R. (ON THE APPLICATION OF CHRISTOPHER PRIDEAUX) v BUCKINGHAMSHIRE COUNTY COUNCIL v FCC ENVIRONMENT UK LIMITED

High Court of Justice Queen's Bench Division Administrative Court

Lindblom J.: 29 April 2013

[2013] EWHC 1054 (Admin); [2013] Env. L.R. 32

Energy policy; EU law; Habitats; Natural England; Planning authorities' powers and duties; Planning permission; Protected species; Waste management; Waste policy

H1 *Environmental Impact Assessment—nature conservation—Directive 92/43 (Habitats)—Conservation of Habitats and Species Regulations 2010—planning permission-development of waste to energy plant-close proximity to habitats of European Protected Species-access road-whether alternative routes for access road required-whether failure to comply with requirements of Directive and 2010 Regulations—whether proper consideration of alternatives for proposed access road—whether national policy on nature conservation applied—whether failure to provide adequate reasons for grant of planning permission*

H2 In October 2010, the Interested Party (FCC) applied to the Defendant (BCC) for planning permission to develop an energy from waste facility on land at a Landfill Site in Buckinghamshire. The application contained a proposal to build an access road to the site along the route of a disused railway line. The construction of the access road required the demolition of certain buildings. The Claimant (P) objected to the proposed development arguing that the construction of the access road would have a significant detrimental impact upon the habitats of three European Protected Species and therefore be contrary to the requirements of Directive 92/43 (Habitats) (the Directive) and the relevant domestic legislation found in the Conservation of Habitats and Species Regulations 2010 (the 2010 Regulations). In considering the application, BCC considered the urgent need for the facility under its waste planning strategy. The site was intended to take all waste produced in Buckinghamshire to convert into energy, thus diverting it from landfill. BCC considered the Environmental Statement submitted with the planning application which addressed the potential ecological impacts including the need for derogation licences required under the 2010 Regulations prior to the demolition of the buildings as part of the construction of the access road. BCC granted planning permission in July 2012 and the derogation licences required were granted by Natural England. P sought to challenge that grant of planning permission by way of judicial review. P argued that BCC had failed:

(1) to comply with the requirements of the Directive and 2010 Regulations by failing to consider the likely effects of the development on European Protected Species, in particular failing to consider alternatives for the proposed access road;
(2) to apply relevant national policy on nature conservation found in the National Planning Policy Framework (NPPF)
(3) to provide adequate reasons for its grant of planning permission

H3 **Held**, in granting permission to apply for judicial review but dismissing the claim for judicial review:

H4 (1) Under reg 9(5) of the 2010 Regulations, BCC's duty was to have regard to the requirements of the Directive in so far as they might be affected by a decision to grant planning permission. It was the function of Natural England to enforce compliance with the Directive by prosecuting those who committed offences contrary to its provisions. Regulation 9(5) did not require a planning authority to carry out the assessment that Natural England had to make when determining such things as derogation licences, so the lawfulness of BCC's acts was not to be tested by imposing upon it a duty that was not its own. BCC had discharged its duty under reg.9(5). The likely effect on protected species had been dealt with in detail and alternative routes for the access roads considered. The officers' reports were pragmatic and evidenced the right approach. P had relied heavily on guidance in the European Commission's guidance document that derogation was to be a 'last resort' and that competent national authorities should select a development option that would ensure the best protection of species. However, that guidance was not the law. Article16 of the Directive did not provide that a derogation licence had to be refused if there was an alternative mode of development with no foreseeable impact, or an impact less harmful, on protected species. In any event, the guidance from the European Commission made it clear that there were other considerations besides protected species. Judging what might be a satisfactory alternative in a particular case required a focus on what was sought to be achieved through the granting of a derogation licence, and on the likely effects of the proposed works on the species in question. In light of the advice it had been given and the absence of ongoing objection from Natural England, BCC had been entitled, if not bound, to conclude that the derogation tests were at least likely to be met.

H5 (2) Assessing the nature, extent and acceptability of the effects of a development on the environment was always exclusively a task for planning authorities, not for courts. It was not the role of the court to test the ecological and planning judgments made in the course of BCC's decision-making process. BCC had been entitled to rely on the analysis of ecological material presented and to give significant weight to the views of Natural England. Having maintained an objection to the proposals over a long period it was perfectly proper to have persisted in that objection if there were any reason to resist the proposals. Looking at the whole process of considering the planning application, there was no doubt that the conclusions reached by BCC on ecological issues were entirely reasonable and congruent with government policy as found in the NPPF.

H6 (3) There was no breach of the requirement to provide a summary of the policies in the development plan relevant to the decision to grant planning permission as required by Town and Country Planning (Development Management Procedure) (England) Order 2010 art.31. BCC did not have to list the provisions of the

Directive, the 2010 Regulations or the national policy framework that it had considered. The summary reasons given were terse, but lawful. Elaborate reasons were not required so long as the essential rationale of the decision was apparent.

H7 **Legislation referred to:**
Highways Act 1980, ss.106, 278
Directive 79/409/EC (Wild Birds)
Directive 92/43/EC (Habitats) Arts. 6(3)(4), 12(1), 16(1),
EC Treaty art.10
Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999 (SI 1999/293) reg.19
Directive 2000/76/EC (Incineration)
Directive 2008/98/EC (Waste Framework)
Directive 2009/28/EC (Promotion of Energy from Renewable sources)
Conservation of Habitats and Species Regulations 2010 (S.I. 2010/490), regs. 3(4), 9(1)(5), 19, 40, 53(9).
Town and Country Planning (Development Management Procedure) (England) Order 2010 (SI 2010/2184) art.31

H8 **Cases referred to:**
Elliott v Secretary of State for Communities and Local Government [2012] EWHC 1574 (Admin); [2013] Env. L.R. 5
R. (Akester) v Department for the Environment, Food and Rural Affairs [2010] EWHC 232 (Admin); [2010] Env. L.R. 33
R. (Morge) v Hampshire CC [2010] EWCA Civ 608; [2011] Env. L.R. 8
R. (Morge) v Hampshire CC [2011] UKSC 2; [2011] Env. L.R. 19
R. (on the application of Buglife: The Invertebrate Conservation Trust) v Thurrock Thames Gateway Development Corp [2009] EWCA Civ 29
R. (on the application of Newsmith Stainless Ltd) v Secretary of State for the Environment, Transport and the Regions [2001] EWHC Admin 74
R. (on the application of Telford Trustee No.1 Ltd) v Telford and Wrekin Council [2011] EWCA Civ 896
R. (Siraj) v Kirklees MC [2010] EWCA Civ 1286
R. (Woolley) v Cheshire East BC [2009] EWHC 1227 (Admin); [2010] Env. L.R. 5
Tesco Stores Ltd v Dundee City Council [2012] UKSC 13
Tesco Stores Ltd v Secretary of State for the Environment [1995] 1 W.L.R. 759

H9 *Mr I. Dove QC and Ms J. Wigley*, instructed by Richard Buxton, appeared on behalf of the Claimant
Mr D. Elvin and *Mr R. Turney*, instructed by Buckinghamshire County Council, appeared on behalf of the Defendant
Mr J. Maurici, instructed by Walker Morris, appeared on behalf of the Interested Party

JUDGMENT

LINDBLOM J.:

1 By this claim for judicial review the claimant, Christopher Prideaux, challenges the planning permission granted by the defendant, Buckinghamshire County Council ("the County Council") on 27 July 2012 for an energy from waste facility on land at Greatmoor Farm, Calvert Landfill Site at Calvert in Buckinghamshire.

2 The claimant lives near the development site. He seeks to have the planning permission quashed on three main grounds. He contends that the County Council failed (1) to comply with the requirements of Council Directive 92/43/EEC on the Conservation of Natural Habitats and of Wild Fauna and Flora ("the Habitats Directive") and the Conservation of Habitats and Species Regulations 2010 ("the 2010 regulations"); (2) to apply the Government's planning policy for nature conservation in the National Planning Policy Framework ("the NPPF"); and (3) to provide adequate reasons for the grant of planning permission.

3 This claim came before me at a rolled-up hearing. It is one of two claims attacking the planning permission. The other, brought by Mr Kenneth Kolb, (CO/12966/2012) was heard immediately after this one. Judgment in that case is also being handed down today.

Background

4 The development of an energy from waste facility at Greatmoor Farm is an essential part of the County Council's waste planning strategy in its Minerals and Waste Core Strategy, which was adopted in November 2012. Policy CS11 of the core strategy allocates the site as a strategic waste complex, including a facility for the recovery of energy from waste.

5 The facility will treat up to 300,000 tonnes of waste generated by households and businesses in Buckinghamshire each year. It is intended to take all of the waste produced by the county's residents – some 500,000 people. It will enable the County Council, as waste disposal authority, to manage the equivalent of the county's own waste arisings by 2016, a target set in Policy 10 of the Buckinghamshire Minerals and Waste Local Plan 2004–2016. The County Council believes there is now an urgent need for the development.

6 The developer is the interested party, FCC Environment UK Limited ("FCC"), formerly Waste Recycling Group Limited. In March 2007 the County Council began the procurement process for its residual waste treatment contract, with a view to diverting waste from landfill. In February 2011 FCC emerged from that process as the County Council's preferred bidder. The relationship between FCC and the County Council is now close to being formally agreed in a contract.

7 The land on which the facility is to be developed lies next to a site already being used for landfill. To serve the new development FCC propose to build an access road from the A41 along the route of a disused railway line. This will take traffic to and from the site without its having to go through the villages of Grendon Underwood, Edgcott and Calvert.

8 The claimant objected to the proposed development because of the impacts he feared it would have on wildlife, and also because he was opposed to the demolition of buildings at Upper Greatmoor Farm to make way for the access road.

9 The works involved in constructing the access road will affect the habitat of three European Protected Species – the common pipistrelle bat, the brown long-eared bat and the great crested newt. The old railway line also has a number of important invertebrates on it, including almost 10% of the national population of the black hairstreak butterfly, as well as other butterflies, among them the brown hairstreak and the grizzled skipper. There are four Sites of Special Scientific Interest between about 200 metres and about a kilometre from the disused railway line, at Sheephouse Wood, Grendon and Doddershall Woods, Finemere Wood, and Ham Home-cum-Hamgreen Woods. Black hairstreak and brown hairstreak butterflies are an identified feature of interest in the designation of all four.

10 The application for planning permission was submitted by Waste Recycling Group Limited on 1 October 2010. It was accompanied by an environmental statement.

The environmental statement

11 In section 8 of the environmental statement, which dealt with "Transport", the options for access to the site were discussed. In November 2007 Scott Wilson had produced the Calvert Landfill Site Road Access Study. The access arrangements had then been "agreed in principle" (para.8.10). Seven options had been considered (para.8.11). Shown on figure 8–1 and described in the text, they included both routes running to the south of the site, one of which was the "selected option" (the Akeman Street railway route, Option 4), and others that would require the use of roads through local villages to the north and west. The favoured route followed the line of the disused railway between the A41 and the Aylesbury to Bicester line. Because of its length it would be "the most expensive option to construct" (para.8.12). However, it was the only one that would "completely remove traffic from local country roads" (ibid.). The road would "pass over the site of the existing 1950s buildings at Upper Greatmoor Farm, to optimise the alignment into the EfW site", and these farm buildings "would therefore be demolished as part of the scheme" (para.8.137).

12 Section 11 of the environmental statement addressed the likely ecological impacts of the development, and the appropriate mitigation. Paragraph 11.107 described the function of the old railway line in providing habitat and a corridor for the black hairstreak butterfly as being of "up to National value". Paragraph 11.135 said this:

> "Similar habitats are available in the local surrounding landscape, which may reduce the magnitude of the predicted impacts for many species. However, black hairstreak has limited dispersal ability and alternative habitats may not be accessible. Research has shown that black hairstreak took 13 years for a new colony to become established from existing colonies only 400m away. The development is therefore predicted to have a direct negative impact upon invertebrate assemblages on the access road of up to Parish value and upon populations of grizzled skipper and glow worms of up to District Value. The development is also predicted to have a direct negative impact on black hairstreaks of up to County value."

One of the identified impacts on black hairstreak butterflies was the effect of dust generated during construction. Combined with "habitat loss and fragmentation",

this was predicted to have "significant adverse effects" upon the local populations of this species para.11.150).

13 In table 11–6 a loss of habitat for the "Invertebrate Assemblage" of "[up] to 100% within the access road" was predicted. The impact without mitigation was described as "Negative …, significant at National level". The mitigation and compensation proposals were the "[creation] of suitable habitat for range of invertebrate species, with specific habitat created for grizzled skipper, glow worms and black hairstreak, within habitat management area." The residual impact, after mitigation, was described as "Negative …, significant at National level in the short term until replacement habitat has matured and developed in suitability". However, this was expected to reduce to a "Neutral impact significant National level in the medium to long term".

14 For bats, the loss of foraging and commuting habitat was said to be a "Negative impact, significant at Parish level", if unmitigated. With mitigation, the impact would be "Negative …, not significant at Parish level" (ibid.).

15 For great crested newts, the loss of aquatic and terrestrial habitat would be "Negative …, significant at Parish level". With mitigation, the impact would be "Negative …, not significant at Parish level" (ibid.).

The further environmental information

16 On 11 July 2011 the County Council requested further environmental information under reg.19 of the Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999. Among other things, it asked for more work to be done on the ecological impacts of the development. It sought further information about the likely impact of the development on the four Sites of Special Scientific Interest and specifically on the habitat of black hairstreak and brown hairstreak butterflies. It also required further surveys of bats and great crested newts.

17 Further environmental information was provided to the County Council in October 2011, December 2011 and February 2012.

The "Updated Ecological Impact Assessments"

18 The further environmental information included "Updated Ecological Impact Assessments" dated October 2011 ("the October 2011 ecological report"), which had been compiled by FCC's consultants, SLR Consulting Limited ("SLR").

19 Among the consultees listed in para.1.3 of the October 2011 ecological report was Natural England. Natural England had been consulted in 2010 and 2011 "on the details of Bechstein's bat records, [and on] survey planning for bats and great crested newts". It had also discussed with SLR "the impacts of the development on butterfly species[,] in particular black hairstreak", and the "design of mitigation plans".

20 In s.2.0 the impact of the development on species present in the Sites of Special Scientific Interest was considered, in particular the black hairstreak and brown hairstreak butterflies. The proposed access road had been "significantly redesigned to ensure the retention of a substantial proportion of the existing scrub habitat …" (para.2.3.2). The predicted loss of habitat and fragmentation were "not considered to adversely affect the ability of the proposed access road to act as a 'link' between other areas of suitable habitat for these populations north and south of the proposed

access route, e.g. Finemere Wood SSSI and Grendon & Doddershall Wood SSSI" (ibid.).

21 The proposed mitigation measures were described (in para.2.5):

> "Existing functional corridors of blackthorn across the main site would be maintained and enhanced. The access road scheme has been redesigned to protect the majority of the blackthorn scrub along the access road. Where cutting back or removal of blackthorn is unavoidable, hairstreak eggs would be translocated prior to these works commencing. The translocation plan would be designed and implemented through the Ecological Management Plan."

Almost 9,500 square metres of new blackthorn-dominated scrub habitat would be created; about 5,000 metres of new hedgerows "would provide new habitat connectivity in the medium [to]long-term"(ibid.). The residual impacts on the butterfly species "of interest in the designation of the SSSIs" were described as being "negative in the short term, but not significant at the National level" (para.2.6). The "direct impacts" on these species would be "limited" because their "major population centres … are not located within the footprint of the proposed development" (ibid.). The provision of "suitable additional and compensatory habitats" was said to be a "positive impact, significant at the National level in the medium to long term" (ibid.).

22 The likely impact on bats was considered in section 6.0. It was noted (in para.6.3.1) that the development "would involve the loss of two roosts for brown [long-eared] and common pipistrelle bats at Upper Greatmoor Farm". Mitigation measures – outlined in para.6.4, described in detail in the Ecological Management Plan, and to be agreed with Natural England – would include the provision of new "roosting opportunities" for both brown long-eared and common pipistrelle bats. New areas of habitat suitable for foraging and commuting would be created within the "main application site". These would "enhance the existing foraging and commuting habitats on the site" (ibid.). The proposed access road, which bats were likely to be using as a "movement corridor" and for foraging, had been redesigned "to retain up to 90% of the existing scrub" (ibid.). The residual impacts were summarized in para.6.5. The residual impact of construction was predicted to be "negative …, not significant at Parish level". There would be "a negative, but not significant impact on foraging habitats in the short term, with a positive impact, significant at up to Regional level in the medium to long term" (ibid.).

23 Section 8.0 dealt with the likely impact on great crested newts. Further surveys of this species had been carried out in 2011 "to provide necessary information to support future Natural England Great Crested Newt Mitigation Licences for the site" (para.8.2). The development would lead to "the partial loss of one … breeding pond, supporting a small population" (ibid.). Less than 5% of the terrestrial habitat within the site would be lost. The proposed mitigation measures were described (para.8.5). The site was already subject to a masterplan, approved when the restoration of the landfill at Pits 4 and 5 had been licensed. A "detailed mitigation scheme" had been prepared both for the area where the energy from waste facility would be developed and for the access road. Newts would be "temporarily excluded from the road construction corridor and translocated to neighbouring connected habitats during construction". "Herpetofauna underpasses" would be created in places where breeding ponds were close to the access route. "Mitigation ponds"

and "suitable terrestrial habitat" would be created. These mitigation measures would result in "a negative residual impact, but not significant at the Parish level, in the short term", but "[in] the medium to long term there would be a positive impact, significant at District/County level" (para.8.6).

24 Impacts on invertebrates were considered in section 11.0. The "bare and open mosaic grassland" on the rail ballast was said to be critical for the lifecycle of species in the "notable invertebrate populations" (para.11.3). About 80% of this habitat would be lost (table 11–2). In the absence of mitigation, the development would have a "direct negative impact upon invertebrate assemblages on the access road of up to Regional Value" (para.11.3). The mitigation proposed was the creation of replacement habitat. The residual impact "would be negative, but not significant at Regional level" (para.11.5). With the creation of "the new and enhanced habitats there would be a positive impact at up to National level in the medium to long term" (ibid.).

25 Section 13.0 summarized the benefits of the proposed development for nature conservation and biodiversity. Paragraph 13.2 concluded that the scheme for habitat creation, management and enhancement proposed in the Ecological Management Plan would "lead to a significant positive impact of at least Regional and up to National value".

26 Annex A to the October 2011 ecological report discussed "how the findings of the assessment can be applied by the competent authority to the decision-making process in terms of the legal implications of granting a planning permission". A derogation licence would be required for "the demolition of Upper Greatmoor Farm", where small numbers of bats were roosting (para.2.3.1). Full details of the proposed mitigation scheme were provided in the Ecological Management Plan. These had been "designed to accord with published good practice guidelines" (ibid.). The mitigation would provide "greater than a 2-for-1 replacement for those roosting opportunities that would be lost, sufficient to ensure that the favourable conservation status of the species concerned can be maintained" (ibid.). Natural England had been informally consulted on the mitigation measures at a meeting on 28 September 2011, and had "offered the opinion that the measures proposed were likely to be sufficient to meet the "favourable conservation status test" for these species" (ibid.). The development would not affect the favourable conservation status of bat species commuting and foraging within the site, and that no licence would be required for any derogation of that kind (para.2.4.1).

27 Paragraph 2.5 of Annex A discussed great crested newts. All "major development" within the Greatmoor Estate was already the subject of "a great crested newt masterplan", which complied with Natural England's advice. The approach in the comprehensive masterplan, "including the EfW and its access road", had been "found … broadly acceptable to Natural England's Wildlife Advisors". Natural England had "given no reason for the applicant to suspect that the EPS licence that would be sought to allow development of the access road would not be granted, assuming that such a scheme is developed in accordance with the approved masterplan". It was concluded that the proposed development would "not affect the favourable conservation status of great crested newts within the application site" (para.2.5.1).

28 The other two tests for licensing under the 2010 regulations were considered. The test of imperative reasons of overriding public interest was said to be satisfied (para.2.7). On the question of there being "no satisfactory alternative" to the

proposed development, it was noted that alternatives had been considered in the environmental statement, and in s.7A of the reg.19 submission (para.2.8). The "alternative scenario to the proposed EfW" would be "the continued operation of the landfill". The "do nothing" option would not deliver "the ecological enhancements and long-term management measures … offered through the EMP". Those would only be carried out if this development were approved. The conclusion, therefore, was that the proposed development was "indeed better then the alternatives in terms of protection and ultimately the enhancement of habitats for bats and great crested newts".

29 The position on European Protected Species was then summarized in this way (in para.2.9):

> "The LPA must consider whether Article 12 will be breached, and if it will be breached, the likelihood of the proponent gaining the necessary derogation licence from Natural England.
>
> The ES confirms that Article 12 would be breached … twice:
>
> 1) the destruction of bat roosts of low conservation significance for common pipistrelle and brown [long-eared] bats.
>
> 2) a risk of injury or killing; the potential for destruction of resting places and disturbance that could impair the ability of great crested newts to survive, to breed or to hibernate or migrate.
>
> In both cases, evidence is presented within the ES and other supporting documents to show that the impacts have been minimised; that mitigation measures proposed are in line with best practice and, as far as is possible, have been scrutinised by Natural England. Natural England has not raised an objection to the assessment of impacts or mitigation measures proposed for EPS. On this basis, it is our conclusion that EPS licences for these breaches are likely to be granted."

30 Appendix 7 G-2 contained reports of further surveys of bats and great crested newts.

"Alternatives"

31 A supplementary section 7A for the environmental statement, entitled "Alternatives", was provided in the further environmental information submitted in October 2011. This contained further information and comment about the "Access Road Alternatives" (in paras 7A.46 to 7A.73). Scott Wilson's study of November 2007 had "reviewed seven options for alternative road access routes providing varying degrees of relief to local villages by reducing or avoiding the need for waste vehicles to travel through the local villages" (para.7A.46). The option of using the Akeman Street railway line "performed well against other options, providing a new route that is grade separated from the local road network and achieves the complete removal of traffic from villages after it leaves the A41". All of the other options considered "involved at least some use of local roads" (para.7A.47). The Akeman Street railway line had been chosen in spite of its being "the most expensive option in terms of construction costs" (para.7.48).

32 A study of another option, shown in figure 7A-1, had also been commissioned in December 2010. This had been done because a village green application had been made for the Akeman Street railway line – an application that in the end

failed. This further option would not use the disused railway line. But it had a number of "significant disadvantages" (para.7A.57). It would require the upgrading of existing roads, "substantially disturbing the rural character of the area, compared with the more discrete route along Akeman Street, and potentially attracting other traffic into the area" (para.7A.61). There would also be ecological impacts. The route followed the north western edge of Ham Home-cum-Hamgreen Woods Site of Special Scientific Interest. The necessary upgrading of the road junction "would have potential impacts upon this relatively small area of oak-dominated broadleaved woodland, which has a rich herbaceous flora and supports the largest breeding colony in the country of the nationally rare black hairstreak butterfly". With the removal of hedgerows for road widening, this would "potentially be more damaging environmentally than following the disused railway" (para.7A.62). The road widening would require land in various ownerships to be acquired, and this might prevent this option being delivered (para.7A.63). There would also be a more significant impact on the settlement of Kingswood (para.7A.64).

33 The "sound policy arguments for using the disused railway line, rather than causing more widespread impacts on the rural area by using local roads" were noted (para.7A.68). In Policy TR14 of the Buckinghamshire County Structure Plan Akeman Street had been identified as a "Route with Potential for Reopening" (para.7A.69).

34 The "Conclusions" in this part of the document said the use of the disused railway line remained "the most acceptable option to access the site". It was "a distinct former transport corridor providing direct access at a convenient point on the A41", minimizing the impact on residential amenity, disturbance on local roads and visual intrusion (para.7A.71). Though concerns had been expressed about ecological impacts, the alternative route raised "similar concerns, with less opportunity for mitigation" (para.7A.72). The "overall ecological enhancements proposed for the … project [would] result in increased biodiversity and improved ecological management within the area in the longer term" (ibid.). The proposed development would not prejudice the line being opened again in the future (para.7A.73).

The Ecological Management Plan

35 The first draft of SLR's Ecological Management Plan went out for consultation in June 2011. A "final" version was submitted to the County Council in August 2011. The aims of the mitigation and enhancement measures were identified, the strategy described, and detailed mitigation measures set out. The document was updated following consultation in June 2012. A further revision was produced after consultation with the Greatmoor Farm Biodversity Partnership Stakeholders, including Natural England, in July 2012. Yet another was submitted to the County Council in the same month. The version to which I shall refer is the last in this series.

36 The purpose of the Ecological Management Plan was to provide "a single point of reference for all ecological mitigation, compensation and enhancement measures proposed as part of the permitted and proposed development of Greatmoor Farm and Calvert Landfill" (para.1.1). Through the work of the partnership, it would "remain a flexible and iterative document" (para.2.2).

37 The mitigation proposals for bats and for great crested newts were explained (sections 4.0 and 6.0 respectively). The overall strategy for mitigation and

enhancement and the detail of the proposed mitigation measures were set out (section 9.0). The arrangements would include monitoring, and the mitigation measures could be adjusted if they had to be. Section 11.0 set out proposals for habitat creation and management. Early successional habitat would be created at the outset (para.11.3). A "key objective in managing the retained scrub, principally blackthorn, along the disused railway line [would] be to maintain a mixed age structure, such that the blackthorn continues to provide suitable feeding and breeding habitat for black and brown hairstreak butterflies" (para.11.4). In the conclusions in section 12.0 it was noted that the Ecological Management Plan provided "[detailed] measurable targets for monitoring change, enabling the management team to monitor and report successes and identify and remedy any areas where the predicted biodiversity enhancements fall short". It was recognized that ecological management is "an adaptive process".

Natural England's objection

38 The County Council consulted Natural England on the proposals in their original form, on the further environmental information, and on the information later submitted to enable conditions relating to the Ecological Management Plan to be discharged.

39 Natural England initially objected, in a letter dated 15 March 2011. It noted the likely impact of the development on European Protected Species. However, it did not oppose the development on those grounds. It asked for further survey work to be carried out.

40 On 12 December 2011 SLR met Natural England to discuss the proposals. On 15 December 2011 Natural England wrote to the County Council to explain why it was still objecting. Having considered the additional information, it maintained its objection, on the grounds that the development was "likely to have a negative impact on a key linkage for species which are interest features of the nearby SSSIs …". Its detailed comments were set out in an annex to the letter. This described "the mitigation required, which, if implemented as set out, and approved by Natural England, would enable [it] to withdraw [its] objection". There had been "constructive discussions" with SLR about the improvements required. It was noted that "[the] black hairstreak is a rare and sedentary butterfly", and that the disused railway line "provides important habitat … in the form of blackthorn", which "allows the butterflies to breed and disperse between the 4 SSSIs, helping to keep the genetic diversity in the populations robust".

41 On 19 December 2011 SLR provided further information to the County Council. SLR referred to the ""time-lag" between the loss of habitats and the created habitats reaching suitable condition for target species, such as black hairstreak". In July 2011 the Department for Environment, Food and Rural Affairs ("DEFRA") had recommended an approach for dealing with this "compensation risk" in its "Technical Paper: proposed metric for the biodiversity offsetting pilot in England". In this approach, said SLR, "a multiplier is used to correct for the disparity between habitats lost and those created". It can also be used, they added, "where there are risks of uncertainties in the compensation approach".

42 In the same letter SLR also set out their understanding of Natural England's position on the mitigation proposed for European Protected Species. On bats they said this:

> "[Natural England] has not previously maintained an objection to the application in respect of impacts to bats and this position was confirmed in our recent meeting. [Natural England's] view is that the mitigation measures proposed for lost bat roosts are broadly suitable and that detailed mitigation proposals, which are subject to scrutiny by [Natural England's] licensing department, are likely to be suitable to avoid effects on favourable conservation status of the species concerned. [Natural England] also expressed the opinion that the impacts associated with foraging and commuting habitat, including Bechstein's bats, would be addressed by the mitigation and compensation measures proposed in the EMP, which would ensure that the conservation status of local populations of bats would not be adversely affected."

43 The letter said this about great crested newts:

> "[Natural England] has not previously maintained an objection to the application in respect of impacts to great crested newts (GCN) and this position was confirmed in our recent meeting. Natural England's planning liaison and European Protected Species (EPS) licensing team have reviewed SLR's 2011 GCN reports and proposed mitigation, through the formal "GCN Masterplan", which accompanied the planning application. The most recent GCN Masterplan (August 2011, v 5) has been approved by [Natural England's] licensing team through the recent grant of an EPS licence for a permitted phase of this masterplan …. Therefore, the appropriate authority (Natural England) has confirmed that the baseline data and mitigation proposed in the masterplan for the Greatmoor EfW is suitable to ensure that the favourable conservation status of local populations of GCN would not be adversely affected by the proposed development, in combination with other associated developments in the Calvert area."

44 A copy of the letter of 19 December 2011 was sent to Natural England. On 20 December 2011 Natural England sent an e-mail to the County Council, maintaining its objection to the proposed development on the same grounds as before, but providing detailed comments outlining "the mitigation required" if it was to withdraw its objection. On 13 January 2012 Natural England wrote to the County Council again. It said it welcomed SLR's letter of 19 December 2011, which had set out to address its "outstanding concerns" and had "[captured] the details and spirit of the meeting" on 12 December 2011. It did not dispute what SLR had said about European Protected Species. It maintained its objection relating to "the special interest features of the SSSIs, specifically the invertebrate interest". It described the work that still needed to be done to "provide certainty that the impacts on the special features of the SSSIs in the wider landscape will be minimised". And it said it looked forward to "continued dialogue with [FCC] in order to find a solution to these issues".

45 In a letter to the County Council dated 2 February 2012 SLR sought to deal with the remaining points in Natural England's objection. It provided further material. The mitigation now embraced a commitment to the "establishment of early successional habitat, and management of scrub to ensure that there is an even mix of age classes of blackthorn to ensure habitat continuity for hairstreak butterflies". Extra compensatory habitat was proposed. In an annex to this letter "Habitat Creation Details" were provided for "Early Successional Habitat". Existing

vegetation and substrate were going to be translocated, to produce early successional habitat of mixed ages. The steps involved in this, and in the continuing management that would be required, were described.

46 In a letter dated 6 February 2012 – its statutory response to consultation – Natural England withdrew its objection to the proposed development. It asked for six conditions to be put on the planning permission. These included a requirement for the development to be carried out "with the full implementation of ecological protection, management and mitigation measures described in the Ecological Management Plan produced by SLR dated August 2011 …". The proposals for the provision of habitat set out in the Ecological Management Plan, including the proposed habitat for butterflies and "foraging habitat for newts and reptiles", had to be brought up to date. And the Ecological Management Plan was to be reviewed annually. Natural England also required a condition stipulating that no development was to take place on the disused railway line "until all relevant mitigation measures, as agreed, have been carried out to a satisfactory standard to ensure that these measures will be successful".

47 On 13 March 2012 Natural England wrote to the claimant. It said it was "satisfied that the ecological value of the access track had been adequately assessed". "[Appropriate] conditions" would be imposed if planning permission were granted. These would ensure that no development would take place on the disused railway line until the Ecological Management Plan produced by SLR in August 2011 had been "reviewed and updated". The claimant should take up "[any] further concerns regarding the consideration of biodiversity in the planning process" with the County Council's planning officers.

48 During the period when Natural England was considering FCC's proposals it was also considering the designation of a new Site of Special Scientific Interest on the route of the abandoned railway. In an e-mail dated 13 April 2011 to other ecologists employed by Natural England, Dr David Sheppard, Natural England's Invertebrate Ecologist, acknowledged that the designation could not stand on the presence of the black hairstreak butterfly alone. In an e-mail dated 29 November 2011 to a local ecologist, Mr Christopher Damant, Dr Rebecca Tibbetts of Natural England's Oxon & Bucks Land Management team said that in Natural England's opinion there was "a clear case for SSSI notification and the site appears to satisfy the relevant selection guidelines for butterflies". Dr Tibbetts went on to say that Natural England intended "to bring a formal proposal to [its] Executive Board for approval next financial year". In a further e-mail to Mr Damant, dated 27 February 2012, Dr Tibbetts said this was being considered in Natural England's "national review of SSSI notifications", due to be completed by March 2015. However, in its letter of 13 March 2012 to the claimant Natural England said that if planning permission was granted for the proposed development, with the necessary conditions, this was "unlikely to prejudice whether or not the site is considered to be of special scientific interest and, accordingly, whether it is ultimately notified as a SSSI, although it may have a bearing on the precise location of the boundary of such a SSSI". On 6 September 2012 Dr Tibbetts sent another e-mail to Mr Damant, to confirm that Natural England was still "actively considering whether or not to propose to its Executive Board that a SSSI be notified in the area of the proposed access route to Calvert".

The Development Control Committee's meeting on 14 February 2012

49 On 14 February 2012 the application was reported to the County Council's Development Control Committee with a recommendation that permission be granted. The committee deferred its decision on the application. The application came back before it on 17 and 20 April 2012.

The officers' reports

50 The County Council's planning officers prepared a lengthy report for the committee on 14 February 2012. They supplemented this with a further report for the meetings on 17 and 20 April 2012.

51 In their report for the meeting in February 2012 the County Council's officers referred to the measures that would be taken to mitigate the impacts of the development on various species, including protected species, on the site (para.35). A "review of the Habitats Regulations", they said, "concludes that with a European Protected Species licence that derogates offences to bats in relation to roosting species, there would be no offence committed" (para.35 ii)). The proposed mitigation for great crested newts had been approved by Natural England's European Protected Species licensing team "as being suitable to ensure the favourable conservation status of local populations of that species would not be adversely affected" (para.35 iii)). As to "Invertebrates", FCC had said "the extensive habitats to be created … and the minimisation of existing vegetation loss along the proposed access road would mitigate [sic] against any loss of habitat, particularly through the creation of the proposed access road" (para.35 vi)).

52 In para.54 of the report the officers said seven alternative access roads had been considered by FCC and a detailed assessment of one of them carried out. The conclusion was that the proposed access road along the disused railway line was to be preferred "as it would not involve the use of local roads and would lead to less disturbance to local residents and visual intrusion than the alternatives considered". There would be ecological impacts, but the alternative raised "similar concerns with less opportunity for mitigation".

53 Natural England's objection – not yet withdrawn when the officers prepared their report, though it had been when the committee met on 14 February 2012 – was summarized (in paras 96 to 98).

54 The comments made by the Council's "ecology advisor" on the various ecological issues were reported (in paras 116 and 117). In para.116 the officers said the ecology advisor was "satisfied that if the ecological mitigation measures are implemented as proposed … there would be no outstanding issue that cannot be secured through a legal agreement or suitable planning conditions". As to great crested newts, she was "… satisfied that, with the mitigation proposed, there will be no net impacts … [and] that the proposals detailed in the Ecological Management Plan … will ensure great crested newts are maintained at a favourable conservation status, therefore meeting the third of the 'three derogation tests'" in reg.53(9)(b) of the 2010 regulations (para.117 i)). As to bats she was "… satisfied with the mitigation proposed and that there will be no net impacts on bat species foraging and commuting within the site, and that the mitigation proposals, … [and] that the proposals detailed in the Ecological Management Plan … will ensure both [common pipistrelle and brown long-eared bats] are maintained at a favourable conservation status, therefore meeting the third of the 'three derogation tests' …" (para.117 ii)).

And as to black hairstreak and brown hairstreak butterflies the ecology advisor was " … satisfied with the mitigation proposed and that there would be no net negative impacts on either species … [and that in] the long term, the habitat management proposals (management of blackthorn scrub) will be beneficial to both species." The conditions she wanted to see on any planning permission were listed (in para.118).

55 The objections of Butterfly Conservation were reported (at para.121). Butterfly Conservation contended that the development would cause loss or damage to several species of butterfly that were BAP priority species, including the black and the brown hairstreak. Butterfly Conservation was later to amplify its objection in a letter dated 1 April 2012, in which it said the black hairstreak has "few powers of dispersal" and is a species that "finds it very difficult to colonise new sites".

56 In para.238 of their report the officers described the proposed new access road – to replace the existing one from Brackley Lane, "which can only be accessed by local roads" – as a "significant benefit of the proposed development".

57 In para.251 the officers referred to policies of the development plan relevant to biodiversity and nature conservation. These included Policy 24 of the Minerals and Waste Local Plan, which "states that permission will not be given for waste development where such proposals would … have a significant adverse effect on the character, appearance, intrinsic environmental value and/or setting of Sites of Special Scientific Interest [etc]", Policy 25 of the same plan, which "states that planning permission will not be granted for waste development which would … have a significant adverse effect on the character, appearance, intrinsic environmental value and/or setting of … areas of nature conservation importance which are not otherwise protected by Policy 24 …", and other policies aimed at preventing harm to wildlife.

58 In para.252 the officers referred to the then extant policy in PPS9, in particular key principle (vi). They said this:

> "… Key principle (vi) states that the aim of planning decisions should be to prevent harm to biodiversity. Where granting planning permission would result in significant harm to those interests, local planning authorities will need to be satisfied that the development cannot reasonably be located on any alternative sites that would result in less or no harm and in the absence of any such alternatives, planning authorities should ensure that before planning permission is granted, adequate mitigation measures are put in place. Where a planning decision would result in significant harm to biodiversity which cannot be prevented or adequately mitigated against, appropriate compensation measures should be sought and if that significant harm cannot be prevented, adequately mitigated against or compensated for, then planning permission should be refused. …".

59 In the section of their report headed "SSSIs", the officers referred to the four Sites of Special Scientific Interest "in close proximity" to the site. They reminded the members of Natural England's objection "on the grounds that [the development] is likely to have a negative impact on a key linkage for species (Black and Brown Hairstreak butterflies) which are interest features of the nearby SSSIs" (para.256). The possibility of the disused railway line being designated a Site of Special Scientific Interest was noted. The officers said that "[at] one time it was also understood that Natural England were intending to proceed with consultation on

the designation of the disused railway line as an SSSI but it is now understood that this is not currently being progressed". If Natural England were to maintain its objection, "members would have to consider whether the impact on the four existing SSSIs would be acceptable", in the light of the advice given earlier in the report. The officers emphasized "central government advice … that where there is likely to be an adverse impact on SSSIs, … planning permission should be refused and an exception should only be made where the benefits of the development at the application site clearly outweigh both the impacts that it is likely to have on the features of the site that make it of special scientific interest and any broader impacts on the national network of SSSIs".

60 The officers told the committee that Natural England had said it would withdraw its objection "if further satisfactory information [was] received from [FCC], including a costed management plan, to provide certainty that the impacts on the special features of the SSSIs and the wider landscape will be minimised" (para.257). The objection might now be withdrawn in the light of the additional information recently submitted. The officers went on to say this (ibid.):

> "… Should Natural England not be satisfied and maintain its objection then I consider that there would be a significant adverse effect on the intrinsic environmental value of the four SSSIs around the site contrary to the provisions of policy 24 of the MWLP and NRM5 and NRM15 of the SEP. Unless members are of the view that the benefits (including need) of the development at this site clearly outweigh both the impacts that it is likely to have on the features of the SSSIs that make them of special scientific interest and any broader impacts on the national network of SSSIs, then planning permission should be refused for this reason. If however [FCC] satisfies Natural England's remaining concerns leading it to withdraw its objection, I would consider that a reason for refusal in terms of the impact on the SSSIs could not be sustained and that it would not be contrary to the provisions of the … policies. …".

61 In the section of the report headed "European Protected Species" the officers summarized the likely impacts on bats and great crested newts and the mitigation proposed (para.258). In para.259 they said that "planning authorities have a statutory duty to have regard to the requirements of the Habitats Directive in reaching planning decisions and this may potentially justify refusal". The officers said there were "three tests that must be satisfied if planning permission is to be granted as set out in [the 2010 regulations]". They then referred to the three tests under the derogation licensing regime: first, that "the consented operation must be for preserving public health or public safety or other imperative reasons of overriding public interest including those of a social or economic nature and beneficial consequences of primary importance for the environment"; second, that "[there] must be no satisfactory alternative"; and third, that "[the] action authorised will not be detrimental to the maintenance of the population of the species concerned at a favourable conservation status in their natural range".

62 As to the first test, the officers noted FCC's argument that "there is an over-riding public interest in terms of meeting the policy objectives" of the Minerals and Waste Local Plan and the emerging Minerals and Waste Core Strategy (para.260).

63 As to the second test – that there must be "no satisfactory alternative" – the officers noted FCC's contention that, compared with the possibility of mineral extraction and landfill extending into Pits 7 and 8, the proposed development would

be "better in terms of protection and ultimately the enhancement of habitats for bats and newts" (para.261). The officers concluded that there was "no satisfactory alternative site likely to come forward to provide a Strategic Waste Complex including an energy from waste recovery facility such that the County Council would meet its aim of net self-sufficiency by 2016 set out in MWLP policy 10" (para.262).

64 The officers then turned to the question of alternative access routes. In para.263 of their report they said this:

> "… [In] considering alternative sites, I would advise that the evidence base for the [core strategy] has not identified a specific access road to the site. The evidence base has considered five alternative route options of which the proposed access road is one. As set out in para.[54] of this report, the applicant has also considered seven alternative access roads and a detailed assessment of one alternative was also carried out. … The applicant's conclusion is that the proposed access road along the disused railway line is preferred as it would not involve the use of local roads and would lead to less disturbance to local residents and visual intrusion than the alternatives considered. It is a distinct former transport corridor providing direct access to the A41. The applicant also concludes that whilst there would be ecological impacts, the alternative raises similar concerns with less opportunity for mitigation."

65 In para.264 the officers said this:

> "… [The] applicant has also considered alternatives to the access road proposed, including one option in some detail. I would advise that as some of the European Protected Species interest relates to the proposed access road, members could take the view that, if there is a better-performing (i.e. less harmful) alternative access roads to the one proposed, then the second test would not be met. Taking account of the evidence base for the [core strategy] and the work carried out by the applicant with regard to alternative routes into the site, it would seem that with regard to impacts on residential amenity and other highway users, there is no better way of achieving a direct access to the A41 for road transport to and from the site, than along the disused railway line as proposed in this application. The applicant argues that the ecological impacts would be less, but it could be argued that the only way to gain a real comparison with the alternatives, in terms of the level of harm that would be caused to European Protected Species, would be for a planning application to have been brought forward with the same level of ecological survey work attached to it as has been provided in support of this application. There is also the need to consider alternative means of transport, which in this case is most obviously by rail."

66 Having discounted access by rail as an option, the officers went on to say, in para.265:

> "… A new access road is essential if the removal of the existing impact of heavy vehicles using local roads to the Brackley Lane access to the site is to be achieved and I consider that, without this, the additional heavy vehicles impact would be unacceptable. Whilst I cannot advise members with certainty that the impact on Protected Species would not be less if an alternative access

> to that proposed in this application were to be brought forward for consideration, it does seem to me that on the basis of the work that has been carried out, there is sufficient evidence that other impacts would be considerable and hard to overcome. On the basis of an assessment of the available evidence, I therefore consider that, on balance, there is no satisfactory alternative access route which would be less harmful and so that there is no satisfactory alternative and in this respect the second test is met."

67 In para.267 of their report the officers came to the third test. They reminded the committee of the County Council's ecology advisor's conclusion that the development would be acceptable if appropriate conditions were imposed. They acknowledged that the there would be "some loss of habitat to both bats and Great Crested Newts". But they said the proposals put forward in the Ecological Management Plan "would substantially mitigate any impact, including along the proposed access road, such that it would not be detrimental to the maintenance of the populations of the species concerned at a favourable status in their natural range". They went on, in para.268, to say this:

> "Therefore, if members are satisfied that the need for this facility to come forward constitutes an over-riding public interest, that there is no satisfactory alternative site including the proposed access road and that the impact to bats and Great Crested Newts would not be detrimental to the maintenance of their populations at a favourable conservation status in their natural range, then the above test for the impact on European protected species is met. Planning permission could therefore be granted and in this respect the development is in accordance with the provisions of theHabitats Directive and the Conservation of Habitats and Species Regulations 2010and the guidance in PPS9."

68 In paras 269 to 272 of their report the officers considered "Nationally Protected Species". They described the disused railway line as a habitat worthy of recognition for its importance at county and regional level (para.269). They referred in para.271 to the substantial provision the application was making for "the creation of new habitats". Their conclusion, in para.272, was this:

> "… [If] members are satisfied that there would be no significant and lasting adverse impact on the nationally protected species or their habitats and that in the longer term there would be a significant enhancement to the biodiversity value of the application site, I consider that the application meets the requirements of Policy 25 of the MWLP and NRM5 and NRM15 of the SEP. If Natural England withdraws its objection then I also consider that in respect of the SSSIs there would be no conflict with policy 24 of the MWLP nor policies NRM5 and NRM15 of the SEP."

69 In their supplementary report for the meetings in April 2012 the officers added to their advice on the mitigation and compensation measures proposed. They reminded members, as the committee had been told at the meeting on 14 February 2012, that Natural England had withdrawn its objection (para.63). One of the objectors believed that Natural England had not had enough time to consider the proposed mitigation measures, and that the information provided by FCC in support of those proposals was misleading or incorrect (ibid.), but Natural England had

"no concerns in this regard" (para.64). The County Council's independent ecology advisor had no objection to the proposals (para.65). Despite local Parish Councils' concerns about "ecological/biodiversity matters", it was "highly unlikely" that an objection to the proposals on those grounds could be maintained (para.66).

Buglife's objection

70 On 15 April 2012 "Buglife – The Invertebrate Conservation Trust" ("Buglife") objected to the application. It said that the mitigation proposed was "insufficient and inadequate to compensate for the impact on UKBAP/NERC listed habitats and species as well as a whole suite of other rare and threatened invertebrates". The proposed translocation of habitat was unproven and lacking in detail. FCC had failed "to identify and assess alternative sites that may cause less environmental damage", contrary to principle (vi) of PPS9.

The Development Control Committee's meetings on 17 and 20 April 2012

71 When the application came back to the Development Control Committee on 17 April 2012 the claimant and other objectors spoke against the proposals. The committee considered the application again on 20 April 2012, and on that day resolved to grant planning permission.

72 On 20 April 2012 the members discussed the likely effects of the development on nature conservation. The minutes record the discussion. Buglife's objection was reported and considered. One of the points Buglife had raised was dealt with in this way, as the minutes record:

> "… The Planning Officer stated that Buglife had referred to the NPPF and suggested guidance which indicated that in certain circumstances the application should be deferred or delayed. The Planning Officer advised that this was not the case. The NPPF says 'if significant harm is unavoidable, or cannot be adequately mitigated against or – as a last resort – compensated for, then planning permission should be refused.' Buglife had interpreted this as meaning the application should be refused, but this is not the intention of the NPPF. It states that harm to biodiversity should be avoided or mitigated. If it cannot be avoided, compensation should be given as a last resort. It was noted that Natural England accepted what would be put in place if the application was approved. The member stated that the NPPF also says 'Planning permission should also be refused if it would result in the loss or deterioration of irreplaceable habitats.' The Ecological Adviser from Jacobs stated that the habitat on the site was not irreplaceable and not structural so it could be replaced. With regard to where the habitat would be situated this would form part of the ecological management plan which would need to be submitted in more detail for approval. The Planning Officer had made reference to invertebrate groups and in this connection it was possible to move and relocate their habitat structure."

The discussion continued in this way:

> "A member stated that Buglife stated that loss of habitat structures and corridors would have an impact on wildlife and asked for clarification. The

Ecological Adviser said he believed this was incorrect. The mitigation would retain many network features in the areas and much of the vegetation was being retained. Other corridors were being strengthened.
With regard to timescale and monitoring of translocation, it was noted that this scheme would … also be submitted for approval in due course."

The Secretary of State's letter of 22 June 2012

73 On 22 June 2012 the Secretary of State wrote to the Council saying he did not intend to call the application in. The proposals, he said, did not involve a conflict with national policies on important matters nor would the development have significant effects beyond the immediate locality. He had therefore decided that the application should be decided at local level.

The planning permission

74 On 27 July 2012 the Council granted planning permission for the development. The reasons given for the grant in the decision notice were:

"There is an overriding need for an Energy from Waste recovery facility to be provided by 2016 which outweighs the significant adverse impact on the settings of Lower Greatmoor Farmhouse and Finemeerhill House Grade II Listed Buildings. Subject to the provision of aSection 106 legal agreement relating to [these] buildings and their settings and other matters and a Section 278 Highways Act agreement and conditions set out above, the proposed development is considered to be generally in compliance with policies 10–13, 17–22, 25, 28–31, 33, 36–39 of the Buckinghamshire Minerals and Waste Local Plan 2004–2016; Policies GP38-GP40, GP45, GP60, GP84, RA29 and RA36 of Aylesbury Vale District Local Plan; CC1, CC2, CC4, CC6, CC8, NRM1, NRM2, NRM4, NRM11, NRM13, NRM14, NRM16, W3-W5, W7, W11-W15, W17, M4, C4, C6 and BE6 of the South East Plan; Planning Policy Statement 10; The Waste Strategy for England 2007; The Government Review of Waste Policy in England 2011; National Policy Statement EN-1 and EN-3; Written Ministerial Statement: Planning for Growth (23 March 2011); The EC Landfill Directive 2007/76/EC; The Waste Incineration Directive 2000/76/EC; The Revised Waste Framework Directive 2008/98/EC; The Renewable Energy Directive 2009/28/ECand the National Planning Policy Framework 2012."

75 A number of conditions were imposed on the planning permission. Condition 4 stated:

"No part of the development including the proposed access road (the disused railway line) shall take place until the Ecological Management Plan … has been reviewed and updated and the amended document has been submitted to and approved in writing by the County Planning Authority. The Ecological Management Plan as submitted shall include:—

…

v) The creation of all habitats within and outside of the application boundary, including the enhancement area … as early as appropriate to minimise the time lag between the destruction of habitats and the creation of replacements.

…

xxii) The annual submission for five years of the results of surveys of black and brown hairstreak butterflies in accordance with Table 9–2 of the EMP. The carrying out of mitigation measures, if negative impacts, attributable to the development, are observed on the populations, ….

xxiii) Confirmation of the volumes of railway ballast that will be made available from the ground preparation works along the disused railway line to develop more of the "open mosaic" (early successional) habitat for the butterflies to recreate the track bed habitat that is being lost;

xxiv) Confirmation of the locations and areas of the habitat to be created, in accordance with recommendations made by the County Planning Authority in consultation with Natural England;

xxv) The submission of a programme for monitoring general invertebrate interest along and adjacent to the line of the proposed new access road … and within newly created habitats to be submitted to and approved in writing by the County Planning Authority before the commencement of works on site. All subsequent work shall comply with the provisions of the agreed monitoring strategy.

…

xxx) The management of the blackthorn scrub along the proposed access road … to initially restore the balance between younger and older age classes and ultimately to establish a small patch cutting regime on approximately a 30 years rotation … to give a range of age classes spread along the length of the railway;

xxxi) The retention of all cut scrub from the disused railway line and the use of this to create foraging habitat for newts and reptiles within the road margins.

…

xxxv) The implementation of the initial stages of the EMP as approved prior to the commencement of the development where specified and the continuance of works in accordance with the EMP throughout the operation of the development.

…".

Condition 6 stated:

"No works associated with the new access … shall take place on the line of the disused railway, until the membership and Terms of Reference of the proposed Greatmoor Biodiversity Partnership have been submitted to the County Planning Authority and approved in writing. The partnership shall include the operator and its ecologist; representatives of the County and District Planning Authorities, Natural England and local ecological stakeholder organisations and shall be operated in accordance with the proposals contained in the Ecological Management Plan."

The derogation licences

76 After planning permission had been granted FCC obtained from Natural England, as the licensing authority under the 2010 regulations, derogation licences for works that would affect great crested newts and bats, on 18 and 28 September 2012, respectively. The licensed works in the licence relating to bats involved the removal of the roof of the farmhouse at Upper Greatmoor Farm, to prevent bats from roosting there.

77 On 2 November 2012 the claimant's solicitors sent a pre-action protocol letter to Natural England contesting the legality of the licences of 18 and 28 September 2012. On 16 November 2012 Natural England wrote to the claimant's solicitors, saying that if a claim for judicial review were issued to challenge the licences, it would not seek to defend those proceedings and would consent to judgment. It accepted that "an insufficiently full picture was considered by Natural England in relation to some of the (perhaps less credible) alternatives". Its officers accepted that "more detailed consideration could have been given by [it] to continuing to use existing local public highways for access to the new development." But the letter also said that the officers had "formed the view that the two licences were properly granted in the sense that the licences ought to have been granted and that it was right to do so."

78 The removal of the roof from the farmhouse at Upper Greatmoor Farm was completed on 3 December 2012. On 10 December 2012 FCC made a further application for a derogation licence for the works that will affect great crested newts. No further application was made for a licence relating to bats. Natural England's derogation licences of 18 and 28 September 2012 were quashed by consent on 31 January 2013. In the "Statement of Reasons" attached to the consent order records Natural England's concession that it had considered "an insufficiently full picture … in relation to some of the alternatives", and in particular that "more detailed consideration could have been given to continuing to use existing local public highways for access to the new development such that the decision should be quashed."

79 On 12 March 2013 Natural England granted a fresh derogation licence for works affecting great crested newts.

The issues for the court

80 The claim raises three main issues:

(1) whether, in considering the likely effects of the development on European Protected Species, the County Council failed to comply with the requirements of the Habitats Directive and the 2010 regulations, and, in particular, failed properly to consider alternatives for the proposed access road;

(2) whether the County Council unlawfully failed to apply relevant national policy on nature conservation in the NPPF; and

(3) whether the County Council failed to provide adequate reasons for its grant of planning permission.

Issue (1): European Protected Species

Relevant law

81 Article 12(1) of the Habitats Directive requires member states to establish "a system of strict protection" for a number of animal species, by prohibiting, among other things, the deliberate disturbance of these species and the deterioration or destruction of their breeding sites and resting places.

82 Article 16(1) permits member states to derogate from the requirements of art.12 for "imperative reasons of overriding public interest", provided that "there is no satisfactory alternative" and that "the derogation is not detrimental to the maintenance of the populations of the species concerned at a favourable conservation status in their natural range".

83 The Habitats Directive is given effect in domestic law by the 2010 regulations. The 2010 regulations make it a criminal offence deliberately to disturb or to damage or destroy the breeding site or resting place of a European Protected Species (regulations 40 and 41). Bats and great crested newts are European Protected Species.

84 In the form in which they were in force when planning permission for the proposed development was granted, the 2010 regulations provided, in reg.9(5), that in exercising any of its functions a "competent authority" – in this case the County Council – "must have regard to the requirements of the Habitats Directive so far as they may be affected by the exercise of those functions". Regulation 9(1) imposes a duty on Natural England to exercise its functions under the enactments relating to nature conservation "so as to secure compliance with the requirements of the Habitats Directive". One of Natural England's functions is the granting of licences to permit derogations from the protection afforded to European Protected Species. In this case the construction of the proposed access road required a licence from Natural England, because of the impacts on bats and great crested newts. Such licences may be granted under reg.53, if there are "imperative reasons of overriding public interest including those of a social or economic nature". Regulation 53(9) provides that Natural England must not grant such a licence unless it is satisfied "that there is no satisfactory alternative" and "that the action authorised will not be detrimental to the maintenance of the population of the species concerned at a favourable conservation status in their natural range".

85 In *R. (Morge) v Hampshire CC* [2011] UKSC 2; [2011] Env. L.R. 19 the Supreme Court considered the duty now provided in reg.9(5), which was then provided in reg.3(4) of the Conservation (Natural Habitats, etc) Regulations 1994. In that case Natural England had withdrawn its objection to the proposals. The court concluded – Lord Kerr of Tonaghmore dissenting – that the local planning authority's committee had been entitled to conclude that licences were not required at all, and therefore that the derogation tests did not need to be considered. In para.28 of his judgment Lord Brown of Eaton-under-Heywood referred to what Ward L.J. had said in the Court of Appeal (in para.61 of his judgment):

> "The planning committee must grant or refuse planning permission in such a way that will 'establish a system of strict protection for the animal species listed in Annex IV(a) in their natural range …' If in this case the committee is satisfied that the development will not offend art.12(1)(b) or (d) it may grant permission. If satisfied that it will breach any part of article 12(1) it

> must then consider whether the appropriate authority, here Natural England, will permit a derogation and grant a licence under regulation 44. Natural England can only grant that licence if it concludes that (i) despite the breach of regulation 39 (and therefore of article 12) there is no satisfactory alternative; (ii) the development will not be detrimental to the maintenance of the population of bats at favourable conservation status; and (iii) the development should be permitted for imperative reasons of overriding public importance. If the planning committee conclude that Natural England will not grant a licence it must refuse planning permission. If on the other hand it is likely that it will grant the licence then the planning committee may grant conditional planning permission. If it is uncertain whether or not a licence will be granted, then it must refuse planning permission."

Lord Brown did not agree. In para.29 of his judgment he said this:

> "In my judgment this goes too far and puts too great a responsibility on the planning committee whose only obligation under regulation 3(4) is, I repeat, to "have regard to the requirements of theHabitats Directive so far as [those requirements] may be affected by" their decision whether or not to grant a planning permission. Obviously, in the days when the implementation of such a permission provided a defence to the regulation 39 offence of acting contrary to article 12(1), the planning committee, before granting a permission, would have needed to be satisfied either that the development in question would not offend article 12(1) or that a derogation from that article would be permitted and a licence granted. Now, however, I cannot see why a planning permission (and, indeed, a full planning permission save only as to conditions necessary to secure any required mitigating measures) should not ordinarily be granted save only in cases where the planning committee conclude that the proposed development would both (a) be likely to offend article 12(1)and (b) be unlikely to be licensed pursuant to the derogation powers. After all, even if development permission is given, the criminal sanction against any offending (and unlicensed) activity remains available and it seems to me wrong in principle, when Natural England have the primary responsibility for ensuring compliance with the Directive, also to place a substantial burden on the planning authority in effect to police the fulfilment of Natural England's own duty."

Lord Brown went on to say (in para.30):

> "Where, as here, Natural England express themselves satisfied that a proposed development will be compliant with article 12, the planning authority are to my mind entitled to presume that that is so. The planning committee here plainly had regard to the requirements of the Directive: they knew from the officers' decision report and addendum report … not only that Natural England had withdrawn their objection to the scheme but also that necessary measures had been planned to compensate for the loss of foraging. … I cannot agree with Lord Kerr JSC's view … that regulation 3(4) required the committee members to consider and decide for themselves whether the development would or would not occasion such disturbance to bats as in fact and in law to constitute a violation of article 12(1)(b) of the Directive."

Agreeing with Lord Brown, Baroness Hale of Richmond said:

> "[44.] … In my view, it is quite unnecessary for [an officers'] report [to committee] such as this to spell out in detail every single one of the legal obligations which are involved in any decision. Councillors were being advised to consider whether the proposed development would have an adverse effect on species or habitats protected by the 1994 Regulations. That in my view is enough to demonstrate that they "had regard" to the requirements of the Habitats Directive for the purpose of regulation 3(4). That is all they have to do in this context, whereas regulation 48(1)(a) imposes a more specific obligation to make an "appropriate assessment" if a proposal is likely to have an effect upon a European site. …
>
> [45.] Furthermore, the United Kingdom has chosen to implement article 12of the Directive by creating criminal offences. It is not the function of the planning authority to police those offences. Matters would, as Lord Brown JSC points out, have been different if the grant of planning permission were an automatic defence. But it is no longer. And it is the function of Natural England to enforce the Directive by prosecuting these criminal offences (or granting licences to derogate from the requirements of the Directive). The planning authority were entitled to draw the conclusion that, having been initially concerned but having withdrawn their objection, Natural England were content that the requirements of the regulations, and thus the Directive, were being complied with. Indeed, it seems to me that, if any complaint were to be made on this score, it should have been addressed to Natural England rather than to the planning authority. They were the people to assess the meaning of the updated bat survey and whether it did indeed meet the requirements of the Directive. The planning authority could perhaps have reached a different conclusion from Natural England but they were not required to make their own independent assessment."

Lord Mance said (at para.55):

> "With regard to the updated bat survey, there is no reason to believe that Natural England did not, when evaluating this, understand both the legal requirements and their general role and responsibilities at the stage at which they were approached by the council. … The important point is … that Natural England was well placed to evaluate this survey, and having done so, gave the advice they did. …."

In his dissenting judgment Lord Kerr said this (in para.82):

> "It may well be that, if Natural England had unambiguously expressed the view that the proposal would not involve any breach of theHabitats Directive and the committee had been informed of that, it would not have been necessary for the committee members to go behind that view. But that had not happened. It was simply not possible for the committee to properly conclude that Natural England had said that the proposal would not be in breach of the Habitats Directivein relation to bats. Absent such a statement, they were bound to make that judgment for themselves and to consider whether, on the available evidence the exercise of their functions would have an effect on the requirements of the Directive. I am afraid I am driven to the conclusion that they plainly did not do so."

86 One of the cases cited in argument in *Morge* but not referred to in any of the judgments was *R. (Woolley) v Cheshire East Borough Council* [2010] Env. L.R. 5. In that case H.H. Judge Waksman QC, sitting as a deputy judge of the High Court, had considered the role of a planning authority when considering whether the derogation tests could be met, as an aspect of its duty to have regard to the Habitats Directive. He said (in para.27 of his judgment):

> "This exercise is in no way a substitute for the licence application which will follow if permission is given. But it means that if it is clear or perhaps very likely that the requirements of the directive cannot be met because there is a satisfactory alternative or because there are no conceivable "other imperative reasons of overriding public interest" then the authority should act upon that, and refuse permission. On the other hand if it seems that the requirements are likely to be met, then the authority will have discharged its duty to have regard to the requirements and there would be no impediment to planning permission on that ground. If it is unclear to the authority whether the requirements will be met it will just have to take a view whether in all the circumstances it should affect the grant or not. But the point is that it is only by engaging in this kind of way that the authority can be said to have any meaningful regard for the directive."

The two sides in this claim disagreed about the status of those observations in the light of the Supreme Court's decision in *Morge*. For the claimant it was argued that they remained good law. For the City Council and FCC it was submitted that they were not.

87 In *Elliott v Secretary of State for Communities and Local Government and others* [2013] Env. L.R. 5 Natural England had not objected to the proposals but had not actually said it was satisfied that they complied with art.12. Keith J. held (in para.52 of his judgment) that an inspector, when having regard to the requirements of the Habitats Directive, had been entitled to take account of the fact that Natural England had not objected:

> "… Of course, Natural England may not in terms have expressed itself satisfied that the proposals in the Masterplan would comply withArt. 12 of the Habitats Directive. Natural England was only not objecting to the proposals – presumably on the basis that the impact on the foraging and roosting habitats of bats would be relatively modest. But the upshot was that when the Secretary of State was obliged to have regard to the requirements of the Habitats Directiveto the extent that they may be affected by his planning functions under the 1990 Act, he was entitled to have regard to Natural England's views about the impact of the proposals on the foraging and roosting habitats of bats, and to grant planning permission unless it was likely that (a) a licence under reg. 53 would be required and (b) when it was applied for, it would be refused."

Keith J. went on to say (in para.53):

> "Judgment in *Morge* was handed down on 9 January 2011, a few weeks after the Secretary of State made the decision which is being challenged in this case. At that time, the test was the more onerous one adopted by the Court of Appeal in *Morge* … and [*Woolley*], … namely that if the planning committee

> was uncertain whether or not a licence under reg.53 would be granted, planning permission should be refused. So if the Secretary of State took the view that it was likely that a licence under reg.53 would be granted if it was sought, all the more so for him to have thought that it was unlikely that it would not be granted if it was sought."

I understand that an appeal against Keith J.'s decision in *Elliott* was dismissed by the Court of Appeal on 23 April 2013.

The European Commission's guidance

88 The European Commission's "Guidance document on the strict protection of animal species of Community interest under the Habitats Directive 92/43/EEC", published in February 2007, gives advice (in paras (34) to (42) of part III) on the assessment of alternatives under art.16. It is for the competent national authorities to evaluate alternatives, but this discretionary power is "subject to several constraints" (para.(35)). The analysis can be considered as having three parts: first, "What is the problem or specific situation that needs to be addressed?"; second, "Are there any other solutions?"; and third, "If so, will these resolve the problem or specific situation for which the derogation is sought?" (para.36). Paragraph 37 says this:

> "The analysis of whether "there is no other satisfactory alternative" presumes that a specific problem or situation exists and needs to be tackled. The competent national authorities are called upon to solve this problem or situation by choosing, among the possible alternatives, the most appropriate that will ensure the best protection of the species while solving the problem/situation. To ensure the best protection of species, these alternatives must be assessed with regard to the prohibitions listed in Article 12. They could involve alternative locations (or routes), different development scales or designs, or alternative activities, processes or methods."

89 Paragraph 38 of the guidance document says that "recourse to Article 16 derogations must be a last resort". Paragraph 39 says that "[the] same strict approach applies to the interpretation of the term "satisfactory"". Given the exceptional nature of the derogation regime and the duty of Member States under art.10 of the EC Treaty to facilitate the achievement of the tasks of the Community, a derogation "would only be justified on the basis of an objective demonstration that there is no other satisfactory solution". As the Advocate General had said in Case C-10/96, this "may be interpreted as meaning a solution which resolves the particular problem facing the national authorities, and which at the same time respects as far as possible the prohibitions laid down in the Directive; a derogation may only be allowed where no other solution which does not involve setting aside these prohibitions can be adopted." Paragraph 40 acknowledges, however, that "the factors for evaluating the existence of another satisfactory solution" are "a matter for the national courts". It adds that "[the] appraisal of whether an alternative is satisfactory or not, in a given situation, must be founded on objectively verifiable factors, such as scientific and technical considerations."

90 Paragraph 41 emphasizes the importance of assessing alternatives:

"Evidently, the requirement to consider seriously other alternatives is of primary importance. The discretionary power of Member States is limited, and where another solution exists, any arguments that it is not "satisfactory" will need to be convincing. Moreover, it should be stressed that another solution cannot be deemed unsatisfactory merely because it would cause greater inconvenience to or compel a change in behaviour by the beneficiaries of the derogation."

Submissions for the claimant

91 On this issue Mr Ian Dove QC for the claimant submitted:

(1) In the planning application documents and in the environmental statement and further environmental information the consideration of alternatives to the proposed access road was sparse. In section 7A in the further environmental information ("Alternatives"), six possible alternative routes, each of which would have provided some relief to local villages, were dismissed simply because they did not "completely remove traffic" from local roads. There was no assessment of the ecological impacts, including impacts on European Protected Species, of any of these alternatives, and no weighing of the environmental benefits of the alternatives against any ecological harm. As for the one alternative that was assessed in more detail, no impact on European Protective Species was identified, and there was no assessment of its possible effects on the Sites of Special Scientific Interest by comparison with the ecological impacts of the development proposed.

(2) The County Council failed to follow the correct approach to the "no satisfactory alternative" test. The correct approach can be seen in the European Commission's guidance. But that guidance was not applied. The officers did not mention it in their report. They ought to have identified "the most appropriate [option] that [would] ensure the best protection of the species while solving the problem/situation" (para.37 of the guidance document). To ensure the "best protection" of the species affected, the alternatives had to be assessed "with regard to the prohibitions listed in Article 12" (ibid.). Above all, as para.38 of the guidance stresses, derogations must be seen as a "last resort". Neither the officers nor the members had considered whether there was any satisfactory alternative to the proposed access road, to avoid the harm that both bats and great crested newts would suffer if that road were built. The officers' analysis in paras 263 and 265 of their report was flawed. There was no evidence that any of the alternative access routes would affect any European Protected Species. But it was clear that FCC's development would harm both bats and great crested newts. This crucial difference between the impacts of the proposed development and the alternatives considered was never confronted by the County Council, or, indeed, by Natural England. By restricting the comparison between the proposals and alternatives to other matters such as residential amenity and visual impacts, the officers had led themselves and the members to ignore a crucial question – whether there was an alternative that achieved the "best protection" of the species in accordance with the Habitats Directive. This was what para.37 of the European Commission's guidance document

required. A specific failing in the officers' report was that they did not consider whether there was any way of avoiding the impact on bats that would be caused by demolishing the buildings at Upper Greatmoor Farm.

(3) In all the time when the application for planning permission was with the County Council, Natural England never grappled with the issues relating to the European Protected Species or the derogation tests in art.16 of the Habitats Directive. It never said whether those tests were likely to be complied with. It never asked itself whether there was any satisfactory alternative route for the access road. Its objection did not relate to impacts on European Protected Species. And the County Council's officers reported nothing to the committee about Natural England's views on those impacts. The County Council could not simply rely on the absence of a relevant objection from Natural England when considering whether derogation licences were likely to be granted. It had to make its own judgment as to whether the requirements of the Habitats Directive could be met and, in particular, whether there was "no satisfactory alternative" for the access road. All five members of the Supreme Court in *Morge* seem to have agreed on those principles. They divided only on an issue of fact – whether Natural England had formed and expressed a view and whether that view had been reported to the committee.

(4) If the County Council had properly assessed whether licences could be issued in this case, it might have concluded that this was unlikely. If so, planning permission should have been refused. Natural England had issued derogation licences after planning permission was granted. It later accepted that those licences were legally flawed because alternatives had not been sufficiently considered. When Natural England consented to judgment it could not say whether fresh licences would be granted. At no time before that would it have been able to offer the County Council a lawful view about the likelihood of licences being granted.

Submissions for the Council and for FCC

92 The submissions made on this issue by Mr David Elvin QC for the County Council and by Mr James Maurici for the FCC can be summarized together. They submitted:

(1) Mr Dove's submissions face an insuperable hurdle in the decision of the Supreme Court in *Morge*. It is there that one finds the law on the task of a planning authority when determining an application for planning permission for development with implications for European Protected Species. The approach indicated in *Woolley* does not survive the decision in *Morge*. The County Council's duty under reg.9(5) was simply "to have regard to the requirements of the directives so far as they may be affected by the exercise of those functions." It is for Natural England, and not for the County Council as a planning authority, to enforce compliance with the Habitats Directive. Regulation 9(5) does not require a planning authority to carry out its own shadow assessment to find out whether there will be a breach of art.12 of the Habitats Directive, or whether a derogation will be permitted and a licence granted.

(2) It is important not to misunderstand the European Commission's guidance. The guidance does not say that, in considering alternatives, a decision-maker must focus only on the impacts those alternatives would have on European Protected Species. In assessing whether an alternative is satisfactory or not it is necessary to take account of "objectively verifiable factors, such as scientific and technical considerations". The principles in the guidance were not misapplied in this case.

(3) The County Council was entitled to place considerable weight on the absence of any objection concerning European Protected Species from Natural England. After a long period of consultation and discussion Natural England's objection to the proposals was withdrawn. Natural England never objected on grounds relating to European Protected Species. And there was never any suggestion that it was anxious about the effects the development would have on European Protected Species or that it was unlikely to grant the derogation licences required. The only objection it had raised was on the grounds of possible impacts on butterflies that were not European Protected Species. The County Council was entitled to conclude that derogation licences were not unlikely to be granted. It is inconceivable that, as the "appropriate nature conservation body" under the 2010 regulations, responsible for ensuring the Habitats Directive is complied with, Natural England would not have objected if it envisaged refusing those licences. In this case therefore, in view of the Supreme Court's decision in *Morge*, it was clearly appropriate for planning permission to be granted.

(4) The County Council had in fact satisfied a test more onerous than was accepted by the Supreme Court in *Morge*. It did not go wrong in considering whether there was any "satisfactory alternative" to the proposed access road. It approached the question in a reasonable and realistic way. The officers concluded that the most viable alternative access would have a number of harmful environmental effects, including ecological impacts. Taking into account these impacts, there was no satisfactory alternative to the access route proposed (paras 264 and 265 of the report). The claimant's complaint is really that the most viable alternative access route was not preferred, because no likely impact on European Protected Species had been identified on that route. This, however, is not what the law requires. The idea that the option with the least impact on European Protected Species must be chosen, irrespective of other considerations, is incorrect. It finds no support in the Habitats Directive, in the 2010 regulations or in the European Commission's guidance document.

(5) Mr Dove's attempt to separate this case from the principles in *Morge* was misconceived. It did not matter that, after planning permission had been granted, Natural England had consented to the quashing of the licences. This did not mean that the County Council was unable to conclude, when it did, that licences were likely to be granted.

(6) This ground of the claim is in any event academic, at least in part. The claimant's case concentrates mainly on the impact on bats from the demolition of the buildings at Greatmoor Farm. But the works required have now been done, under a licence granted by Natural England. No bats remain. No licence for works affecting them is now required. If the planning permission were quashed and had to be determined again, the claimant's

concerns about the bats at Upper Greatmoor Farm would no longer be relevant.

Discussion

93 I cannot accept Mr Dove's argument on this issue. In my view the submissions made by Mr Elvin and Mr Maurici are correct.

94 I think Mr Dove exaggerated the County Council's task, as a planning decision-maker, when dealing with the consequences of the proposed development for European Protected Species. It is the function of Natural England to enforce compliance with the Habitats Directive, by prosecuting those who commit offences contrary to its provisions. Under reg.9(5) of the 2010 regulations, the County Council's duty was to have regard to the requirements of the Habitats Directive so far as those requirements might be affected by its decision whether to grant planning permission.

95 The lawfulness of what the County Council did in this case is not to be tested by imposing upon it a duty that was not its own, and a role in exploring alternatives that it might only have had to perform if the Supreme Court's decision in *Morge* could be put to one side and the Court of Appeal's restored.

96 As the final decision in *Morge* makes clear, reg.9(5) does not require a planning authority to carry out the assessment that Natural England has to make when deciding whether there would be a breach of art.12 of the Habitats Directive or whether a derogation from that provision should be permitted and a licence granted. If a proposed development is found acceptable when judged on its planning merits, planning permission for it should normally be given unless in the planning authority's view the proposed development would be likely to offend art.12(1) and unlikely to be licensed under the derogation powers (see para.29 of Lord Brown's judgment in *Morge*).

97 The majority of the Supreme Court rejected the kind of assessment favoured by the Court of Appeal, which would require a more penetrating enquiry into the prospects of a licence being granted. In Lord Brown's view, with which Lords Walker and Mance and Baroness Hale all agreed, a planning authority is not expected to supervise the performance by Natural England of its "primary responsibility for ensuring compliance with the Directive", or to take that responsibility upon itself. In the opinion of Lord Brown (in para.30) and Baroness Hale (in para.45) the authority was entitled to conclude that Natural England, having withdrawn its initial objection to the proposal, was satisfied that the requirements of the Habitats Directive were being met.

98 None of the judgments in the Supreme Court in *Morge* expressly disapproved the approach suggested by H.H. Judge Waksman QC in para.27 of his judgment in *Woolley*. Indeed, none of the judgments referred to *Woolley* at all, although it was cited in argument. Mr Dove submitted that what the judge had said in that case was still good law. Mr Elvin and Mr Maurici argued that it was not, because it was, in effect, what had been said by the Court of Appeal in *Morge*. I think they were right. *Woolley* cannot be read now as support for an approach more exacting than was finally sanctioned in *Morge*. If the majority of the Supreme Court in *Morge* had wanted to endorse the approach suggested by the judge in *Woolley* and to adopt what he had said as a gloss on the words of Lord Brown (in para.29) and Baroness Hale (in paras 44 and 45) I think they would have said so. They did not. The whole

tenor of their reasoning is less demanding of planning authorities than the observations of H.H. Judge Waksman QC in *Woolley*. In my view, the law is now to be found in *Morge*, not in *Morge* plus *Woolley*.

99 I think the County Council discharged its duty under reg.9(5) in this case with no less rigour than was required to comply with the approach indicated by the Supreme Court in *Morge*. It did at least as much as it had to do to satisfy itself that the necessary derogations were not unlikely to be licensed. Indeed, I think it did enough to satisfy even the more burdensome remit for planning authorities envisaged by the Court of Appeal in *Morge*, and by the judge in *Woolley*.

100 In the documents FCC and SLR submitted to the County Council and Natural England the likely effects of the development on European Protected Species were dealt with in depth. Ample detail was provided in the environmental statement. More was produced when it was asked for. The proposals were modified, the strategies for mitigation improved. The County Council's reg.19 request required, among other things, updated surveys of bats and great crested newts. The reg.19 submission included a large amount of material on European Protected Species, and the likely effects upon them if the proposed access road was constructed and used. By the time that submission was made the access road had been redesigned. A substantial proportion of the existing scrub habitat was now going to be retained (para.2.3.2 of the October 2011 ecological report). Further surveys of bats and great crested newts had been undertaken (sections 6 and 8 of the October 2011 ecological report). It was acknowledged that derogation licences would be required for works affecting bats and great crested newts (paras 6.4 and 8.2, respectively). In Annex A to the October 2011 ecological report the relevant statutory tests were discussed in detail. The Ecological Management Plan, which itself went through several revisions, set out the mitigation proposals.

101 Alternative routes for the access road were also considered in the EIA. In section 8 of the environmental statement it was explained that the arrangements for access had been under consideration for a long time. The chosen option – Option 4, the Akeman Street railway route – was the most expensive. But it was the only one that would completely remove traffic from local roads (paras 8.10 to 8.12). Alternatives for the access road were assessed in the supplementary section 7A of the environmental statement in the reg.19 submission. The aim to relieve local villages from waste vehicles was emphasized (para.7A.46). The preferred route was judged to perform well against the other options (para.7A.47). The alternative shown in figure 7A-1 had significant disadvantages, including its likely impact on a Site of Special Scientific Interest (paras 7A.57 to 7A.65).

102 When the application came before the County Council's committee the officers provided the members with a thorough analysis of the matters relevant to their consideration of European Protected Species.

103 Having referred to the statutory duty to have regard to the requirements of the Habitats Directive (in para.253 of their report), the officers went on to consider the specific requirements relating to European Protected Species, and then to cover the likely impacts on those species (in paras 258 to 268). They identified the three tests in the licensing regime (para.259). Mr Dove acknowledged that they did this accurately. It cannot be suggested, therefore, that when making its decision on the application for planning permission the committee was unaware of the relevant requirements. It was clearly aware of them and had regard to them. So the issue narrows to whether the consideration it gave them was adequate. I believe it was.

104 The officers provided the committee with their views on the application of the derogation tests. The only contentious part of this advice is the passage in which the officers dealt with the alternatives for the proposed access road.

105 In my view the advice the officers gave on those alternatives, which the members plainly accepted, was sound and sufficient.

106 The officers referred to the several options in paras 263 to 265 of their report. The factual accuracy of what they said has not been questioned. Nor has it been said that their views on the merits and disadvantages of the alternatives were irrational. That submission would have been untenable.

107 The officers' conclusions, in para.265 of their report, were clear: first, that a new access road to the site was "essential" if the impact of heavy vehicles using local roads was to be removed; secondly, that without this new access road the additional impact of heavy vehicles serving the proposed energy from waste facility would be "unacceptable"; thirdly, that although the impact on European Protected Species might prove to be less if an alternative access route were brought forward, there was enough evidence that "other impacts would be considerable and hard to overcome"; fourthly, that on balance there was "no satisfactory alternative access route that would be less harmful … so that there is no satisfactory alternative"; and fifthly, therefore, that the second test for derogation was met. These conclusions were, I think, reasonable and realistic. The members were being told that no acceptable alternative to the proposed route for the access road had been identified. Regardless of whether there would be lesser impacts on protected species, other objections to the alternatives considered would be "hard to overcome". The traffic they would put on to local roads would be "unacceptable". None of them was "satisfactory".

108 I do not see any force in Mr Dove's complaints about the officers' advice. The officers' approach was, I believe, pragmatic and right.

109 To say, as they did, that one could not be sure whether any of the alternatives would have less effect on European Protected Species than the access road proposed was not misleading. It was correct. No detailed surveys, which might have shown a lesser impact, had been done. But, as Mr Elvin submitted, this would only have mattered if there had not been clear objections to the alternatives on other grounds. There were such objections. None of the alternatives was acceptable. It was not necessary to compare their potential impacts, if any, on European Protected Species. Whatever the result of that exercise might have been, none of the alternatives was going to "resolve the problem or specific situation for which the derogation [was to be] sought" – as it is put in para.36 of the European Commission's guidance document. The officers did not refer to the guidance document in their report. But their advice was not inconsistent with it.

110 I do not accept that the officers needed to spell out for the members all the considerations that had gone into the proposed alignment of the access road, and why the demolitions at Upper Greatmoor Farm were necessary. As the officers understood, the aim of minimizing the ecological impacts of the development had influenced the design of the road as the proposals evolved. They could have explained this is detail in their report. But they were not obliged to do so.

111 As Mr Elvin submitted, it is not the law that a derogation may only be licensed if there is no alternative. The relevant proviso in art.16(1) of the Habitats Directive is that there is no "satisfactory alternative". Mr Elvin contrasted the provisions of art.16(1) with the stringent provisions in art.6(3) and (4) governing the protection

of habitats in Special Areas of Conservation and Special Protection Areas, and in particular the language of art.6(4), which refers simply to the absence of "alternative solutions".

112 Mr Dove relied heavily on the advice given in the European Commission's guidance document, and especially the point made in para.38 of it – that derogation "must be a last resort". But the guidance is not the law. The law is to be found in the relevant provisions of the Habitats Directive and the 2010 regulations, and in any jurisprudence that sheds light on their meaning. Paragraph 37 of the guidance enjoins the competent national authorities to select from the "possible alternatives" the one that will ensure the best protection of the species "while solving the problem …". But this does not require a comparative assessment of the possible effects of each suggested alternative on the European Protected Species. Article 16 of the Habitats Directive does not provide that a licence must be refused if an alternative emerges with no foreseeable impact on European Protected Species, or an impact less harmful than that of the project in hand. And I do not accept the suggestion that an alternative must be regarded as satisfactory – or can only be satisfactory – when that is so. As Mr Maurici pointed out, this could have some very odd results. For example, it might be seen as justifying the destruction of a Site of Special Scientific Interest where no species protected under the Habitats Directive were present, even if the impacts of the proposed development on European Protected Species were going to be modest and easily overcome.

113 As is clear from the European Commission's guidance, other considerations other than the effects of European Protected Species can and will come into play. Physical, planning and timing constraints are germane to the question. Any or all of these may prove decisive. To be satisfactory an alternative has to be a real option, not merely a theoretical one. When planning permission for it would likely be refused because, for instance, it would strain the capacity of local roads, or disturb people in their homes, or mar the setting of a listed building, or harm flora or fauna important in a Site of Special Scientific Interest, it may well be reasonable to dismiss it as a "satisfactory alternative". Without the planning permission it would require a hypothetical option of that kind would not be a real alternative; it could not meet the identified need.

114 Judging what is, or may be, a satisfactory alternative in a particular case requires a focus on what is sought to be achieved through the derogation, and on the likely effects of the works on the species in question. As Mr Elvin submitted, in the absence of European case law on the application of the derogation tests under the Habitats Directive, there is a useful parallel in the cases in which similar provisions in Directive 79/409/EEC (the Wild Birds Directive) were considered by the European Court of Justice. For example, in *Commission v Finland*C-344/03 [2005] ECR I-11033), which concerned derogations to allow the hunting seasons for various species of duck to be extended, the court held (at para.44) that for one species – the long-tailed duck – there was "no other satisfactory solution". This bird could not be hunted in the autumn hunting season. Hunting other species of duck could not be considered an "other satisfactory solution" It would render the derogation provisions "nugatory" (see para.43). This accords with the general principle that an alternative will not be "satisfactory" if it fails to achieve the relevant aim.

115 In the light of the advice they were given, and in the absence of any objection from Natural England, the County Council's committee was in my view entitled

to conclude, if not bound to conclude, that the derogation tests were at least likely to be met.

116 As the committee was well aware, by the time FCC's proposals came before it for a decision, the effects of the development on ecological interests, including European Protected Species, had been discussed over a long period, both with the County Council's officers and with Natural England. It is clear that the committee gave considerable weight to the conclusions reached by Natural England. This is hardly surprising. It is exactly what one would expect. Natural England is the "appropriate nature conservation body" under the regulations. Its views on issues relating to nature conservation deserve great weight. An authority may sensibly rely on those views. It is not bound to agree with them, but it would need cogent reasons for departing from them (see, for example, the judgment of Sullivan J., as he then was, in *R. (Hart District Council) v Secretary of State for Communities and Local Government*[2008] EWHC 1204 (Admin); [2008] 2 P. & C.R. 16, at para.49), and the judgment of Owen J. in *R. (Akester) v Department for the Environment, Food and Rural Affairs* [2010] Env. L.R. 33, at para.112).

117 It was not necessary for Natural England to have said that the derogations were going to be licensed, or were likely to be. Like the authority in *Morge*, the County Council was entitled to assume that Natural England was satisfied that the requirements of the Habitats Directive and the regulations were being complied with (see paras 6, 8, 30 of Lord Brown's judgment, and paras 37 to 40 and 44 and 45 of Baroness Hale's). The facts in *Elliott* were also similar (see para.52 of Keith J.'s judgment).

118 Natural England's position on the European Protected Species potentially affected by the development was not obscure. When it objected to the proposals, in March 2011, it did not do so on any grounds relating to bats or great crested newts. It knew those species were present in areas likely to be affected by the development. It asked for further survey work to be done, to establish whether bats were present on or near the development site. Those surveys were done, and their results were seen by Natural England.

119 I have referred to the relevant correspondence between Natural England, SLR and the County Council in late 2011 and early 2012; I need not repeat the detail now. It is clear from the correspondence that Natural England had no misgivings about the likely effects of the development on European Protected Species and the ways in which those effects were going to be mitigated, with some benefit as a result. There was never the slightest hint of derogation licences being refused in due course. There was nothing to indicate that Natural England was likely to take a different view on any of the derogation tests – including the test of "no satisfactory alternative" – from that expressed by the officers in their advice to the members. In the circumstances the County Council could properly conclude that licences were not likely to be refused. Indeed, any other conclusion would have defied the facts.

120 As was held in *Morge* and *Elliott*, a similar conclusion could be drawn in a case where Natural England had at first resisted proposals for development on grounds relating to European Protected Species, only later to change its stance. There is no reason in my view why this should not be so in a case where Natural England has never opposed the development on such grounds. I do not see a material difference between this case and *Morge* on the basis suggested by Mr Dove – that in *Morge* the critical question was not whether a derogation licence was unlikely to be issued

but whether the proposals complied with art.12. The crucial point in my view is that here, as in *Morge*, Natural England's position was absolutely plain from what it had said and done – and from what it had not said and not done – during its involvement in the planning process. In that process it could be expected to act in the public interest, just as it could in its own process when deciding whether derogations ought to be licensed.

121 The subsequent quashing of the derogation licences in a consent order does not negate the analysis on which the County Council's officers' advice and its committee's decision were based. Natural England's decision to issue those licences and the order of the court to quash them both came after planning permission had been granted. Neither of those two events had any influence on the County Council's decision-making on the planning application. The same applies to the further licence granted by Natural England on 12 March 2013. As I said at the hearing, the fact that this new licence has been issued, and the possibility that it too may be challenged in a claim for judicial review, do not affect my conclusion on this issue at all.

122 If I had come to a different conclusion on this part of the claim, I think there would have been some force in the submission that it is now academic, at least so far as it relates to the impact on bats. The works necessary to exclude bats from the buildings at Upper Greatmoor Farm have already been carried out. Any further works to implement the planning permission would not disturb bats. I would have had to bear this in mind in exercising my discretion to grant or withhold relief.

123 For the reasons I have given, however, this ground of the claim must fail.

Issue (2): NPPF policy on nature conservation

Relevant law

124 It is trite that a claim for judicial review is not an opportunity to contest the planning merits of a planning authority's decision. Questions of planning judgment and weight are not for the court but for the planning decision-maker (see the speech of Lord Hoffmann in *Tesco Stores Ltd v Secretary of State for the Environment* [1995] 1 W.L.R. 759, at p.780). In *Newsmith Stainless Ltd v Secretary of State for Environment, Transport and the Regions* [2001] EWHC Admin 74, Sullivan J., as he then was, observed (in para.7 of his judgment) that "where an expert tribunal is the fact finding body the threshold of *Wednesbury* unreasonableness is a difficult obstacle … to surmount", more difficult still in most planning cases because the decision-maker is not simply deciding questions of fact, but reaching a series of planning judgments when there will usually be "a fairly broad range of possible views, none of which can be categorised as unreasonable." Those principles may be seen at work in many cases like this. They are applied, for example, in cases where a planning judgment has had to be made under a particular provision of policy.

125 In *R. Buglife v Thurrock Thames Gateway Corporation* [2009] 2 P. & C.R. 8 a claim for judicial review was made on the basis that the development corporation had failed to apply the advice in para.1(vi) of PPS9 "Biodiversity and Geological Conservation" – which was in similar terms to that now given in para.118 of the NPPF. It was submitted that the duty to look for alternative sites had been triggered and that only if no such sites were available could the possibility of mitigation on

the appeal site arise. The grant of planning permission on the basis that significant harm could be adequately mitigated, it was said, did not accord with the advice in PPS9. The claim failed, on both the first instance and on appeal. In his judgment, with which Rix L.J. and Arden L.J. agreed, Pill L.J. said this (at para.49):

> "There was no sentence-by-sentence analysis of PPS9. However, its overall tenor was not ignored, the adverse effects being carefully analysed. The respondents were entitled to conclude that the harm was not, in the terms of the circular, significant. They were entitled to take the mitigation proposed, and the assessment of its effect, into account when making their decision. They were entitled to give considerable weight to the representations of Natural England, the expert statutory consultees. Indeed, it would have been surprising if, having regard to the public interests involved, they did not give them such weight. The planning conditions imposed and the detailed section 106 agreement were, as Natural England accepted, a valuable safeguard. Natural England withdrew its objection to the planning application."

The NPPF

126 The NPPF was published by the Government in March 2012. In para.118 it states:

> "When determining planning applications, local planning authorities should aim to conserve and enhance biodiversity by applying the following principles:
>
> "• if significant harm resulting from a development cannot be avoided (through locating on an alternative site with less harmful impacts), adequately mitigated, or, as a last resort, compensated for, then permission should be refused;
> • proposed development on land within or outside a Site of Special Scientific Interest likely to have an adverse effect on a Site of Special Scientific Interest … should not normally be permitted. Where an adverse effect on the site's notified special interest features is likely, an exception should only be made where the benefits of the development, at this site, clearly outweigh both the impacts that it is likely to have on the features of the site that make it of special scientific interest and any broader impacts on the national network of Sites of Special Scientific Interest;
> …
> • the following wildlife sites should be given the same protection as European sites:
>
> "– potential Special Protection Areas and possible Special Areas of Conservation;
> – listed or proposed Ramsar sites; and
> – sites identified, or required, as compensatory measures for adverse effects on European sites, potential Special Protection Areas, possible Special Areas of Conservation, and listed or proposed Ramsar sites."""

Submissions for the claimant

127 On this issue Mr Dove submitted:

(1) The assessment of impacts on invertebrates presented in the environmental statement and the reg.19 material betrayed an incoherent and unsubstantiated analysis. It exaggerated the positive impacts of the proposed compensation, downplayed the negative impacts, and depended far too much on mitigation measures whose success was at best uncertain and an Environmental Management Plan yet to be composed. The impacts of the development on the black hairstreak and brown hairstreak butterflies, even with mitigation, would be significant at a national level, at least until the replacement habitat had matured. There would also be impacts on the grizzled skipper butterfly, which, without mitigation, would be significant at a regional level. The "mitigation" proposed was the creation of replacement habitat. Such measures are more accurately described as "compensation". The prediction of positive impacts in the medium to long term was plainly wrong. It must assume (i) that the recreation of habitats elsewhere would preserve or increase the abundance of these species, and (ii) that the creation of further compensatory habitat would maintain the function of the disused railway line as a wildlife corridor for the invertebrate communities, linking the Sites of Special Scientific Interest. Both assumptions were bad. There was no scientific basis for assuming that the recreation of habitat would work. It was irrational of the County Council to conclude that the proposed mitigation for the impacts on the black hairstreak butterfly would be effective. The conditions imposed on the planning permission did not reflect the basis upon which Natural England withdrew its objection. They did not ensure that the mitigation would be successful.

(2) The County Council, in approving FCC's proposals, adopted an approach incompatible with national planning policy in the NPPF. This was a case of the kind envisaged in the first principle in para.118 of the NPPF – a case of "significant harm" to biodiversity. It engaged the hierarchy of (i) avoidance, or, failing that, (ii) adequate mitigation, or, as a last resort, (iii) adequate compensation. Neither the County Council nor Natural England had understood that. This was a fatal flaw in the County Council's decision-making. The County Council had not assessed whether any of the alternatives would avoid, or reduce, the ecological harm that the proposed access road would cause, including the harm to the function of the disused railway as a link between invertebrate habitats. The County Council had neglected the priority given in government policy to the avoidance of impacts. And it had also absorbed into its own judgment the false optimism of the proposed habitat compensation.

(3) The County Council had also failed to heed the second principle in para.118 of the NPPF – that development likely to harm a Site of Special Scientific Interest should not normally be permitted. Natural England thought the disused railway line itself satisfied the criteria for notification as a Site of Special Scientific Interest. The reason why this land had not yet become a Site of Special Scientific Interest was, essentially, "bureaucratic". It ought therefore to have been considered by the County Council as being, in effect, a Site of Special Scientific Interest to which the policy should have been

applied, and the development should therefore not have been permitted. The planning officers' comment, in para.256 of their report, that consultation on the designation was "not currently being progressed" was misleading. Anyway, the committee had not grasped either the intrinsic ecological value of the disused railway line or its function as a link in the network of Sites of Special Scientific Interest around it. Natural England had objected because of the likely effect of the development on this link. To imagine that this would not be harmful was perverse, given the amount of habitat that was going to be damaged or destroyed.

Submissions for the Council and for FCC

128 Mr Elvin and Mr Maurici submitted:

(1) This was an undisguised attack on expert assessments made in documents submitted to the County Council by FCC, and accepted both by it and by Natural England. The court was being invited to gauge the likely impacts of the development on butterflies and the likely success of the proposed translocation of habitat. Mr Dove was attempting to re-argue an objection that did not prevail before the planning decision-maker when considered on its merits. This sort of argument has no place in a claim for judicial review. It was hardly perverse for the County Council's committee to rely on its planning officers' judgment and its own expert's advice on ecological matters and on the carefully considered views of Natural England. The claimant might disagree with Natural England's conclusion. But the County Council was entitled to accept it without exposing itself to the charge of irrationality.

(2) The County Council did not ignore or misapply government policy in para.118 of the NPPF. The premise here was that the development was going to cause "significant harm". The claimant's argument depended, therefore, on the County Council having been not merely mistaken but irrational in accepting its officers' advice and Natural England's – that, with the proposed measures for habitat translocation and creation in place, the effects on invertebrates, including butterflies, would not be significant. This was a hopeless submission. The principles in para.118 of the NPPF were correctly applied by the committee. The possibility of an alternative route using existing roads was properly considered. In their reports the officers explored mitigation and compensation in depth. These were all matters of expert planning and ecological judgment. There was no error of law.

(3) The officers' report did not mislead members about the possibility of the disused railway line being designated a Site of Special Scientific Interest. The position was accurately set out. Natural England letter's withdrawing its objection had said nothing about the proposed access road being considered for designation as a Site of Special Scientific interest, nor had it suggested that the decision on the application for planning permission ought to be deferred until the possibility of designation had been considered. But in their report the officers identified and considered the value of the disused railway for butterflies. They did not overlook its function as a link

between the Sites of Special Scientific Interest. They considered this explicitly (see paras 256 and 257 of their report).

Discussion

129 I cannot accept the submissions made by Mr Dove on this issue. Again, in my view, those of Mr Elvin and Mr Maurici are well founded.

130 It is not the role of the court to test the ecological and planning judgments made in the course of the County Council's decision-making process. Assessing the nature, extent and acceptability of the effects that a development will have on the environment is always – apart from the limited scope for review on public law grounds – exclusively a task for the planning decision-maker.

131 I do not think the ecological analysis presented to the County Council by FCC was flawed in a way that could vitiate the County Council's decision to grant planning permission. Mr Dove argued that the analysis was obviously wrong. But I cannot see that it was. Nor, in my view, was it unreasonable or irrational for the County Council to rely upon that analysis. On the contrary, I think it might have been unreasonable not to do so.

132 Mr Dove submitted that the County Council could not reasonably find the mitigation proposals for the black hairstreak butterfly satisfactory, for two main reasons: first, because the proposals did not reflect the fact that the black hairstreak is a sedentary species, which does not readily adapt to new habitat; and secondly, because there is likely to be a delay in the new habitat becoming suitable. A formidable difficulty for this submission is that Natural England, having very carefully considered the proposed mitigation, withdrew its objection, and the County Council's expert advice was also that the mitigation would be effective. The claimant himself raised concerns about the mitigation, but these were rejected by Natural England in its letter of 13 March 2012.

133 It is important, I think, to view the relevant ecological material as a whole, as it was after a process of consultation, the submission of further information, the refinement of FCC's proposals, the evolution of the intended measures for avoiding harmful impacts on the species potentially affected by the development, SLR's correspondence and dialogue with Natural England, and the withdrawal of Natural England's objection. For example, para.11.135 of the environmental statement, which identified possible harmful effects on butterflies, should not be read in isolation, as if it were the final word on this matter. It was not. Further work was done. In the October 2011 ecological report it was concluded that there would be a "direct negative impact" on hairstreak butterflies in the absence of mitigation. To paraphrase: the losses would not be great and the proposals would not prevent the access road acting as a link between the Sites of Special Scientific Interest. The provision of new habitat to compensate for the losses would reduce the impact and, over time, lead to new connections being formed. Although there would be some harm to the butterfly species in the short term this would not be significant. The further information on the proposed mitigation measures provided by FCC enabled Natural England to withdraw its objection, which it did on 6 February 2012. The documents and correspondence through which this history can be traced were all available to the County Council's committee when eventually it met to consider the planning application in April 2012.

134 The issues relating to biodiversity and nature conservation were discussed in the officers' report. They were also debated by the members, as the committee minutes show. The officers' reporting of the issues, including those relating to butterflies and the Sites of Special Scientific Interest, was not perfunctory. It was in my view conscientious, even-handed and thorough. Its coverage of the issues as they stood when the decision on FCC's proposals came to be made cannot be faulted. The gist of the relevant objections, including those of Butterfly Conservation and Buglife, was reported and commented upon. The members knew the County Council's ecological adviser was content that the proposed mitigation would be effective. And they were told that Natural England was no longer objecting to the proposals at the meeting on 14 February 2012, and again in the updating report for the meetings in April.

135 Standing back from all this, one can see that the conclusions of the County Council's committee on the ecological issues were in the circumstances perfectly rational, however much the claimant and others might wish to dispute them. They had a basis in objective evidence and in expert assessment and judgment. They were supported both by the County Council's own ecological adviser and by Natural England. Buglife had doubted the efficacy of the proposed translocation of blackthorn. But it was for the County Council's members to come to their own conclusions on all the material they had. It was not perverse for them to conclude – as Natural England and those advising them had done – that deleterious effects on the assemblage of butterflies on and around the site had been avoided, though some damage was likely in the short to medium term and only later would the "compensation" habitat yield its benefits. This is the kind of judgment that planning committees are used to making. It will not be defeated in a claim for judicial review by disagreement alone, even if such disagreement has expert opinion behind it.

136 In the end, despite Mr Dove's great presentational skill, this part of the claim is really an attack on the expert judgment of Natural England and the corresponding views of the County Council's own ecological expert, the planning officers, and, ultimately, the members as well. It does not convince me that the County Council committed any error of law.

137 As I have already said, the County Council was entitled to give significant weight to the views of Natural England. For a long time Natural England maintained an objection. It did so because it wanted to be satisfied that the Sites of Special Scientific Interest and the species of particular importance within them would be sufficiently protected by the intended mitigation for invertebrates, especially the black hairstreak and the brown hairstreak butterflies. In the end, in the light of all the information SLR had produced, Natural England was satisfied. By early February 2012 it could no longer see any reason to resist the proposals. If at that stage it had been uneasy about the mitigation proposed it would have persisted in its objection.

138 SLR was always conscious of the idiosyncrasies of the black hairstreak. One can see this, for example, in 11.135 of the environmental statement, where it was acknowledged that "alternative habitats may not be accessible". In the additional information provided in response to the reg.19 request and in later correspondence, attention was given to the detailed design of habitat for the black hairstreak. SLR's letter of 2 February 2012 explained the measures proposed for the creation of early successional habitat, of mixed ages, and for the management of this habitat.

139 In its letter of 6 February 2012, withdrawing its objection, Natural England made clear what conditions it expected to see imposed on the planning permission if the development was approved. One of these would prevent development on the disused railway line "until all relevant mitigation measures, as agreed, have been carried out to a satisfactory standard to ensure that these measures will be successful". This did not, in my view, betray a lingering uncertainty about the effectiveness of the proposed mitigation. Rather, it envisaged that the relevant mitigation measures would have been carried out to a satisfactory standard before development went ahead on this part of the site, to ensure that the mitigation would be successful.

140 The conditions imposed on the planning permission translated Natural England's requirements into enforceable planning controls. Condition 4 set out a series of detailed requirements for the habitat mitigation encompassed in the Ecological Management Plan. Condition 6 required the Greatmoor Biodiversity Partnership, on which Natural England would be represented, to work "in accordance with the proposals contained in the Ecological Management Plan". The conditions provide a comprehensive and flexible system for regulating the mitigation strategy and the ecological management of the site. They do not leave the mitigation unreasonably at large or ill-defined. They comprise the essential requirements of Natural England in its letter of 6 February 2012.

141 The July 2012 version of the Ecological Management Plan emerged after consultation with, among others, Natural England. It set out a detailed strategy for ecological mitigation and enhancement, and a framework for ecological management. The mitigation strategy had been maturing over the months during which Natural England had maintained its objection. It was designed to facilitate the breeding and dispersal of the black hairstreak, which Natural England had described in its letter of 15 December 2011 as a "rare and sedentary butterfly". It allowed for what SLR had recognized in their letter of 19 December 2011 to the County Council as the "time-lag" between the loss of habitats and the new habitat reaching a suitable condition for the "target species", including the black hairstreak. It was modelled on the multiplier approach recommended by DEFRA for dealing with this "compensation risk" in its technical paper of July 2011.

142 Natural England was evidently convinced that this approach would work and could be incorporated into a planning permission by conditions. This was, in my view, an entirely reasonable conclusion for Natural England to reach, and for the County Council to share.

143 Seen against that background, the submissions Mr Dove sought to base on the advice in para.118 of the NPPF are clearly without merit.

144 As Mr Elvin submitted, the true question here is not whether the County Council misunderstood what the policy says, but whether it applied the substance of the policy wrongly on the facts. One comes back then to the familiar principle, reiterated by Lord Reed in *Tesco v Dundee City Council* [2012] P.T.S.R. 983 (at para.19) that many provisions of development plans – and likewise many provisions of national planning policy – are "framed in language whose application to a given set of facts requires the exercise of judgment" and that "[such] matters fall within the jurisdiction of planning authorities, and their exercise of their judgment can only be challenged on the ground that it is irrational or perverse … ". Applying that principle to the facts of this case, I cannot see any reason to set the County Council's decision aside.

145 In my view there is no significant difference between the advice in para.118 of the NPPF – at least so far as it is relevant in this case – and the equivalent, preceding advice in PPS9, which the Court of Appeal had to look at in *Buglife*.

146 The officers had prepared their report for the February 2012 meeting before the NPPF was published. But they did refer, in para.252 of their report, to Key Principle (vi) of PPS9, which was similar to the advice now given in para.118 of the NPPF. They acknowledged the principles of avoidance, mitigation and compensation in national policy. Their advice was in my view consistent with the guidance in para.118 of the NPPF. As they noted in para.251 of their report, the concept of "significant adverse effect" – which I think is the same thing as "significant harm" – was to be seen in relevant provisions of the development plan. In para.256 they reminded the members of the Government's advice that "where there is likely to be an adverse impact on SSSIs, … planning permission should be refused …". In para.257 they noted Natural England's remaining concerns and the prospect of those concerns being overcome. They acknowledged in para.271 that new habitats were going to created. And in para.272 they brought the members to these questions: whether there would be "significant and lasting adverse impact on the nationally protected species or their habitats", whether "in the longer term there would be a significant enhancement to the biodiversity value of the application site", and whether there would be a conflict with development plan policies relating to Sites of Special Scientific Interest. If Natural England were to withdraw its objection – which it did – the officers' advice was that there would be no conflict with those policies. When they came to write their supplementary report, by which time Natural England's objection had gone, the officers were able to say, in para.66, that it was highly unlikely that an objection on grounds relating to biodiversity could be sustained. At the committee meeting on 20 April 2012, when ecological matters were being debated, the committee was guided on how it should apply the advice in para.118 of the NPPF.

147 Looking at the whole of this process, I am in no doubt that the conclusions reached by the County Council on the ecological issues it had to grapple with were entirely reasonable, and congruent with government policy in the NPPF. As in *Buglife*, the policy was, in substance, correctly applied. And the proposals did not clash with it.

148 The first principle in para.118 of the NPPF was not offended.

149 The County Council's committee could properly conclude, in the light of the officers' advice and bearing in mind that Natural England had withdrawn its objection, that the proposed development would not cause any "significant harm" to wildlife, and that it was compatible with the aim of conserving and enhancing biodiversity. This clearly was the committee's conclusion.

150 Alternatives to the proposed access road were considered. Each of them would result in some kind of planning harm. The officers' conclusion, therefore, which the members accepted, was that there was no satisfactory alternative to the development proposed. That was made clear in para.265 of the officers' report. Again, this was quintessentially a matter of judgment for the members. It was a judgment made in the specific context of the derogation tests for European Protected Species. But it was also relevant more generally to the effects on biodiversity, including the impact on the disused railway line as a link in a network of habitats for butterflies and other invertebrates.

151 Even if this had been a case in which "significant harm" to ecological interests could be "avoided" by locating the development on an alternative site with less harmful impacts, it would still have been open to the County Council to conclude, as Natural England had, that any such harm could be "adequately mitigated", and therefore that the first principle in para.118 of the NPPF was met. The policy invites the decision-maker to consider the mitigation proposed. It is not surprising that the policy is expressed in this way. As Mr Elvin pointed out, mitigation measures can be taken into account when a competent authority is considering whether harm will be caused to habitats enjoying a very high level of protection, such as Special Protection Areas (see para.76 of Sullivan J.'s judgment in *Hart District Council*). In applying the policy in para.118 of the NPPF it would have been both artificial and wrong for the County Council to divorce the proposed mitigation measures from the development proposals in considering whether "significant harm" to biodiversity or, specifically, to any of the Sites of Special Scientific Interest, would result. In this case the mitigation clearly was taken into account and was found to be adequate. It was sufficient to prevent any "significant harm". This was enough to satisfy the first principle in para.118.

152 The second principle in para.118 was not breached.

153 The objection pursued by Natural England, and ultimately withdrawn, was to development proposed on land outside any designated site, which might nevertheless affect species within Sites of Special Scientific Interest. If, despite all it knew about the development by early February 2012, Natural England had still thought it might have unacceptable effects on any Site of Special Scientific Interest or any "notified special interest features" it would surely have said so. But it did not. In the circumstances the County Council's committee could reasonably conclude, as the officers had advised, that the refusal of planning permission was not justified on such grounds. Its decision did not go against the policy in para.118 of the NPPF for "development on land … outside a Site of Special Scientific Interest likely to have an adverse effect on a Site of Special Scientific Interest".

154 The last of the principles in para.118 was not engaged in this case.

155 Unlike "potential Special Protection Areas" and "possible Special Areas of Conservation", proposed designations of Site of Special Scientific Interest do not come within the advice in para.118 of the NPPF. When FCC's application was being considered the route of the disused railway line was not a Site of Special Scientific Interest, and there was no definite proposal for it to be designated. Designation was no more than a possibility.

156 I reject Mr Dove's submission that that the officers misled the committee about the proposal to designate the disused railway line as a Site of Special Scientific Interest. When the application was considered by the County Council's committee in April 2012 there was no obvious momentum behind this. The officers cannot be criticized for saying – as they did in para.256 of their report – that the designation was not at that stage being progressed. This was not inaccurate. In the summer of 2011 Natural England had carried out a survey of invertebrates. No formal process followed. The County Council's officers seem to have assumed, rightly as it turned out, that consultation was not imminent. A possible designation was contemplated, but apparently not until 2015. Even with the advantage of hindsight, it cannot be said that the officers got this wrong. The e-mail correspondence on which Mr Dove relied – between officers of Natural England and between them and the claimant's ecologist – shows some enthusiasm for designating a strip of land along the path

of the abandoned railway. But it does not sustain the submission that the only obstacles to designation were "bureaucratic". Whether the case for designation had been made was still very much in doubt. And Natural England was not concerned about the development coming forward while the question was still live. It did not fear that the development would spoil the special interest that designation would serve to protect. In its letter to the claimant of 13 March 2012 it confirmed that if planning permission were granted this was unlikely to prevent a new Site of Special Scientific Interest being notified.

157 The committee knew that in Natural England's view the disused railway line provided a "key linkage" for butterflies that were "interest features" of the Sites of Special Scientific Interest nearby. The officers referred to this in para.256 of their report. This had been one of the considerations underlying Natural England's objection. The members could reasonably take it from the withdrawal of that objection that the function of the railway line as a link between the Sites of Special Scientific Interest was not seen by Natural England as an impediment to planning permission being granted. But the officers made sure that the members appreciated the intrinsic value of the disused railway line for wildlife. In para.269 of their report they described the line as a habitat worthy of recognition at county and regional level. The committee had this in mind when it made its decision. Once again, I find it impossible to conclude that the judgment it came to was either unreasonable or contrary to government policy in the NPPF.

158 This ground of the claim therefore fails.

Issue (3): Reasons

Relevant law

159 Article 31 of the Town and Country Planning (Development Management Procedure) (England) Order 2010 ("the Development Management Procedure Order") requires a local planning authority, when granting planning permission, to state in its decision notice a summary of its reasons for the grant of permission, and a summary of the policies and proposals in the development plan that were relevant to its decision to grant permission.

160 When the court is considering the adequacy of summary reasons for a grant of planning permission, it is permissible and sometimes necessary to have regard to the surrounding circumstances (see paras 13 to 19 of the judgment of Sullivan L.J. in *R. (Siraj) v Kirklees Metropolitan Council* [2011] J.P.L. 571). By their nature a local planning authority's summary reasons for granting planning permission do not present a full account of its decision-making process. A fuller summary of the reasons for granting planning permission may well be necessary where the members have granted planning permission contrary to an officer's recommendation. But in para.16 of his judgment in *Siraj* Sullivan L.J. said this:

> "Where on the other hand the members have followed their officers' recommendation, and there is no indication that they have disagreed with the reasoning in the report which lead to that recommendation, then a relatively brief summary of reasons for the grant of planning permission may well be adequate. …".

Submissions for the claimant

161 Mr Dove submitted:

(1) The County Council's decision notice of 27 July 2012 is clearly defective. It does little more than list the development plan policies relevant to the application. It says nothing about the nature conservation issues arsing under Habitats Directive and the 2010 regulations. It does not explain how the interests of protected species had been taken into account in the County Council's decision-making. It does not say how the proposals comply with policies relating to nature conservation. It does not enable those who are concerned about the effects the development will have on wildlife to understand why planning permission was granted.

(2) If a local planning authority has accepted its officer's recommendation to grant permission, the committee report is relevant when the adequacy of its summary reasons is being considered. In this case, however, the officers' report was itself deficient. It did not include any analysis of the proposals against the tests in para.118 of the NPPF, or any similar policy tests in the development plan or previous national policy. The analysis relating to European Protected Species was also flawed.

(3) The public has been severely prejudiced by the failure to provide adequate reasons. It was impossible to understand how the relevant national and development plan policies had been applied, and, therefore, how it could be said in the summary reasons that the development was "generally in compliance with" the development plan.

Submissions for the Council and for FCC

162 Mr Elvin and Mr Maurici submitted:

(1) The reasons given in the decision notice are entirely adequate. The County Council did not have to list the relevant parts of the Habitats Directive and the 2010 regulations. Article 31 of the Development Management Procedure Order requires a summary of the relevant policies in the development plan, not a list of relevant European legislation. The County Council also had to set out a summary of its reasons for the grant of permission, not full reasons as to why each objection was overcome.

(2) In this case the County Council's committee had the benefit of a very detailed report from its officers, a further report to bring that one up to date, and oral advice from them as well. The members accepted the recommendation the officers made. The application was found to be in accordance with the development plan, apart from policies relating to listed buildings. In the circumstances the summary reasons stated in the decision notice were plainly sufficient, and up to the standard required (see *Siraj*).

Discussion

163 Having rejected Mr Dove's argument on issues (1) and (2) – which, he acknowledged, was the foundation for what he submitted on this aspect of the

claim – I have concluded that this ground too must fail. In my view there was no breach of art.31(1) of the Development Management Procedure Order in this case.

164 Under art.31(1) the County Council had to provide in its decision notice a summary of the policies in the development plan relevant to its decision. It was not required to refer also to those provisions of the Habitats Directive and the 2010 regulations with which it had sought to comply, or to any passages in the NPPF that it had taken into account. As Mr Dove accepted, the decision notice contains a long list of relevant provisions in the development plan, as well as other policy documents, including the NPPF, with which the proposals were said to be "generally in compliance".

165 Terse as they are, the summary reasons given for the grant are also lawful. Elaborate reasons are not required. Brevity is usually a virtue, so long as the essential rationale of the decision is apparent. Here it is.

166 In this case the members who made the decision to grant planning permission plainly agreed with the conclusions and recommendation in the officers' report. The court may consider the adequacy of the summary reasons given for the grant in that context (see the judgment of Sullivan L.J. in *Siraj*, at paras 16 and 19, and the judgment of Richards L.J. in *R. (Telford Trustee No. 1 Ltd) v Telford and Wrekin Council* [2012] P.T.S.R. 935, at paras 54 to 58). The proposed development had been found to accord with relevant provisions of the development plan, apart from the policies relating to listed buildings – because there was going to be harm to two grade II listed buildings. The County Council's summary reasons referred to the "overriding need" outweighing the "significant adverse impact" on the settings of those listed buildings. In their report the officers assessed the proposals in unsparing detail, within the relevant policy framework. They explored the likely effects of the development on the interests of biodiversity and nature conservation, conscious of the policies they had to apply. In the circumstances I think the County Council did enough to discharge the statutory requirement for summary reasons in its decision notice. It would have been possible for it to expand on the reasons it gave. But it did not have to. The reasons it did give were adequate.

167 I have already dealt with Mr Dove's submission that the officers' report was deficient because it did not explain how the proposals complied with the advice in para.118 of the NPPF. The point is not good one. And it is no better when presented again as a challenge to the County Council's summary reasons. The committee was properly advised on the substance of relevant national policy. The decision notice did not have to recite the advice.

168 If I had found the summary reasons in the decision notice fell short of what was required I would have held that this did not cause the claimant or anyone else substantial prejudice. The reasons why planning permission was granted in this case may readily be seen in the officers' report, which sets them out at considerable length. In these circumstances it could not be said that anybody has been prejudiced by a deficiency in the reasons stated in the County Council's decision notice. The remedy then, rather than an order to quash the planning permission, would have been mandatory relief requiring the reasons to be made good (see the judgment of Ouseley J. in *R. (Midcounties Co-operative Limited v Wyre Forest District Council* [2009] EWHC 964 (Admin), at para.191).

Conclusion

169 I am not persuaded that the claimant's grounds were unarguable, and I am therefore able to grant him permission to apply for judicial review. But for the reasons I have given the claim itself is dismissed.