Coast Natura 2000 Designations ([defined as in the Natura 2000 Mitigation Contribution]).” RAMS meant the Recreation [disturbance] Avoidance and Mitigation Strategy, in relation to Essex Coast Natura 2000 Designations as already defined, adopted by the Council as at the date when development commenced.
17. There had been the usual session at the Inquiry in which the terms of conditions and unilateral undertakings were discussed, with the Inspector, in a more informal round table manner as is commonplace. This discusses differences between the parties on the terms and scope of conditions and any s106 undertaking; the Inspector can raise questions about the topics, wording, and test the proposals against Government policy, because it is the Secretary of State who grants permission. There was no issue between the parties as to the efficacy of the undertaking in removing any adverse effect of the development on European sites, after allowing for the effect of the proposed SANG. But Natural England was not present. The Inspector caused a letter to be sent to Natural England seeking its views on the conditions, dealing with the SANG, and on the unilateral undertaking, dealing with off-site mitigation. All parties were copied into the letter and the reply.

18. The letter from the Planning Inspectorate dated 23 April 2019 pointed out that the Inspector, as the competent authority for the purposes of reg. 63 of the Habitats Regulations “must for the purposes of the assessment consult the appropriate nature conservation body and have regard to any representations made by that body within such reasonable time as the authority specifies.” The Inspector sought the views of Natural England as the appropriate nature conservation body on the following:

“1. Is Natural England content that the proposed provision of SANG and a proportionate financial contribution to fund off-site visitor management measures are sufficient to avoid an adverse impact to the integrity of the European Sites and relevant features? If you are not content then please specify your reasons and provide details of any additional measures you consider are necessary.

2. The proposed provision of SANG and financial contribution to fund off-site visitor management measures will be secured by way of planning condition and planning obligations. ...

Through the planning obligations the Owner of the land covenants to:

1. Pay to the Council the RAMS contribution (as set out in an approved RAMS) prior to the commencement of development or in the event the RAMS has not been formally approved before commencement of development pay to the Council a sum of £122.30 index linked per residential dwelling. ... Can Natural England confirm if it is content that this adequately secures the deliverability of the measures?

3. Any other relevant matters that you wish to make.”

19. The reply came by email dated 20 May 2019. It answered the questions in sequence:

“1. Yes, Natural England is content that the proposed provision of SANGS and a proportionate financial contribution to fund off-site visitor management measures are sufficient to avoid an adverse effect on the integrity of the European Sites and relevant features. This is consistent with the strategic approach that we have helped facilitate with LPAs in Essex to deal with recreational disturbance impacts from residential development on coastal European Sites, and with the case-by-case advice we have given to date.

2. Yes, Natural England is content that this approach to using planning conditions/obligations to secure on-site (i.e. SANGS) and off-site (i.e. financial contribution towards the Essex Coast RAMS) measures is adequate in securing their

deliverability...[They were content with the condition for the SANG].

3. Natural England has no further comments on any other matters.

We hope this is helpful but please feel free to get in touch should you have any further queries.”

20. The Inspectorate had no further queries.
21. Natural England had issued its interim advice in August 2018. Its stated purpose was:

“to ensure that any residential planning applications coming forward ahead of the Essex Coast RAMS which have the potential to impact on coastal European designated sites are compliant with the Habitats Regulations. It specifically relates to additional recreational impacts that may occur on the interest features of the following European designated sites.”
22. These ten sites included those identified as relevant by the Inspector. In further explanation, local planning authorities, as competent authorities under the Habitats Regulations, were advised that it was anticipated that new residential development within the recreational ZoI would be likely to have a significant effect on the sensitive interest features of those sites through increased recreational pressure, whether any given residential development was considered alone or in combination with other residential developments.
23. It described the RAMS as:

“a large-scale project which involves all of the [relevant] Essex authorities ... working together to help mitigate these effects. Once adopted, the RAMS will comprise a package of strategic mitigation measures to address such effects, which will be costed and funded through developer contributions. However, it is recognised that a considerable proportion of the residential allocations in your local plan will already be coming forward as planning applications, prior to the adoption of the Essex Coast RAMS. In the interim period until the RAMS is in place and the necessary developer contributions are known, it is therefore important that any recreational impacts from residential schemes such as these are considered in terms of the Habitats Regulations through a project-level Habitats Regulations Assessment (HRA).”
24. A simple flowchart explained how mitigation was to be provided in relation to recreational disturbance; the charts referred to RAMS, albeit that this interim advice preceded its adoption. The recreational disturbance mitigation package was to be identified and summarised. Natural England was to be consulted before a decision was reached on whether the proposed development, as thus mitigated, would have any adverse effect on the integrity of a European site. Annex 1 contained its suggested

scope of mitigation requirements for residential developments of over 100 dwellings. Annex 1 stated first that SANGs should be provided in order to minimise any increase in recreational pressure on the European sites by containing most pressure within the development boundary. That would be unlikely fully to mitigate impacts “when all residential development within reach of the coast is considered together ‘in combination’”. Off-site mitigation was also required as part of the mitigation package. Therefore:

“As such, in the interim period before the RAMS is adopted, a financial contribution should also be agreed with and collected from the developer, prior to commencement, on the basis that it can be used to fund strategic ‘off site’ measures (i.e. in and around the relevant European designated site(s)). These measures should be targeted towards increasing the relevant European site(s) resilience to recreational pressure and be in line with aspirations of the emerging RAMS. As an example in this interim period, this could include funding towards existing warden in schemes at the relevant European designated site(s). A suitable delivery mechanism for the measures must be agreed to secure them and ensure they are implemented from the first occupation of dwellings. Alternatively, we understand that it may be acceptable at the outline planning stage to include a suitably-worded planning condition which secures full adherence with the emerging Essex Coast RAMS at the Reserved Matters stage. Once the RAMS has been adopted, a financial contribution should be secured from these developments prior to commencement.”

25. The Inspector made no adverse comments in the DL about the provisions of the s106 unilateral undertaking which dealt with the position once the RAMS had been adopted. It is instructive, therefore, in the light of her concerns about the position before the RAMS was adopted, to consider the way in which the draft RAMS, produced not long before the resumed Inquiry, identified mitigation measures. For each European site, the potential areas of disturbance of birds through increased visitor access were identified, together with the access management and monitoring measures currently in place. Finally, there was a discussion of further mitigation options. For example, at Hamford Water, the five options for specific measures included enforcement against unauthorised quad bikes and motorbikes, the creation of a permissive bridle path, shorter circular paths from car parks, alternative sites for windsurfers and canoeists, and access restrictions at certain times of the year. Generally, there was a need for more rangers focusing on problem areas where measures would achieve the greatest impact.
26. A costed mitigation package for the period 2018 to 2038 was presented, divided into sections of immediate, short to medium and long-term measures, with a total cost of just under £9m. Immediate measures included the salary of a delivery officer, two rangers, signboards, surveys, and the provision of information to the public. The total cost of the mitigation package of just under £9m divided by the total number of houses anticipated produced a contribution required per dwelling of £122.30, as set out in the s106 unilateral undertaking.

27. The Grounds of Claim and Mr Warren's Skeleton Argument complained that the Inspector had not raised the two aspects which troubled her with THLL, even though all parties and Natural England had been content. The Grounds had however eschewed a claim that the Inspector acted unfairly, in breach of natural justice. Although this aspect troubled me, it goes no further.
28. The primary issue in this Ground is a narrow one of interpretation. There were two aspects: the absence of identification of specific visitor management measures, and the absence of a requirement that no dwellings be occupied before the additional resilience measures were implemented.
29. Mr Warren submitted that there was no requirement in Natural England's interim advice that specific visitor management measures be identified; all that was required was the "funding of strategic off-site measures" which were to be "in line with the aspirations of the emerging RAMS." It would be unworkable to allocate contributions to specific measures at the time of the grant of permission when it was not known when development would commence, or what other schemes and mitigation measures might come forward. Developers could not actually implement such measures on the European sites, away from their own development site, and were dependant on the local planning authority to receive the funds, and to disburse them directly or indirectly on the appropriate measures.
30. He also submitted that the interim advice did not require a restriction on the occupation of dwellings before specific mitigation measures were implemented. This was for much the same reasons: it was not known what specific measures would be implemented, until there was a specific phasing plan. Where the interim advice referred to the securing of off-site measures before occupation of the dwellings, it was directed at the local authorities which would receive the financial contributions from developers, and not at the developers themselves who would not be in a position to secure the actual provision of those measures.
31. In both respects, the Inspector had erred in her interpretation of the interim advice. In departing from it, the Inspector had given inadequate reasons. She had not, for example, found the interim advice to be inadequate.
32. Ms Lean submitted that the Inspector was entitled to doubt the effectiveness of the unilateral undertaking, for the reasons she gave which were drawn from Natural England's interim advice. She accepted that the phrase "specific visitor management measures" did not feature in that advice. The draft RAMS did identify likely appropriate mitigation measures to be applied to each designated site, whereas the unilateral undertaking referred only to "additional visitor management measures relating to the Essex Coast Natura 2000 Designations". Ms Lean described this as the undertaking being "silent" as to the potential measures which might be secured. Precisely the same financial contribution would be made, whether the formal adoption of RAMS came before or after the commencement of development. She asked, rhetorically, how the decision-maker could be satisfied beyond all reasonable doubt, that, even with the mitigation measures, the project would not adversely affect the integrity of the site "when there is simply no information as to what the proposed mitigation measures will comprise?" The Inspector was right to interpret the interim advice as requiring greater certainty as to the mitigation measures.

33. The interim advice required a suitable delivery mechanism to be agreed to secure delivery of the mitigation measures by the time of the first occupation of the dwellings. It did not in terms require restrictions on the occupation of dwellings before implementation of such measures, but there was simply no mechanism in the unilateral undertaking or proposed planning conditions to “ensure” implementation of off-site mitigation measures by the time of first occupation of dwellings, which is when the additional recreational pressure would begin.
34. The Inspector was clearly aware of the positions of both THLL and Tendring DC, but had her own responsibility as the competent authority under the Habitats Regulations.
35. The views of Natural England had not been sought on the efficacy of the specific wording of the unilateral undertaking. Natural England was consulted on the principle of the mitigation and answered the letter on that basis, not on the efficacy of the specific wording of the undertaking. But to the extent that the Inspector departed from the view of Natural England, she had given adequate and sufficiently cogent reasons for doing so.
36. Mr Williams accepted that Tendring DC had been content with the effectiveness of the unilateral undertaking at the resumed Inquiry in April 2019, to prevent any adverse effect on European sites. But that question was for the judgment of the Inspector, reviewable here only on grounds of irrationality, in the *Wednesbury* sense. It was not clear, in view of the Inspector’s summary of its terms in the consultation letter of April 2019, whether Natural England had actually seen the undertaking. Moreover, Natural England did not specifically address whether the off-site visitor management measures could be delivered, where RAMS had not been adopted before the commencement of development.

Conclusions on Ground 1: the interpretation of Natural England’s interim advice

37. There was no dispute but that the Inspector had correctly directed herself as to what the Habitats Regulations required, and how high the bar was, as established by *Landelijke Vereniging tot Behoud van de Waddenzee v Staatssecretaris Van Landbouw Natuurbeheer en Vissierij* CJEU C-127/02 [2005] CMLR31 at [55-59], and *Grace v An Bord Pleanala* CJEU C-164/17, [2018] Env LR 37 at [51].
38. The principle behind the pooled contributions was important. The overall strategic effect of the contributions would be that there would be no adverse effect on the European designated sites, from the expected housing developments. There was no issue but that no moratorium on housing developing in the ZoIs, pending adoption of the RAMS, had been assumed or intended by the Inspector. It was never intended that a specific measure should be calibrated against a specific sum, or degree of harm from one development to one or more European sites should be calibrated against a specific measure, in order to prove that there would be no adverse effect. That would probably prove to be an impossible task anyway. The first developer might also have to pay a wholly disproportionate cost for measures to be implemented for others to benefit from, without contribution.
39. It was agreed that, whatever the Inspector might have decided in the absence of Natural England’s interim advice, her reasons for being unable to conclude that there would be no adverse effect on European sites, depended on her interpretation of that

advice. No party defended the decision on the basis that the Inspector had rejected the advice, as she was entitled to do, provided she gave cogent reasons for doing so. That argument was trailed by both Ms Lean and Mr Williams, but both accepted that she had intended to accept the advice as the basis for her decision.

40. There was no dispute but that the figure of £122.30 per dwelling was the appropriate figure to be found in the RAMS, and the unilateral undertaking.
41. The Inspector was correct to hold that no specific visitor management measures were identified in the unilateral undertaking before the RAMS was adopted. She was also correct to hold that there was no restriction on the occupation of dwellings before implementation of the measures towards which the Natura 2000 contributions would go. Any misinterpretation depends entirely on whether the interim advice required or advised that.
42. I turn to the first issue in the interpretation of the advice: did it require the mitigation measures to be specified where RAMS had not been adopted? The unilateral undertaking requires the developer to pay a contribution to Tendring DC, “towards the funding of additional visitor management measures” relating to Hamford Water in particular. The money was not to be disbursed by the developer but by Tendring DC. In the interim advice, a contribution had to be sought from the developer “on the basis that it can be used to fund strategic ‘off-site’ measures”; it did not require a specific project or a list of potential projects to be identified. The local authority would receive the contribution on the basis that it would be put towards relevant mitigation or prevention measures. These are defined a little further in terms of their purpose in the following sentence: “increasing resilience to recreational pressure” and, importantly, “in line with aspirations of the emerging RAMS”. The example given was support for existing wardens.
43. I see nothing in the interim advice requiring a specific list of measures on which the contribution was to be spent, as the Inspector interpreted it, or even a list from which the specific measures were to be drawn. There is no reference either in the advice to such a list being required to be set out in condition or agreement or unilateral undertaking or even simply to be available to the local authority, at the time when permission was granted. It would be for the local authority, no doubt having taken Natural England’s advice, to decide how the contribution should be best spent in line with the aspirations of the emerging RAMS. Obviously, the further the RAMS had emerged, the more readily could be discerned what would achieve its aspirations.
44. I consider that, whatever the merits of her position in the absence of the interim advice, the Inspector misinterpreted the interim advice in that respect. I am reinforced in that view by two further factors.
45. The Inspector was content with the unilateral undertaking for the post-RAMS stage. The language of the unilateral undertaking itself is no more specific as to the measures towards which the developer’s contribution could go; it referred to what the RAMS was expected to contain. The “RAMS contribution”, post-adoption, was payable “towards works and improvements identified by the RAMS to mitigate any increased use as a result of the development”. The Inspector could see, from the draft, how the RAMS would be structured, and the sort of measures it would propose, and propose in relation to Hamford Water. Ms Lean suggested that it was the difference in

degree of identification of measures which the draft RAMS made possible, which enabled the inspector to be satisfied with the post-RAMS position, while being dissatisfied with the pre-RAMS position in the unilateral undertaking.

46. I do not accept that as an adequate basis for reconciling the Inspector's views in relation to the positions before and after adoption of RAMS. RAMS would only provide a range of options for any of the designated sites, and the contribution was also available to spend on mitigating the effect of the development at any of a wider range of designated sites. Yet she regarded the absence of the identification of specific visitor management measures as a fatal flaw in the unilateral undertaking pre-RAMS adoption; DL130.
47. Moreover, if she had regarded the degree of identification of measures in the draft RAMS as critical to the difference, because it showed what the RAMS on adoption would be like, it is surprising that she did not see the draft RAMS in the same light in relation to the additional visitor management measures of the Natura 2000 contribution, equally showing what they would go towards. Although the text of the undertaking still referred to measures in line with the aspirations of RAMS, their identification had advanced to as specific a list of options as persuaded her that the RAMS would suffice. No conflict was suggested between the draft RAMS and the requirements of the Natura 2000 contribution of the unilateral undertaking.
48. The second point in support comes from the view of Natural England. I am not willing to assume, as Mr Williams suggested might be the case, that Natural England did not have a copy of the unilateral undertaking when it replied to the Inspectorate's letter of consultation. There is no direct evidence, but his suggestion seems the less probable. I am also not prepared to assume, as Mr Williams' suggestion impliedly invited me to, that the Inspectorate engaged in a process of official consultation, as competent authority with the statutory conservation body, without telling Natural England what issues actually concerned it. No issue about the specific wording of the pre-RAMS undertaking was raised by the Inspectorate. The particular issues raised by the Inspector in her DL were not specifically raised for Natural England's comment. The issues the letter raised were broad enough to cover both the principle of the arrangements and the efficacy of the wording in carrying them into effect. Question 1 asked whether Natural England was content that the money for off-site management measures was sufficient to avoid an adverse impact. Question 2 asked it to "confirm" that it was content, (note there was no challenge in that question), that "this adequately secures the deliverability of the measures? "This" in question 2 is not a reference to the quantity of money but to the covenants in the planning obligation. The answers to each were "Yes", and no qualifications were raised either there or in answer to Question 3 which offered the opportunity to say that the wording could be improved. Under either question, or between the two, Natural England is accepting that the sum, and the way in which what the money is to be spent on is defined, are sufficient for it to know that there would be no adverse effect.
49. This is only consistent with the unilateral undertaking being consistent with the interim advice, as interpreted by Natural England. The Inspector does not say that she is rejecting how the draftsman of the advice says it applies.
50. I am also satisfied that the reservations expressed by the Inspector in a note of 22 November 2018 about an earlier proposed condition contain nothing which explains

how her interpretation relates to the interim advice. Events had moved on anyway, in the nature of the obligation, now a s106 undertaking and not a condition, in its wording and in the circumstances in which it would be applied, in the light of the draft RAMS.

51. I am satisfied therefore that, on this first point, the Inspector misinterpreted the interim advice.
52. The second aspect of the main issue in Ground 1 was the securing of the measures before the first occupation of a dwelling. Neither in the pre or post-RAMS adoption world does the unilateral undertaking require the mitigation measures to have been implemented before commencement of development or first occupation of the houses. All that is required in either event is that, before the commencement of development, the money is paid to Tendring DC.
53. The interim advice states that “A suitable delivery mechanism for the measures must be agreed to secure them and ensure that they are implemented from the first occupation of dwelling.” The Inspector’s criticism of the unilateral undertaking in this respect is that there is no requirement for the measures to have been implemented before first occupation of the dwellings. She clearly took this to be something to which the developer should agree in a more rigorous planning obligation; DL131.
54. There is no mention in the interim advice, in its brief mention of the position after the adoption of RAMS, of any such mechanism for “ensuring” the implementation of measures before the first occupation of dwellings. It may be for that textual reason that she was content that there should be no such mechanism in the unilateral undertaking as it applied after the adoption of RAMS, but remained concerned about its absence from the pre-RAMS part of the undertaking. I see no rational basis however, and none was suggested, for differentiating between the pre and post-RAMS adoption world in relation to ensuring the timing of the implementation of the measures. I would regard it as very odd for the Inspector to conclude that there was no need for such a mechanism after the adoption of RAMS, but that such a mechanism was needed before its adoption. I read the comment in the interim advice about ensuring that the measures are implemented before occupation of the first dwellings as implicitly applicable to the post-adoption world; it is just not mentioned again, for the interim advice is not intended to deal with the post-adoption position. If that was not how she read it, in my judgment she was mistaken.
55. The Inspectorate raised no such issue specifically in its letter of consultation; it confined itself to asking whether the obligation adequately secured the deliverability of the measures. To this, Natural England gave the reply I have already set out. Both question and answer treated deliverability as covering the mechanism for securing them, as well as the timing of their implementation. Otherwise, and very oddly, Natural England were consulted on deliverability but not timing, and answered positively in relation to adverse impact, without addressing timing at all. I am not prepared to assume such a failure in consultation or answer. I also consider that if Natural England had been concerned about the timing point, it would have raised that in response to Question 3 from the Inspectorate.
56. However, I do not consider that the Inspector was wrong in reading the interim advice as requiring some mechanism, by obligation or condition which required first

occupation to be prevented until the measures had been implemented. The wording is clear as to the need for a mechanism to ensure that the measures are in place before first occupation. A mechanism cannot simply be the receipt by the local authority of the contribution plus a reasonable expectation that it will do what it should do by a time which it does not control. So some form of preventative measure had to be found. I accept that agreement would be difficult were a local authority to prove recalcitrant when an agreement was sought about the timing by it of the expenditure of the contributions. But the crucial issue here is that a mechanism is required by the interim advice, whatever may be the difficulties, to prevent occupation before implementation of the measures.

57. I do not think that the sentence starting “A suitable delivery mechanism...” can be treated as confining the need for agreement to “securing” the measures, leaving “ensuring” their implementation before occupation of dwellings, solely to the efforts of the local planning authority. It reads more naturally, however, as if the need for agreement applies to both “securing” and “ensuring”. I would have expected any such distinction to have been drawn more clearly and to have been highlighted. Whether any such condition as the advice puts forward in the alternative can lawfully be imposed is another matter; but the fact that that is the alternative shows that the “ensuring” obligation was not to be left to the mere will of the recipient local authority.
58. This may mean that, on the interpretation of the interim advice, a unilateral undertaking is not sufficient without some other form of comfort that, if the money is paid, the recipient local authority will ensure that it is spent before any dwelling is occupied. It may mean that only an agreement will do. Tendring DC could prevent or delay first occupation, or indeed frustrate the whole development, by a condition precluding first occupation until the measures had been implemented. The local authority cannot by condition be compelled to spend the money. Nor, indeed, can it be compelled to enter an agreement to do so, hence the introduction of the enforceable unilateral undertaking. It also means that the Inspector should not have been satisfied with the position after adoption of RAMS. It is difficult to avoid the conclusion that there is an internal contradiction in her views.
59. I give considerable weight nonetheless to the apparent view of Natural England that the undertaking satisfied the meaning of the words it had devised. Its answer to the Inspectorate’s consultation letter shows that it was plainly content with the terms of the unilateral undertaking, and considered that it met the interim advice. It was content that Tendring DC would spend the money in time, as was Tendring DC and every other participant. It was common ground behind the RAMS that the developers could not carry out the works themselves.
60. However, I have to interpret the advice as I find it and, even giving substantial weight to Natural England’s view, I cannot agree with it. Whatever difficulties or contradictions this might create, the issue is one of interpretation, not one of a judgment on the rationality or good sense or practicability of the interim advice. I give considerable weight to the practicability of the outcome in determining the meaning of the advice, but I am not persuaded that a protective mechanism cannot be devised or devised in this case, let alone that it would be without purpose. Of course, the issue was not straightforward for those reasons, but I consider that the Inspector was right.

61. She did not say that she thought that Natural England had misinterpreted its advice; perhaps she did not think that it had. I consider however that that is the logical consequence of her conclusion for the reasons I have set out, but it does not matter; what matters is what the advice means. I also point out that this issue of interpretation is not the sort of reasons issue which may lead to the quashing of a decision; the Inspector may have given bad reasons for coming to the right answer, without error of law.
62. This however leads on to a related point. I am satisfied that Natural England was asked whether it was satisfied that the undertaking and contribution would mean that there would be no adverse effect on any designated site. It replied that it was. Accordingly, the Inspector was faced with the clear view of the statutory consultee, with the issue expressly raised in the context of the undertaking, that it was satisfied on that score. Natural England, Tendring DC, and the local Wildlife Trust for that matter, were satisfied that there would be no adverse effect on a designated site in the light of the unilateral undertaking. In my judgment, she rejected that conclusion, whether or not she realised that was what she was doing. She was entitled to reject their views, of course. Mr Warren submitted that that rejection was not adequately reasoned. Ms Lean and Mr Williams submitted that if that was what she had done, it was clear why.
63. It was not at issue but that the views of Natural England, as the statutory consultee on nature conservation, should be given considerable weight, and that cogent reasons were required for departing from their views on nature conservation issues; *Smyth v Secretary of State for Communities and Local Government* [2015] EWCA Civ 174 at [85], Sales LJ. Indeed, in DL125, second sentence, the Inspector so directs herself. This is not an issue of whether her interpretation of the interim advice was correct; it is whether the rejection of the views of Natural England that there would be no adverse effect was adequately reasoned.
64. I accept that the Inspector does not state that she is disagreeing with the views of Natural England, though I consider that it is obvious that she did, in the light of the answers to the consultation letter. I also consider that, although no natural justice point is raised, that where an Inspector is taking a view that is contrary to those of all the relevant parties, and doing so without any form of alert to the parties that she may do so, she has an obligation to explain just why she has rejected an agreed position that there would be no adverse effect. This is even more so where she has raised questions of the statutory consultee, which go to the effectiveness of the undertaking in removing all adverse effects, but without raising her particular concerns about its text.
65. But I consider that she has in fact given adequate reasons in relation to the issue of ensuring implementation of the measures before first occupation. The interim advice requires it; there was no provision in the relevant section of the undertaking. Natural England put forward that advice, which has not been met. The internal contradiction in her acceptance of the position post-adoption of RAMS does not help THLL here. In effect she also concludes that Natural England ought not to have been satisfied, in the light its own advice, that there would be no adverse effect on the designated sites.
66. Accordingly, on the principal issue in Ground 1, I conclude that the Inspector misinterpreted the interim advice in one respect.

The secondary issue in Ground 1: should a condition have been imposed by the Inspector?

67. Mr Warren's secondary contention under this Ground was that the Inspector erred in law, at DL19, in concluding that the harm could not be overcome by the use of planning conditions. It was plain that the absence of an occupancy restriction could have been resolved by a condition restricting the occupation of units until the implementation of the measures funded by the contribution. Her view was irrational, or else she ought to have imposed a condition in suitable form.
68. Ms Lean submitted that it was not for the Inspector to come up with a condition, let alone to devise its wording, restricting first occupation of a dwelling until after unspecified measures had been implemented by someone other than the developer; *Gladman Developments Ltd v Secretary of State for Communities and Local Government* [2019] EWCA Civ 1543, Lindblom LJ, at [55-60]. *Top Deck Holdings Ltd v Secretary of State for the Environment* [1991] JPL 961, Court of Appeal, did not support Mr Warren's submission. It was not clear that a condition alone could solve this problem. The Inspector had already alerted the parties to the implementation issue through her comments on the proposed condition 11, in November 2018.
69. I do not consider that it was for the Inspector to devise a condition to meet her concerns. The authorities do not support any obligation on an Inspector to think of solutions or devise wording for conditions. There might be very obvious cases, where the Inspector sees a simple answer by condition to a problem which could be imposed, and there may be nothing wrong with such a condition. But I accept the submissions of Ms Lean on this point, borne out as they are by clear authority.
70. I accept that a condition might have been a solution, but its drafting would not have been easy. Mr Warren suggested that the Inspector should have imposed a simple condition preventing first occupation until the measures, for which the contribution had been paid, were implemented. That would avoid the harm, but it is not a clear answer because of the power it would have given to Tendring DC, opposed to the development in principle, to delay occupation of the development. Indeed, such power was a point which Mr Warren had raised in support of his argument on the interpretation of the interim advice. Its imposition could have given rise to a fairness point. She had seen proposed Condition 11; some of the problems in it had gone away or been solved, but not its unlawful, albeit unrecognised, attempt to require Tendring DC to spend the money on measures of mitigation.
71. In the upshot, there was one error in her interpretation of the interim advice, in relation to the specificity of the list of mitigation measures. But the Inspector's decision would not have been different on that account because I have concluded that she was right, and her decision was adequately reasoned, on the second limb, ensuring that the measures were implemented before first occupation. She would still have not been satisfied that there would be no adverse effect, and would still have had to dismiss the appeal. I deal later with the discretion point, on the assumption that I should have found for THLL on Ground 1.

Ground 2: affordable housing

72. It is not possible to consider this ground without referring to part of what the Inspector concluded in relation to housing need in general. By the time of the resumed Inquiry in April 2019, Tendring DC accepted that it could not show a 5 Year Housing Land Supply, 5YHLS: the supply was in the range of 3.5-4.02 YHLS.
73. The “tilted balance” derived from the Framework applied: there was a presumption in favour sustainable development. But, as the Inspector said in DL26, the tilted balance would not apply if policies in the Framework “protecting designated heritage assets or habitat sites” provided a clear reason for refusing the development. I am satisfied that she found that the tilted balance would not apply for each of those reasons; her conclusions in relation to each gave her no choice.
74. She accepted that the 200 new dwellings “potentially would contribute towards improving the District’s 5YHLS and meeting local housing needs”. She then set out a number of reasons why she did not accept that their provision would be quick or early, contrary to the contentions of THLL:

“27... The appellant has placed emphasis on benefits being delivered quickly and early to secure delivery of housing units. However, any planning permission for this major development would be in outline. The appellant would not be the developer and, as set out in the supporting financial statement, the intention would be to dispose of the land to realise capital. The probability is that development would be phased. Before any reserved matters could be submitted planning conditions would require an improved phasing plan and an approved strategy for the provision of suitable alternative natural green space (SANG) to be in place. These factors alone indicate why there is not clear evidence available to confirm such matters as a timescale for submission of reserved matters applications and discharge of conditions, developers’ delivery intentions, anticipated start and build up rates.

28. It may be expected that housing completions would begin on site within 5 years bearing in mind the reasons for the release of the land to realise capital for investment in the Lifehouse hotel and spa. Nevertheless, because of the lack of clear evidence it is not possible to say now that a grant of outline permission for major development would result in the site being deliverable and immediately contributing towards the 5YHLS. I note that the appellant adopted a similarly robust approach towards potential housing sites when considering housing supply and the Council’s Strategic Housing Land Availability Assessment (SHLAA).”

75. The Inspector then turned specifically to affordable housing. The 2007 Local Plan had required 40% of new dwellings to be affordable. The Council’s own viability evidence, supporting its emerging Local Plan, showed that between 10% and 30% affordable housing would be sought; the emerging Local Plan Inspector had said that there was no evidence to support a percentage higher than 30% being viable.

Accordingly, the appeal Inspector accepted 30% or 60 units of affordable housing, as acceptable on this more up to date evidence. She continued:

“31. A planning obligation would secure an approved affordable housing scheme before commencement of development. At this stage there is no indication of tenure split and what proportion of affordable dwellings would be affordable housing to rent, as opposed to other affordable routes to home ownership included within the definition of affordable housing in Annex 2 of the Framework. Therefore it is not possible to conclude the degree to which the type of affordable housing supported by the scheme would be available to meet local housing needs.

32. In effect the proposal does no more than be consistent with emerging policy on the proportion of affordable housing to be provided on-site, given the total numbers of homes to be built and the absence of evidence to indicate whether viability is likely to be an issue. There is very little actual evidence to support the appellant’s claim that the 60 units at the appeal site could start to be delivered in 2020.

33. In conclusion, the proposal would facilitate the delivery of a number of new affordable homes, in an area where delivery has been low and well below demand. Balanced against this significant contribution to local housing need are the other identified considerations that reduce the strength of the appellant’s argument on the matter.”

76. Mr Warren submitted that the Inspector had reduced the weight given to the affordable housing contribution by having regard to immaterial considerations, or considering them irrationally. These were what she referred to in DL33, as the “other identified considerations”. These referred back to (1) mere consistency with emerging policy, DL32; (2) an absence of evidence indicating whether viability was an issue, DL32; and (3) the absence of information about the tenure split; DL31. She ought to have raised the latter point with THLL so that it could deal with it.
77. I shall deal first with viability, and then the tenure split, taking “mere consistency” last. As to viability, Mr Warren submitted that there was no basis upon which THLL had had to address the viability of the affordable housing contribution, where it met all that the local planning authority required. Ms Lean submitted that this was no more than a reflection of what the Inspector said in DL32 in which she explained her rejection of some of the advantages claimed by THLL. Mr Williams said that the absence of viability evidence was a reflection of the fact that the 30% figure had been taken from the emerging Local Plan, rather than being based on evidence specific to this proposal. But this point had not weighed against the proposal.
78. As to the third point, the likely tenure split, Mr Warren submitted that Tendring DC had been content with the s106 unilateral undertaking, under which the tenure split had to be approved by the local authority as part of its approval of the affordable housing scheme. Before me, the parties accepted that there had been no evidence

before the appeal Inspector about any particular form of affordable housing being more needed than another, or that certain tenure splits would be less advantageous than others. The figure of 30% was enshrined in THLL's s106 unilateral undertaking; the tenure split was to be resolved in the approval of an affordable housing scheme. Ms Lean referred me to the supporting text to Policy HG4 of the 2007 Local Plan which referred to a housing needs survey showing that affordable housing locally would almost certainly have to be in the form of social renting, because a large number of residents could not afford low-cost market housing, and only a very small percentage of households in need could benefit from shared ownership. The Inspector had both the unilateral undertaking and the Local Plan policy.

79. Alternatively, Mr Warren contended that, as no issue concerning the tenure split was raised by THLL or by the Inspector, it was unfair for her to reduce the weight given to the benefit of the provision of affordable housing on account of the absence of information about the tenure split. Ms Lean submitted that the comment on tenure split was neutral, a simple statement of the state of the evidence. All that the Inspector had done was to reduce the strength of THLL's overstated arguments, rather than the weight given to the benefit of the provision of affordable housing. Mr Williams submitted that THLL could have dealt with the tenure split, if it had wished to do so but, in the absence of evidence from it, the Inspector was entitled to conclude that there was no evidence about the degree to which the affordable housing would meet local needs. She was also entitled to take that into account in deciding what weight to give to the provision of affordable housing. On their submissions, no question of unfairness arose.
80. On mere consistency with policy, Mr Warren referred me to DL99 on "public benefits." "Public benefit" was very broadly defined: it could be anything that delivered economic, social or environmental progress flowing from the development, provided it was of a nature and scale to benefit the public at large. In DL100, the Inspector said that the primary social benefit from the proposal would be the provision of housing and affordable housing; 60 affordable homes "would contribute to meeting the high need in this regard. My planning merits assessment has identified several caveats about the actual contribution and timing in respect of these benefits." In DL102, she said: "Benefits resulting from policy compliance reduces the weight I attach to them."
81. Mr Warren submitted that it was irrational not to attribute greater weight to a benefit that was consistent with a policy aimed at achieving a particular benefit, rather than simply to acknowledge consistency with policy and no more. It was certainly no basis for reducing the weight to be given to policy compliant benefits, as she had done in DL102. This was all part of the way in which she approached her comment in DL103, upon which the Secretary of State relied, that the benefits had been overstated by THLL.
82. Ms Lean submitted that the Inspector had not reduced the weight given to the significance of the affordable housing provision in making the comments she had done. The Inspector had only identified in DL27 and 32 considerations which reduced the strength of the appellant's argument on the matter. THLL had claimed advantage from the quick and early contribution which the development would make to the provision of housing and affordable housing. She had explained why in her judgment it would probably not do so. By contrast in DL 189, she recognised the strong support

which affordable housing gave to the proposal. The point was no more than a neutral expression of the limit of THLL's argument as she found it.

83. DL 102 and 103 were addressing whether the "public benefits" from the proposal outweighed the harm which would be done by the proposal to the RPG and Conservation Area. The Inspector saw, properly, no "public benefit" for those purposes in a benefit that was no more than policy compliant.
84. Mr Williams adopted Ms Lean's submissions. He also submitted, however, that the judgment that the proposal was no more than consistent with the emerging policy, was relevant to the weight she gave to the affordable housing provision.

Conclusions on Ground 2

85. I accept that the Inspector, in DL27 and 32, rejected THLL's case that there were advantages in granting permission for the early provision of housing, including affordable housing. But that point can only be one of "the other identified considerations that reduce the strength of the appellant's argument on [affordable housing]". The others are the factors which underlie this ground: particularly viability evidence, tenure split and mere consistency with policy.
86. I take first viability and the tenure split, as I see them as the important points. The Inspector's reasons for rejecting THLL's claimed advantage of early housing provision, were based on its actual arguments. By contrast, although seemingly rejecting other claimed advantages relating to viability and tenure split, she did not refer to any claim actually made by THLL in relation to viability or tenure split, let alone to any overstatement in them. Mr Williams did show me passages in THLL's case in which the early provision of housing had been emphasised as an advantage, but he showed me nothing on the topics of viability and tenure split in DL31. Indeed, Tendring DC had raised nothing by way of caveat about them.
87. The Inspector is correct that there was no viability evidence related to this site; THLL had simply provided the top of the range which the emerging Local Plan supported, since the higher outdated Local Plan figure of 40% had been found not to be viable for Tendring generally. It is difficult to see then why further viability evidence would be provided or expected.
88. Her language suggests that she could be looking to a future stage, in referring to whether viability is likely to be an issue; DL32. This could be a reference to some debate in the future about whether the housing offered under the s106 undertaking might not be forthcoming. But no such issue was raised by the parties, nor was such an issue raised by the Inspector during the session on conditions and the undertaking. She identified no provision and I was shown no provision in the undertaking which would have enabled THLL to satisfy its obligations with a lower percentage.
89. There was no suggestion that the current evidence of viability was insufficient to enable a judgment to be made about the appropriateness of the 30% contribution; it was the maximum. I do not think therefore that that was what she was referring to. It is difficult to see her viability comment as a comment on the evidence which had already emerged in the Local Plan process, as Mr Williams suggested. She regarded 30% as "acceptable"; DL30, and the range went as low as 10% in the emerging Local

Plan. It could, I suppose, be a reference to a future stage in the emerging Local Plan process, where a percentage of affordable housing higher than 30% might be found justifiable. But this was not the contention of any party before me; and if it were her point, it would appear to be a speculation on her part, not raised with the parties.

90. I do not consider that this “caveat,” as she described it in DL100, is a mere neutral comment on the state of the evidence. I cannot accept Ms Lean’s submission about what she means. Whatever she means, it is one of the considerations, DL33, “Balanced against this significant contribution to local housing need...that reduce the strength of the appellant’s argument on the matter.” As she had no argument from THLL on this, for example giving particular weight to the percentage, it cannot be said that a specific claim has been overstated. If she is not responding to an overstatement about those particular aspects, and she is not, I cannot avoid the conclusion that she has reduced the weight given to the provision of affordable housing because of the viability evidence or lack of it. But there was no basis for her reducing the weight given to the provision of affordable housing because of the state of the viability evidence for the reason she gave or for any other reason. The point was simply irrelevant.
91. I have much the same concern over what she said about the tenure split. She did not identify any claims made by THLL about any claim of a match to tenure needs, which she regarded as unsubstantiated. No caveat was expressed by Tendring DC about the tenure split which might emerge from the s106 affordable housing scheme, in which tenure split required its approval. The Inspector could have referred to the text supporting Local Plan policy HG4, in this context, but did not do so; she regarded that policy as out of date. That was all Ms Lean could find, on being pressed, as to the basis for the Inspector’s concern, and no one else could improve on it. There was no evidence that that had been referred to at the Inquiry. All parties took it that Tendring DC would know what split it wanted when the scheme was presented and would be in a position to enforce it.
92. The third sentence of DL32 suggests that a mismatch between provision and needs could occur. But there is no basis for that point in the reasons she gives or the evidence she heard. She also gave THLL no chance to deal with it: either by explaining the scheme for approval and how that enabled Tendring DC to impose its tenure split, or adjusting its terms to meet her concern.
93. Again, it is clear from DL33, that DL31 is not a neutral statement about the evidence, though its second sentence may be accurate. This “caveat” is a factor which is “Balanced against the significant contribution to local housing needs...”. There was no basis in the evidence for her to reduce the weight given to the provision of affordable housing for any reason related to tenure split, and no basis for this factor to be material in the way the Inspector used it.
94. I also consider that it was unfair for the Inspector to deploy this caveat or factor in reduction of the weight she gave to the affordable housing provision, without giving THLL the chance to deal with it, by evidence or commentary. It would not have been difficult to raise during the conditions and undertaking session. It was not an issue raised either by Tendring DC, and THLL could reasonably have supposed that Tendring DC’s contentment with a mechanism which required its approval to the tenure split, would satisfy the Inspector.

95. I am not persuaded however that the first point raised under this ground is sound as a separate point. DL32, in the first part of the first sentence, is accurate, albeit that it is oddly dismissive in tone, of compliance with a significant, socially beneficial Framework policy and emerging Local Plan policy.
96. DL100 is written in the context of the task of weighing “less than substantial harm to a heritage asset” against the “public benefits” of the proposal. The Inspector’s comment in DL100 about the “caveats” is merely a reflection of the second and third points, which I have just dealt with, and stands or falls with them. I cannot see that in substance it adds anything to them.
97. Mr Warren drew on DL102, second sentence: “Benefits resulting from policy compliance reduces the weight I attach to them.” I do not consider that the Inspector’s approach there is necessarily wrong in the context of environmental benefits, which is where that sentence appears. If there had not been compliance with policy, there would have been an additional objection. Compliance avoids it. It is difficult to see why mere compliance with policy, the mere removal of an objection, should itself be a public environmental benefit, rather than the removal of a public drawback. It may be different where the policy is about the achievement of a public good rather than the prevention of a harm, for example providing for the optimum re-use of a listed building. Compliance would then be a benefit. But I do not consider that the Inspector is addressing that sort of point. And she gave significant weight to the provision of affordable housing anyway.
98. DL102 may also be a general comment which the Inspector applied outside the specific environmental context. However, the weight given to a policy or to benefits arising from compliance with a policy is a matter of judgment which is for her; nor does her judgment involve a misinterpretation of the PPG, or reliance on an immaterial consideration.
99. I consider that the Inspector is simply giving no additional weight to the fact that THLL were compliant with affordable housing policy. She gave significant weight to compliance with the policy, that is the provision of affordable housing, albeit reduced wrongly because of two factors irrelevant to the judgment she had to make.
100. If the Inspector is correct in her appraisal of the “caveats”, I see no further point adverse to her decision in this aspect. But if wrong in her appraisal of two caveats, as I think she is, I see no further advantage to THLL from any error in the third point, no additional positive weight given to simple consistency with policy.
101. But she went beyond giving no additional positive weight, to the provision of affordable housing, in dealing with viability and the tenure split. She was not simply removing the effect of any over-statement of its case by THLL. She reduced the weight she gave to compliance with a significant and socially beneficial policy, because THLL had not shown additional benefits from viability or tenure split. She is doing so by reference to considerations immaterial to this particular case.
102. The Inspector has therefore erred in my judgment in relation to two “caveats” which affected, to some but to no very great degree, the weight she gave to the provision of affordable housing. I shall consider their significance when I consider the exercise of my discretion.

Ground 3: paragraph 80 of the Framework

103. The Inspector dealt with this under the heading of “Business case, local economy and employment.” The hotel had opened in 2010 but went into receivership within a year. THLL acquired it in 2012, with the capital debt of £8.5m and debt repayments of £350,000 pa. Performance was stable by 2017, and indeed it was operating near capacity. The appellant’s case was that:

“43...the proposal is central to the ongoing financial security of the Lifehouse hotel and spa, which is also a major local employer, a tourist facility and the steward of the registered park and garden. According to the appellant Lifehouse employs about 200 people, relies on roughly 70 local suppliers in Tendring District and local contractors are employed to carry out repairs and maintenance. In total the economic contribution of Lifehouse is around £4.2 million a year. Without a capital injection Lifehouse is highly likely to become insolvent in the next 5 years, with all the adverse consequences for its employees and the local economy.”

104. The sale of the land would pay down the debt, and provide for capital investment in upgrading facilities in various ways. Although the bank loan agreement required money raised from the sale of an asset to be used to repay debt, the bank had agreed that an unspecified element of the proceeds could be spent on improvements to the hotel.
105. The Inspector appraised this against policies as follows:

“45. The Local Plan encourages proposals for new or improved tourist attractions which enhance the District’s ability to attract and cater for visitors, increase local employment opportunities and which do not conflict with other important economic or environmental objectives of the plan. The Framework expects planning policies and decisions to help create the conditions in which businesses can invest, expand and adapt. [This reflects paragraph 80 of the Framework]. In rural areas the aim should be to enable sustainable rural tourism and leisure developments which respect the character of the countryside. [This reflects paragraph 83 of the Framework.] However, the development for which planning permission is sought, and is required, is new housing. The proposal is not put forward as an enabling development [This is a reference to paragraph 79 of the Framework] and no planning mechanism is proposed to link the proposed development of the land to investment in the hotel and spa. The conditions to which the Framework refers include development plan strategies and policies, allocation of land and overcoming barriers to investment by provision of adequate infrastructure and improving the environment. There is no indication that planning decisions should accommodate or be justified by a scenario of the type relied on by the appellant....

47. A major housing development would be a permanent change to the local environment. By contrast the financial circumstance, business and decision-making environment would be open to a number of external influences, risks and uncertainties and potential changes in the short term. The history of the hotel and spa over the last ten years or so as not been stable, with the current owners purchasing the business from administration in 2012. The current financial position is fragile. Even with the proposed capital investment in the business there is no certainty that its future will be safeguarded. There is a stated need for further major capital investment within the next five years or so. All in all there is no reliable evidence to demonstrate that the long-term future of the Lifehouse from the sale of the land.

48. In conclusion, the Lifehouse hotel and spa is an important local business and employer and positively contributes to tourism in the area. The need for investment in improved accommodation and facilities to maintain its position in a competitive market has been demonstrated. An injection of funding may well reduce the risk to the business, provide opportunities for its development and safeguard employment in the short term. However, the business justification for release of the land to large-scale housing development has limited weight when placed in a broader planning policy and economic context.”

106. The language of [80] of the Framework is notably broad. It is in the chapter headed “Building a strong, competitive economy”.

“80. Planning policies and decisions should help create the conditions in which businesses can invest, expand and adapt. Significant weight should be placed on the need to support economic growth and productivity, taking into account both local business needs and wider opportunities for development. The approach taken should allow each area to build on its strengths, counter any weaknesses and address the challenges of the future....”

107. There is a reference to “enabling development” in [79b] of the Framework, in the context of permitting the development of isolated homes in the countryside, where it would be “appropriate enabling development to secure the future of heritage assets.” THLL agreed this was inapplicable, in evidence to the Inspector. In [83], the Framework describes decisions which would support a prosperous rural economy, through “the sustainable growth and expansion of all types of business in rural areas”, and “sustainable rural tourism and leisure developments which respect the character of the countryside...”.

108. The parties’ submissions were straightforward. Mr Warren submitted that the financial cross-subsidy for the hotel business, and then onwards into local employment and the local economy, were well within the scope of [80] of the

Framework, and the proposal, thus supported, should have been given greater weight. Ms Lean submitted that the Inspector's reasons showed that the form of cross-subsidy proposed was not within the scope of [80], which did not envisage that planning decisions should be justified by the type of scenario relied on by THLL. In any event, the problems identified by the Inspector, which led to her giving little weight to the argument for THLL, meant that she would have given it the same limited weight even if it had fallen within the scope of [80]. Mr Williams adopted those submissions.

109. I do not accept that the Inspector misconstrued [80] of the Framework. She analysed the issue: this was not itself an application for business or employment development within [80]. She did not rule out the economic link as irrelevant. The development could only fall within the first two sentences of [80], in a broad sense, because of the way in which it could help the hotel business, through providing a source of investment. She was well aware of the importance of the economic role of the hotel; DL48. The Inspector analysed the financial evidence in a manner which has drawn no criticism. She pointed out that there was no planning mechanism linking the housing development to some investment in the hotel. Even if there had been a link provided by a planning mechanism, the issues raised in DL47 were the crucial ones in her conclusion on this point, and, as I read the DL, would have been present whatever her view on [80].
110. [80] of the Framework does not exclude enabling development in principle from its scope, it does not expressly relate to, let alone favour, enabling development either; its thrust is correctly identified by her in DL47. The housing development could not receive any more than the limited sort of support which any very broadly expressed policy can be interpreted as affording to that which can be said to fall within its scope, without being what the text is really directed at.
111. If a planning mechanism had provided some link to rural tourism and leisure, for the purposes of [83] of the Framework, [83] would still not have helped because she found that the development would not respect the character of the countryside.
112. Her conclusion that only limited weight could be afforded to THLL's argument on this point would have been inevitably the same, even if she had been wrong to exclude the planning implications of the financial relationship from her consideration of [80] of the Framework.

Discretion

113. The DL identified seven main issues: housing needs, the local economy and employment, the settlement form with landscape character and appearance of the countryside, the setting of the registered park or garden and the nearby conservation areas, the designated European nature conservation sites, the capacity and safety of the highway network, and the social and physical infrastructure of Thorpe-le-Soken and the surrounding area.
114. The Inspector had to consider whether the proposal conflicted with the development plan, and if so whether material considerations indicated a decision otherwise than in accordance with the Plan, s38(6) Planning and Compulsory Purchase Act 2004. She went through the various issues and policies.

115. Mr Williams took me through the various passages in the DL in which the underlying views were elaborated, to show me the degree of conflict with important policies, and also to show that, even if the Inspector were wrong about conflict with the Habitats Regulations, under Ground 1, the tilted balance in favour of development would still have been disappplied because of the harm to the designated heritage assets of the registered park or garden, RPG, and with one of the two Conservation Areas.
116. I refer to these briefly. The scale of the proposal made it contrary to QL1 as it fell outside the category of limited development consistent with local community needs, and would be outside the settlement development boundary. This undoubted conflict was not regarded as conclusive against the proposal because the settlement boundary was being reviewed; DL54.
117. The Inspector made a number of comments about the adverse impact of the proposal on landscape character, and about its visual impact, before concluding in DL73:
- “The proposed development would not protect but would significantly harm the quality of the landscape and its distinctive local character. There is potential for the layout to incorporate existing site features of landscape and amenity value but the development of the housing site would not respect local views, especially those enjoyed by the most sensitive receptors. The proposal is contrary to Policies EN1 and QL9 the proposal fall short of compliance with the policy requirements of the Framework summarised above.”
118. The appeal site adjoined the boundary of the Thorpe-le-Soken Conservation Area which included Thorpe Hall, a grade II listed registered park and garden, RPG. Policy EN17 protected the setting of a conservation area from harmful development outside it. At DL 89, the Inspector described the proposal as resulting in the suburbanisation of land immediately outside the Conservation Area and the RPG “which would be a substantial and permanent change to the setting of these designated assets.” At DL90 and following, she said:
- “The scale and massing of housing development on the southern margin of the RPG would result in the loss of an important visual association with its rural setting the introduction of a considerable amount of movement and activity associated with the residential land use would intrude on the quiet environment enjoyed within the gardens and parkland....
91. Attention needs to be directed to a consideration of the effect on the conservation area as a whole. The proposed development would have no effect on the character or appearance of the main street whether historic buildings are concentrated. The effect would be on the character area of Thorpe Hall. The development of a suburban housing estate and public park would physically and visually divorce the historic landed estate from its essential rural setting to the

south. The significance of the distinctive historical association in the development of the village will be much reduced....

96. The development would not protect the RPG and say would be against the advice in the Local Plan. The harm to the significance of this designated heritage asset would be less than substantial.

97. The proposal would prejudice the setting of Thorpe-Le-Soken conservation area and harm outward views. As a result of the conflict with the requirements of Policy EN17 the policy direction is that the development should be refused. In the terms of the Framework, the proposal would lead to less than substantial harm to the significance of the designated heritage asset.”

119. In the light of this, the Inspector went on to balance the harm the designated assets against the public benefits of the proposed development. She attached great weight to the conservation of the RPG and conservation area.

120. I have already referred, in dealing with “public benefit” in relation to affordable housing, to much of what the Inspector said in DL99-102. I pick up the rest here. A new public park would largely benefit the residents of the new housing. There would be economic benefits during the construction period, plus employment retention and possible expansion at the hotel with indirect economic benefits, acknowledged to be short term. Reduced traffic congestion would be slight at best. Environmental benefits were based largely on reasonable expectations, in view of the outline nature of the proposal. Overall, DL103, the Inspector considered the weight of public benefits to have been overstated by THLL. She ended this topic thus:

“104. If the harm is taken to be the cumulative harm to the heritage assets, as indicated by the balancing exercises carried out by the appellant and by the Council, the harm is not outweighed by the public benefits. However the wording of the Framework indicates that a separate balancing exercises is required for each designated heritage asset. On that basis the outcome is not so clear but on balance I conclude that in each case the less than substantial is not outweighed by the public benefits.”

121. At DL159, the Inspector concluded that the development would have adverse impacts on the capacity of the local highway network, although the non-compliance with Policy TR1 would not justify a refusal of planning permission on capacity grounds alone applying the severity test in the Framework. There was a degree of conflict with policy TR 3a, and QL2 on pedestrian and cycle needs. There would be a significant impact on healthcare provision in the village resulting in harm to the social and community provision to meet the health needs of existing and future residents which meant that the objectives of Policy QL12 were not met.

122. In the final section of her DL, headed “Planning Balance and Conclusions”, she said this:

“187. The overriding conclusion is that to ensure compliance with the Habitats Regulations planning permission cannot be granted.

188. The proposed development fails to comply with Local Plan Policies QL1, QL9, EN1, EN11a, and EN17, policies which in the main are directed at controlling the location of development and which apply to areas with statutory designations and enjoy a high level of protection. In terms of physical and social infrastructure, local biodiversity and accessibility there is a degree of conflict with Policies QL2, TR1, and TR3a and compliance with Policies TR6, COM6, COM26, EN6, and EN13 insofar as details have been submitted at this outline stage. My conclusion is that the proposal is not in accordance with the development plan when read as a whole.

189. Under the Framework there is a presumption in favour of sustainable development. Local Plan Policies HG1, HG4 and QL1 in respect of new housing provision in the District, including affordable homes, are out of date but the tilted balance in paragraph 11 does not apply in this case because policies in the Framework protecting areas of particular importance provide a clear reason for refusing the development. The proposal has strong support in so far as it contributes to the social objective of bringing forward land for new homes including affordable housing in the District. Limited economic benefits have been identified. Balanced against these positive aspects the unacceptable environmental consequences show that the proposal is not a sustainable solution. Inadequacy in healthcare facilities has not been satisfactorily addressed. Overall the proposed development is not acceptable when assessed against the policies in the Framework.

190 Even allowing for the inconsistencies between certain policy requirements and the Local Plan and national policy, the direction provided by the Local Plan is supported by the Framework.

191. The identified harm is not able to be overcome by the use of planning conditions. There are no other considerations that indicate the outcome should be other than in accordance with the development plan.”

123. Policy EN11a deals with habitats, and for the purpose of considering discretion in relation to Ground 1, it falls out of account.
124. Mr Williams accepted that this Court could only exercise the residual discretion under s288 of the 1990 Act, and refuse to quash a legally flawed decision, if it were satisfied that the decision would inevitably have been the same, even if the error had not been made; *Simplex (GE) Holdings v Secretary of State for the Environment* [1988] 3 PLR

25, and *Smech Properties Ltd v Runnymede BC* [2016] EWCA Civ 42. His primary submission concerned an error in relation to Ground 1, on the assumption that Grounds 2 and 3 had failed, but he made the general point about the position in relation to those Grounds, to which Mr Warren responded.

125. He pointed to the findings that, quite apart from the Habitats Regulations, the development proposed would not be in accordance with the development plan, and should be refused in the absence of material considerations indicating otherwise. Compliance with the Habitats Regulations would remove a fatal objection, without creating a consideration indicating a favourable decision. The Inspector had analysed the extensive failings of the development measured against development plan policies. The “tilted balance” would still be inapplicable, regardless of the position in relation to European sites, because there was harm to designated heritage assets, the RPG and Conservation Area, which she found was not outweighed by public benefits; see DL26.
126. Mr Warren recognised the force of these points, but contended that they were not quite strong enough to justify the refusal of a remedy in respect of errors made under Ground 1. If he were right, in respect of Grounds 2 or 3, it was clear, he said, that the *Simplex* test would not be satisfied. There would be a stronger case under DL100 and 102, and the heritage balance in DL104 would be different. DL189 and 190 would be strengthened.
127. If I had found for THLL on all of Mr Warren’s Ground 1 points, I would have refused to quash the decision in the exercise of my discretion under s288, applying *Simplex*. The appeal, inevitably, would still have been dismissed for the reasons which Mr Williams gave. Success for THLL on this point, with the prospect that the Inspector might have found that there would be no adverse effect on a designated site on the basis of the unilateral undertaking, could not have altered the overall decision. It would only have removed a complete bar to the grant of permission, and provided for compliance with policy EN11a. It would have added nothing to the positive case for the development to go into the balance against the other harm which she found.
128. It could not have altered her conclusion that the proposal did not accord with the development plan, in view of the extensive non-compliance with it; DL188. It could not have afforded a positive consideration to indicate a decision otherwise than in accordance with the development plan. Mr Williams was also right to point to the extent of adverse impact on the quality of the landscape and its distinctive local character; DL73, and to the extent of harm to the RPG and Conservation Area, in DL89-97. If the Inspector made no error in relation to housing, her analysis of the housing benefit, including affordable housing, when measured against the harm to designated heritage assets, would still not have sufficed to lead to a different outcome for the appeal; DL104. The tilted balance would still not have come into play because of the harm to heritage assets; DL26 and 189. This would still be so, even if DL189 also covered the designated nature conservation sites as “areas of particular importance”, rather than treating them as dealt with exclusively in DL187, as the overriding consideration which prevented the grant of planning permission at all. There were also the other adverse effects in relation to health care and highways impact, even though the latter would not have warranted a refusal by itself.

129. I could not quash the decision on the grounds of the error in relation to affordable housing if it were the only error, because the possible adverse effect on the European designated sites would still require refusal of permission.
130. As I have explained, I do not consider that the error in Ground 1 which I found, could have led to an overall decision on the issue of adverse effect favourable to THLL. However, I am also of the view that, even if errors in relation to Ground 1 were sufficient to lead to a different overall conclusion on Ground 1, they, with Ground 2 could still not possibly have altered the decision.
131. The presumed errors in Ground 1 could only have removed an objection; there would still have been no favourable “tilted balance”. The proposal would still have faced major objections against which a modestly warmer welcome for affordable housing could not have weighed to any significant extent at all, and plainly not enough even possibly to alter the decision. The Inspector described her comments on affordable housing tenure and viability as “caveats” to a benefit to which she gave significant weight, even after rejection of the asserted advantage of early provision. The caveats could not affect her conclusion that the proposal did not accord with the development plan, and they detracted little from the affordable housing provision and other circumstances which might indicate a decision not in accordance with it. I see nothing to suggest that it could have altered the balance of harm and public benefit in relation to designated heritage assets.

Conclusion

132. Although I consider that the Inspector erred in certain minor respects, they could not have affected her decision. This application is dismissed.