

# FREETHS

## CITY OF BRADFORD METROPOLITAN DISTRICT COUNCIL CORE STRATEGY EXAMINATION

### COMMENTS FROM CEG LAND PROMOTIONS LTD ON HOMEWORK ITEM 4: DOCUMENT PS/F050

#### **Introduction**

1. CEG has reviewed the Council's Homework Item 4: Document PS/F050. This contains a Table illustrating the policy approaches of other Local Authorities affected by the South Pennine Moors SPA ("SPA").
2. From this Table (the contents of which we assume to be correct) it can be seen that the Local Authorities in the vicinity of the SPA, when adopting development plans, have satisfied the Habitat Regulations Assessment requirements of regulation 102 Conservation of Habitats and Species Regulations 2010: (i) through application of general planning policies included in the plan; (ii) and/or in a number of cases (eg Leeds, Kirklees and this may also apply to the other examples listed), by deferring detailed consideration of impacts on the SPA and appropriate mitigation to a lower tier plan, or project, through site specific work to be undertaken following adoption of the development plan eg as part of the Allocations DPD.

#### **Consistency with Approach Approved in *Teignbridge***

3. The general approach seen from the Table is entirely consistent with the judgment in the recent case of *Abbotskerswell Parish Council v Teignbridge District Council* [2014] EWHC 4166 (Admin) ("**Teignbridge**") (see copy attached) which CEG identified in its earlier representations on the Core Strategy.
4. In *Teignbridge*, the Parish Council claimant sought to quash all or part of the Teignbridge Local Plan 2013-2033 which had been adopted by Teignbridge District Council (paragraph 1) following an examination. The primary ground of challenge was an allegation that the Local Plan had been adopted in breach of the appropriate assessment requirement of regulation 102 Conservation of Habitats and Species Regulations 2010. It was alleged that there had been a failure to ensure strategic level protection for the South Hams Special Area of Conservation ("**SAC**") (this SAC hosts approximately 31% of the UK's population of Greater Horseshoe bats ("**GHB**")) (paragraph 2).
5. However, the Local Plan had included (i) a general policy requiring a bespoke site mitigation plan to be submitted for each proposed development as it came forward in the future (paragraph 72), and (ii) a further policy, requiring adoption of a Supplementary Planning Document ("**SPD**") at a later stage to include a "GHB Mitigation Strategy" and the identification of suitable alternative natural green spaces to relieve recreational pressure on European sites. It was anticipated that this future SPD would identify the requirements and measures necessary to mitigate the likely effects of all types of development in all areas to avoid or mitigate an adverse effect on the integrity of the SAC (paragraphs 70 and 78). In addition the text accompanying the policies in the Local Plan (not the policies themselves) anticipated that settlement level bespoke mitigation plans would be needed for three specific towns but these would be addressed at a later stage (paragraphs 76 and 77).
6. With this approach reflected in the Local Plan, NE confirmed that the HRA had been successfully concluded and it had no objection to the Local Plan's adoption (paragraph 58).

# FREETHS

7. Despite this, the Parish Council claimant alleged that the GHB mitigation measures ought to have been put in place in the Local Plan itself, at a strategic, settlement and site level, before the Local Plan was adopted (paragraph 26(i)). It was alleged that the Local Plan did not ensure implementation of recommendations for a wider framework to avoid adverse effects on the SAC (paragraph 30) and that, as a consequence, these Local Plan policies were undeliverable (paragraph 31). The Inspector who conducted the examination into the Local Plan concluded that the future safeguards referred to in the plan (ie the SPD, future bespoke settlement level mitigation plans and bespoke site mitigation plans for future development) did not have to be in place in advance of the adoption of the Local Plan (paragraph 83). However the Parish Council contended that the Inspector had erred in concluding that the Local Plan satisfied the statutory requirements and was sound (paragraph 32).
8. The Court rejected these criticisms and the Parish Council's contentions. The Judge, Mrs Justice Lang, concluded that the Inspector had been correct in his approach. In relation to the anticipated future SPD in particular, the Judge concluded that the Local Plan's provision for the preparation of a GHB Mitigation Strategy amounted to provision for a mitigation strategy, in line with the requirements of the HRA. She concluded that it was acceptable for the SPD document to be prepared "down the line" (paragraphs 79-80).
9. The Judge (see paragraphs 82-84) went on to conclude that the Parish Council's allegation that the mitigation anticipated by the Local Plan was neither effective nor enforceable, and so undeliverable, was not supported by the evidence. The Judge found that the Inspector was entitled to conclude that the housing policies were capable of delivery, whilst still affording sufficient protection to the GHB and he was entitled to conclude that the Local Plan met the statutory requirements and was sound, applying the criteria in the National Planning Policy Framework.

## **Conclusions**

10. The Table at document PS/F050 which shows the policy approaches used by other Local Authorities affected by the SPA and the *Teignbridge* case both demonstrate that it is acceptable for details regarding the delivery and availability of mitigation measures in relation to the SPA to be considered "down the line" at a lower tier plan or project stage and following adoption of the Core Strategy.

**21 April 2015**

Neutral Citation Number: [2014] EWHC 4166 (Admin)

Case No: CO/2729/2014

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

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: Tuesday 16<sup>th</sup> December 2014

**Before:**

**THE HONOURABLE MRS JUSTICE LANG DBE**

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**Between:**

**ABBOTSKERSWELL PARISH COUNCIL**

**Claimant**

**- and -**

**(1) TEIGNBRIDGE DISTRICT COUNCIL**

**(2) SECRETARY OF STATE FOR  
COMMUNITIES AND LOCAL GOVERNMENT**

**Defendants**

(Transcript of the Handed Down Judgment of  
WordWave International Limited  
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165 Fleet Street, London EC4A 2DY  
Tel No: 020 7404 1400, Fax No: 020 7831 8838  
Official Shorthand Writers to the Court)

**Jenny Wigley** (instructed by **Richard Buxton Environmental & Public Law**) for the **Claimant**  
**Michael Bedford** (instructed by **Teignbridge District Council Legal Services**) for the **First Defendant**  
**Richard Kimblin** (instructed by **The Treasury Solicitor**) for the **Second Defendant**

Hearing dates: 26<sup>th</sup> & 27<sup>th</sup> November 2014

Judgment

As Approved by the Court

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**Mrs Justice Lang:**

1. The Claimant applies under section 113 of the Planning and Compulsory Purchase Act 2004 (“PCPA 2004”) to quash all or part of the Teignbridge Local Plan 2013 - 2033, adopted by Teignbridge District Council (“the Council”).
2. The primary ground of challenge is that the Local Plan, in particular in relation to the provision of additional housing, roads and infrastructure, has been adopted in breach of the Habitats Directive (EU Council Directive 92/43/EEC). The Claimant alleges that it fails to ensure strategic level protection for a protected site which hosts approximately 31% of the UK’s population of Greater Horseshoe bats. The Claimant and those it represents are particularly affected by a proposed housing development near Abbotskerswell and wish it to be located elsewhere.
3. At the commencement of the hearing, I allowed both parties to adduce further evidence, since I considered it was in the interests of justice for me to consider all the material upon which the parties wished to rely.

**Facts**

4. The Greater Horseshoe bat (“GHB”) is a European protected species and a significant proportion of the British population is contained within a series of caves in the Teignbridge and South Hams area. In consequence the South Hams Special Area of Conservation (“SAC”) was established under the Conservation of Habitats and Species Regulations 2010 (“the 2010 Regulations”. It includes five Sites of Special Scientific Interest. The bats use the wider countryside of South Devon for commuting, foraging, roosting and mating.
5. Preparatory work on the Local Plan was undertaken from 2008 to 2010, based on a level of growth set out in the draft Regional Spatial Strategy (RSS) for the South West. It set out requirements for a substantial number of new homes and new jobs
6. Following extensive assessments and consultation, the proposed Local Plan was submitted for examination to the Inspector (Mr G. Salter) in June 2013. Examination hearing sessions took place in September 2013.
7. The Inspector published 13 proposed Main Modifications to the Plan, which led to further consultation. His report was delivered on 9<sup>th</sup> April 2014, recommending 12 Main Modifications.
8. The Council adopted the Local Plan on 6<sup>th</sup> May 2014.

**Statutory and Policy Framework**

**Planning and Compulsory Purchase Act 2004**

9. Subsection (3) of section 113 of the PCPA 2004 enables a person aggrieved by a relevant document, which includes a development plan document like a Local Plan, to apply to the High Court on the grounds that:

- i) a document is not within the appropriate power;
  - ii) a procedural requirement has not been complied with.
10. By subsections (6) and (7), the High Court may quash the relevant document or remit it, if satisfied that the grounds are made out, but in the case of non-compliance with a procedural requirement, it may only do if “the interests of the applicant have been substantially prejudiced by a failure to comply” (s.113(6)).
11. Each local planning authority is required to produce a local plan for its area, pursuant to sections 17 and 19 of the PCPA 2004. By regulations 2 and 6 of the Town and Country Planning (Local Planning) (England) Regulations 2012 (“the 2012 Regulations”), the “local plan” means the local development documents referred to in regulation 5(1)(a)(i)(ii) or (iv) or 5(2)(a) or (b), which are “development plan documents” for the purposes of section 17 PCPA 2004.
12. A draft local plan must be consulted upon and published (regulations 18 and 19 of the 2012 Regulations). Under regulation 20, any person may make representations to the planning authority about a local plan.
13. By section 20(1) PCPA 2004, the planning authority must submit its development plan documents to the Secretary of State for Communities and Local Government for independent examination by an Inspector.
14. Subsection (5) provides, so far as is material:
- “The purpose of an independent examination is to determine in respect of the development plan document–
- (a) whether it satisfies the requirements of sections 19 and 24(1), regulations under section 17(7) and any regulations under section 36 relating to the preparation of development plan documents;
  - (b) whether it is sound.”
15. Subsection 7C makes provision for the Inspector to recommend modifications, which the local authority must publish with reasons. By subsection (7), where the Inspector considers it is reasonable to conclude that the document satisfies the statutory requirements, he must recommend that it is adopted.
16. Section 23 provides that the local authority may only adopt a development plan document in accordance with the recommendations of the Inspector.
17. The National Planning Policy Framework (“NPPF”) addresses local plans in paragraphs 150 to 182. It provides, so far as is material:
- i) Local plans are the key to delivering sustainable development that reflects the vision and aspirations of local communities (at 150).

- ii) Local plans must be prepared with the objective of contributing to the achievement of sustainable development (as provided for in section 39(2) PCPA 2004). To this end, they should be consistent with the NPPF (at 151).
- iii) Local planning authorities should seek opportunities to achieve the economic, social and environmental dimensions of sustainable development. Significant adverse impacts on any of these dimensions should be avoided and wherever possible alternative options to reduce or eliminate such impacts pursued. Where adverse impacts are unavoidable, measures to mitigate the impact should be considered (at 152).
- iv) Local plans should be aspirational but realistic (at 154).
- v) A wide section of the community should be proactively engaged so that local plans, as far as possible, reflect a collective vision and a set of agreed priorities (at 155).
- vi) Local planning authorities should set out the strategic priorities for the area in the local plan, including delivery of the homes needed (at 156).
- vii) Local plans should identify land where development would be inappropriate, for instance because of its environmental significance and contain a clear strategy for enhancing the natural environment (at 157).
- viii) Planning authorities should prepare a Strategic Housing Market Assessment to assess their housing needs and a Strategic Housing Land Availability Assessment to establish realistic assumptions about the availability and suitability of land to meet the identified need for housing (at 159).
- ix) A sustainability appraisal meeting the requirements of the European Directive on strategic environmental assessment should be an integral part of the plan preparation process. Local Plans may require other environmental assessments, including under the Habitats Regulations.

18. Paragraph 182 of the NPPF provides:

“The Local Plan will be examined by an independent inspector whose role it is to assess whether the plan has been prepared in accordance with the Duty to Cooperate, legal and procedural requirements, and whether it is sound. A local planning authority should submit a plan for examination which it considers is “sound” – namely that it is:

Positively prepared – the plan should be prepared based on a strategy which seeks to meet objectively assessed development and infrastructure requirements ....;

Justified – the plan should be the most appropriate strategy, when considered against the reasonable alternatives, based on proportionate evidence;

Effective – the plan should be deliverable over its period and based on effective joint working on cross-boundary strategic priorities;

Consistent with national policy – the plan should enable the delivery of sustainable development in accordance with the policies in the Framework.”

### **Habitats Directive & the Conservation of Habitats and Species Regulations 2010**

19. The Habitats Directive (EU Council Directive 92/43/EEC) provides in Article 1, so far as is material:

“(e) conservation status of a natural habitat means the sum of the influences acting on a natural habitat and its typical species that may affect its long-term natural distribution, structure and functions as well as the long-term survival of its typical species within the territory referred to in Article 2.”

“(i) conservation status of a species means the sum of the influences acting on the species concerned that may affect the long-term distribution and abundance of its populations within the territory referred to in Article 2.

The conservation status will be taken as ‘favourable’ when:

- population dynamics data on the species concerned indicate that it is maintaining itself on a long-term basis as a viable component of its natural habitats, and
- the natural range of the species is neither being reduced nor is likely to be reduced for the foreseeable future, and
- there is, and will probably continue to be, a sufficiently large habitat to maintain its populations on a long-term basis.”

“(l) special area of conservation means a site of Community importance designated by the Member States through a statutory, administrative and/or contractual act where the necessary conservation measures are applied for the maintenance or restoration, at a favourable conservation status, of the natural habitats and/or the populations of the species for which the site is designated”

20. Article 6 of the Habitats Directive provides, so far as is material:

“2. Member States shall take appropriate steps to avoid, in the special areas of conservation, the deterioration of natural habitats and the habitats of species as well as disturbance of the species for which the areas have been designated ...”

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

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

21. The 2010 Regulations give effect to the Habitats Directive in domestic law.
22. The GHB is a European Protected Species protected by Regulation 40(1) and 41 of, and Schedule 2, to the 2010 Regulations.
23. “Favourable conservation status” in relation to a European Protected Species is defined by Regulation 3(1) of the Habitat Regulations 2010 to mean the same as in paragraph (i) of Article 1 of the Directive.
24. Plans are made subject to the provisions of the Habitats Directive by virtue of Regulation 102:

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

(1) Where a land use plan-

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

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

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



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

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

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

25. Regulation 107(1)(c) provides ‘land use plan’ includes a local development document, as provided for in Part 2 (local development) of the PCPA 2004.

#### **Grounds**

26. The Claimant’s grounds were somewhat repetitious and so I have re-ordered them as follows:

- i) Failure to comply with the Habitats Directive and the 2010 Regulations in that more extensive GHB assessments ought to have been undertaken, and GHB mitigation measures put in place, at strategic, settlement and site level, before the Local Plan was adopted. The adopted policies were therefore undeliverable. The Inspector ought not to have approved the proposed Local Plan and the Council ought not to have adopted it.
- ii) The Inspector failed to give adequate reasons for his conclusions.
- iii) Failure to comply with the consultation requirements in respect of the Strategic Environmental Assessment (SEA).

#### **Local Plan**

27. The Claimant submitted that, before adopting the Local Plan, the Council had to undertake an “appropriate assessment” of the proposed housing allocations to ascertain their effect on the GHBs in South Hams SAC.
28. It could not lawfully adopt the Local Plan unless it could rationally ascertain that the housing allocations would not adversely affect the integrity of the SAC. In this context the standard of “ascertainment” was “certainty” or “no reasonable scientific doubt”.
29. The Claimant’s case was that the Council should have undertaken more extensive GHB surveys in the areas in which housing allocations were proposed, to ascertain the likely adverse effects on the GHB, before the Local Plan was submitted, and

considered mitigation measures. It was a breach of the Directive and the Regulations, as well as irrational, not to do so.

30. The Claimant also submitted that the Local Plan did not ensure implementation of recommendations for a wider framework to avoid adverse effects on the SAC, in particular:
- i) a strategic mitigation strategy in collaboration with the other SAC affected planning authorities;
  - ii) settlement level bespoke mitigation plans for the major affected settlements.
31. The consequence of these failures was that the policies in the Local Plan were undeliverable.
32. The Claimant submitted that, for these reasons, the Inspector erred in concluding that the Local Plan satisfied the statutory requirements and was sound.
33. The Claimant relied on the case of *Sweetman & Others v An Bord Pleanála C-258/11*, 11 April 2013) in which the application of these provisions was summarised by the CJEU as follows:

“40. Authorisation for a plan or project, as referred to in Article 6(3) of the Habitats Directive, may therefore be given only on condition that the competent authorities - once all aspects of the plan or project have been identified which can, by themselves or in combination with other plans or projects, affect the conservation objectives of the site concerned, and in the light of the best scientific knowledge in the field - are certain that the plan or project will not have lasting adverse effects on the integrity of that site. That is so where no reasonable scientific doubt remains as to the absence of such effects (see, to this effect, Case C-404/09 Commission v Spain, paragraph 99, and Solvay and Others, paragraph 67).

41. It is to be noted that, since the authority must refuse to authorise the plan or project being considered where uncertainty remains as to the absence of adverse effects on the integrity of the site, the authorisation criterion laid down in the second sentence of Article 6(3) of the Habitats Directive integrates the precautionary principle and makes it possible to prevent in an effective manner adverse effects on the integrity of protected sites as a result of the plans or projects being considered. A less stringent authorisation criterion than that in question could not ensure as effectively the fulfilment of the objective of site protection intended under that provision (see, to this effect, Case C-404/09 Commission v Spain, paragraph 99, and Solvay and Others, paragraph 67).

...

44. So far as concerns the assessment carried out under Article 6(3) of the Habitats Directive, it should be pointed out that it cannot have lacunae and must contain complete, precise and definitive findings and conclusions capable of removing all reasonable scientific doubt as to the effects of the works proposed on the protected site concerned (see, to this effect, Case C-404/09 Commission v Spain, paragraph 100 and the case-law cited). It is for the national court to establish whether the assessment of the implications for the site meets these requirements.

...

46. Consequently, if, after an appropriate assessment of a plan or project's implications for a site, carried out on the basis of the first sentence of Article 6(3) of the Habitats Directive, the competent national authority concludes that that plan or project will lead to the lasting and irreparable loss of the whole or part of a priority natural habitat type whose conservation was the objective that justified the designation of the site concerned as an SCI, the view should be taken that such a plan or project will adversely affect the integrity of that site.

47. In those circumstances, that plan or project cannot be authorised on the basis of Article 6(3) of the Habitats Directive. Nevertheless, in such a situation, the competent national authority could, where appropriate, grant authorisation under Article 6(4) of the Directive, provided that the conditions set out therein are satisfied.”

34. The Claimant argued that the final sentence of paragraph 44 of *Sweetman* – “It is for the national court to establish whether the assessment of the implications for the site meets these requirements” – should be interpreted to mean that the Court should conduct a full merits review of the Council’s assessment, rather than applying a *Wednesbury* test.
35. The Defendants agreed that the process of drafting and adoption of the Local Plan triggered the obligations under Regulation 102 of the Habitat Regulations 2010. Thus, prior to adoption, the First Defendant had to ascertain that the Local Plan would not adversely affect the integrity of the Special Area of Conservation, applying the test of no reasonable scientific doubt.
36. I accept the Defendants’ submission that, under Regulation 102(4), this was a judgment for the plan-making authority to make, and so it is only reviewable by the court on conventional judicial review grounds. This is confirmed by the following authorities: *R (Loader) v Secretary of State for Communities and Local Government* [2012] EWCA Civ 869, [2013] PTSR 406 per Pill LJ at [31]; *Feeney v Oxford City Council* [2011] EWHC 2699 (Admin) at [81]; *R (Evans) v. Secretary of State for Communities and Local Government & Ors* [2013] EWCA Civ 114, at [32] – [40]. *Cairngorms Campaign v Cairngorms National Park Authority* [2013] CSIH 65, at [63] to [64]. In my judgment, it is plain from paragraph 46 of the judgment in

*Sweetman* that the decision is one for the “competent national authority” to take, not the court. I do not consider that the final sentence of paragraph 44 is a sufficient basis upon which to find that the domestic authorities on the standard of the court’s review should not be followed and applied.

37. Applying the appropriate legal tests, I have not been able to discern any error of law in the steps taken by the Council and its exercise of judgment, pursuant to the Directive and the 2010 Regulations.
38. I consider that the Council acted in accordance with its obligations under the Habitats Directive and Regulations, acted rationally, took into account all relevant considerations and applied the NPPF. It undertook all the assessments which were required at this stage of the planning process. It consulted, and responded constructively to recommendations in the Habitats Regulations Assessments, and to concerns raised by Natural England. This is demonstrated by the iterative process which I summarise below.
39. The draft RSS required that 15,900 homes should be provided across the district from 2006 to 2026, including at least 2,000 in the south west of Exeter and 8,000 in the Newton Abbot area.
40. In 2009, the Council undertook a full Strategic Housing Land Availability Assessment, assessing more than 300 sites. The assessment panel included representatives of Natural England, the Environment Agency and other statutory agencies. Each site was the subject of detailed appraisal, including the potential impact on the GHB, based on earlier radio-tracking records of bat movement.
41. Following the changes introduced by the Localism Act 2011, including the abolition of regional strategies, the Council had to re-consider the form and content of the proposed Local Plan.
42. In May 2010, Natural England produced the Consultation Zone Planning Guidance for the South Hams SAC with the aim of ensuring “that the relevant planning authorities are in a position to meet the statutory obligations associated with the Greater Horseshoe Bat conservation interest of the South Hams SAC”. The Guidance identified the sustenance zones and strategic flyways used by the GHB. It is apparent from the evidence that the Council followed this Guidance.
43. The Teignbridge Core Strategy: Issues and Alternative Options document was published for consultation in June 2010. Natural England’s response identified environmental constraints to accommodating growth, including the protection of bats.
44. In September 2010, a draft Habitats Regulations Assessment was undertaken. It produced a series of recommendations, which guided further work on the Local Plan. In respect of the South Hams SAC it stated:

“there are a range of impact types including land take, light pollution, severance of flyways and possible changes to management of remaining farmland. Appropriate mitigation will include lighting control, hedge protection and financial or other contribution to habitat enhancement.”

45. In March 2011, Kestrel Wildlife Consultants, acting on behalf of the Council, produced a site screening for the Chudleigh Caves SSSI, the key site within the South Hams SAC. Sites were assessed as green (unlikely to affect the integrity of the SAC); orange (effect would depend upon the details of the proposal and the form of mitigation provided) and red (unlikely that effective mitigation or compensation would be possible). Mr Thornley, the Council's planning officer with responsibility for preparation of the Local Plan, said in his witness statement that the Kestrel report informed the place-level distributions in the Preferred Options document.
46. The Teignbridge Local Plan Preferred Options document was finalised in November 2011 and consulted upon from January to March 2012. It was accompanied by a Habitats Regulations Assessment dated November 2011. It identified the proposed housing allocations which were within, or adjacent to, bat sustenance zones or strategic flyways and therefore had the potential to negatively impact the GHB and the SAC. It recommended further assessments by a bat expert and advised that "once sites are known, Appropriate Assessments may be needed, and depending on the level of impacts, mitigation may be required or an alternative site may need to be found".
47. Natural England responded to the consultation by letter dated 16<sup>th</sup> December 2011, seeking clarification on the stage at which any appropriate assessments would take place, in particular, whether it would be at the level of this plan or "down the line" at lower tier plan or project stage. The letter added:
- "14. We accept it may be necessary to rely upon "down the line" assessment for at least some policies and proposals. The draft Natural England guidance sets out the criteria under which lower tier assessment may be acceptable and we would encourage you to check that these apply wherever lower tier assessment is considered.
15. One of the criteria is whether at lower tier stage there would be freedom to change the nature and/or scale and/or location of the proposal in order to avoid adverse effects...."
48. Mr Thornley explained in his witness statement that, in the light of the November 2011 Habitats Regulations Assessment and the consultation responses, the Council gathered additional evidence. Kestrel was commissioned to undertake appraisals of the site at Bovey Tracey, Kingsteignton, Newton Abbot and Kingskerswell. Mr Thornley said that the policy wording and site allocations set out in the Preferred Options document were refined by the Council to take account of the recommendations made following these appraisals, when formulating the Proposed Submission version of the Local Plan.
49. In September 2012, the Proposed Submission Local Plan together with the Sustainability Appraisal and the Strategic Environmental Assessment, were considered and approved by the Council's Overview and Scrutiny Committee, the Executive, and the full Council. The Claimant objected specifically to the proposed housing allocation in policy NA3 at Wolborough (near Abbotkerswell) and, through its Councillor, put forward an alternative location, Conitor Copse. This site was investigated but had to be rejected as it contained a cave supporting a bat roost and included a strategic flyway.

50. In October 2012 a further Habitats Regulations Assessment was produced, in light of the further evidence and amended proposals. Its conclusions on the South Hams SAC were:

“Those allocations assessed as likely to impact the South Hams SAC were assessed by a suitable expert, who advised on how to avoid harm to the bats. This included redrawing of some boundaries, dropping of one potential additional allocation and specific survey/mitigation measures recommendations for others. Specific reference is made to survey/mitigation requirements in key proposals. Natural England’s South Hams SAC – guidance for planners’ (‘GHB protocol’ in screening table) will be followed. None of the remaining Allocations are assessed as causing impacts that would be impossible to mitigate.”

51. Natural England made its consultation response by letter dated 19th December 2012. It listed the policies it considered to be unsound. The list did not include NA3 In relation to the South Hams SAC it said:

“We have based our response on the Reports commissioned by the Authority... which considered many sites and made one of three observations

- That there would be no impact on the SAC.
- That there were Likely Significant Effects but it was considered impacts on the SAC could be mitigated against.
- That there were Likely Significant Effects but it was considered that impacts on the SAC could not be mitigated against.

Many of the sites were in the second category and Natural England is satisfied that it is appropriate for some sites to be assessed for HRA at a project stage and therefore does not object to the allocation of those sites. However, the report has indicated that for some of the allocated sites, delivery was questioned. In addition, cumulative sites of housing ... adjacent to ... mineral and waste development have not been considered...”

52. Natural England welcomed the inclusion of policies in relation to provision of green infrastructure.
53. Submission of the Local Plan was deferred to allow further work to be undertaken on the Habitats Regulations Assessment (as well as some other issues). The Council commissioned Kestrel to prepare a supplementary report with a review of the evidence relating to bats in the District, the assessment of local plan allocations and the potential impact on the South Hams SAC.

54. A revised Habitats Regulations Assessment was produced in June 2013, which addressed concerns raised by Natural England, among others. It made a number of case specific recommendations. In respect of a number of policies, including NA3, it added a specific requirement:
- “A bespoke GHB mitigation plan ... must be submitted to and approved before planning permission will be granted. The plan must demonstrate how the site will be developed in order to sustain an adequate area of non-developed land as a functional part of the local foraging area and as part of a strategic flyway used by commuting GHBs associated with the South Hams SAC. The plan must demonstrate that there will be no adverse effect on the SAC alone or in combination with other plans or projects.”
55. It also recommended that the Council should prepare and publish, a GHB Mitigation Strategy, in collaboration with the other planning authorities with responsibility for the South Hams SAC, as a supplementary planning document. It would identify the requirements and measures necessary to mitigate the likely effects of all types of developments (both alone and in-combination with other projects) in all areas where there could be an adverse effect on the integrity of the South Hams SAC. This Strategy would eventually replace the guidance published by Natural England in 2010.
56. The Assessment concluded:
- “With the above measures in place ... it is advised that the Teignbridge Local Plan can be concluded to be in accordance with the requirements of the Habitats Regulations and parent European Directives.”
57. The recommendations in the Habitats Regulations Assessment were added to the Proposed Submission, which already contained requirements to take account of the need for bat mitigation and the strategic requirement in relation to European protected species.
58. In response to further consultation, Natural England confirmed in a letter of 18<sup>th</sup> June 2013 that the Habitats Regulations Assessment had been satisfactorily concluded.
59. The Local Plan was formally submitted for examination in June 2013, together with the Habitats Regulations Assessment. The examination sessions held by the Inspector included SAC issues. There was debate about the effectiveness of GHB mitigation and whether it was sufficient for the Council to provide for bespoke mitigation plans before planning permission was granted on any individual project.
60. After the examination, a further addendum to the Strategic Environmental Assessment was produced in December 2013. Section 4 contained an assessment of the likely in-combination and cumulative impact on the region. Under the heading “Greater Horseshoe Bat South Hams SAC”, it stated:

“There exists a risk of potential in-combination effects of development in Teignbridge and in neighbouring authorities with responsibilities for the South Hams SAC, on the integrity of bat habitat including roosts, flyways and areas for foraging. Principally this is through severance and light pollution.

The HRA indicates that potential in-combination effects on the South Hams SAC, through development in Teignbridge and in neighbouring planning authorities (Dartmoor National Park, Torbay and South Hams), can be mitigated through the introduction of a landscape scale Greater Horseshoe Mitigation Strategy. This should be prepared and published in collaboration with other planning authorities with responsibilities for the South Hams SAC as a supplementary planning document. The Strategy can replace relevant guidance by Natural England and identify the requirements for a provision of measures necessary to mitigate the likely affects (sic) of all types of developments (both alone and in combination with other projects) in all areas where there could be an adverse effect on the integrity of the South Hams SAC.

The Council has proposed minor changes to the ... submission which make clear the requirement for the Greater Horseshoe Bat Mitigation Strategy and securing bespoke greater horseshoe bat mitigation plans for large-scale development proposals. The Teignbridge Green Infrastructure Strategy (July 2011) has identified a series of green corridors that could support and enhance the main strategic flyways around Newton Abbot, Kingsteignton, Kingskerswell and Bovey Tracey.”

61. In his Report delivered on 9<sup>th</sup> April 2014, the Inspector found:

“15. A raft of policies, EN8 – EN12, are directed specifically at protecting biodiversity, important habitats, priority species and flora. Natural England raised no objection to the broad approach of these policies. The detailed policies for site allocations include appropriate criteria to mitigate and/or offset any impact on protected species or habitats, with particular reference to bats, given the proximity of the South Hams SAC ... On balance, subject to provisions relating to some specific sites, I agree the benefits of new housing outweigh the environmental disadvantages at those particular locations.”

62. In relation to specific sites, the Inspector gave careful consideration to the provision for the protection of GHB, and concluded that it was sufficient. He attached considerable weight to the fact that the proposals were not objected to by Natural England. He accepted that the requirement for a bespoke GHB mitigation plan to be approved before planning permission could be granted for a specific project was an appropriate safeguard.



63. Immediately before the Local Plan was adopted, Natural England sought some further changes, and these too were incorporated by the Council. In an email dated 2<sup>nd</sup> May 2014, Natural England said that settlement level bespoke mitigation plans were needed at Bovey Tracey, Chudleigh and Kingsteignton. It said it would be sufficient if this was set out in the text accompanying the policies. It did not need to be incorporated into the wording of the policies themselves.
64. I return now to the Claimant's criticisms of the Local Plan.
65. In my judgment, the Council and the Inspector acted lawfully in concluding, in the exercise of their planning judgments, that the Local Plan provided sufficient protection for the GHB. Pursuant to regulation 102(4) of the 2010 Regulations, the Council ascertained that the Local Plan would not adversely affect the integrity of the SAC.
66. It is apparent from the evidence which I have summarised above that the Council did undertake extensive Habitats Regulations assessments, in compliance with the Habitats Directive and Regulations. Those assessments were properly taken into account by the Council in formulating the Local Plan.
67. The Plan's policies provided effective protection for GHBs. Policy EN10 of the Local Plan expressly stated:

“European Wildlife Sites including...South Hams...will be protected. Development that is likely to have a significant effect on the integrity of a European Wildlife Site will be subject to assessment under the Habitats Regulations 2010 and will not be permitted unless adverse effects can be fully mitigated and/or compensated. Further specific requirements are set out below.

Roosts, strategic flyways and sustenance zones for greater horseshoe bats, which constitute the special interest of the South Hams Special Area for Conservation will be protected, and where possible, enhanced to reflect the specific requirements of that species. In locations within or adjoining such roosts, strategic flyways and sustenance zones, there may be the need to include protection zones or removed certain permitted development rights (particularly lighting and wind turbines) to protect their continued use...

...A Habitat Regulations Assessment (HRA), required under the Habitats Directive, has been undertaken on the policies within the Local Plan to ensure there will not be an adverse effect on any such site. Additionally, it is a requirement under the Habitat Regulations that any development proposals which may have an impact on a European Site are subject to further assessment in order to avoid harm to those sites.”

68. Policy EN11 provided:

“To protect and expand the presence of legally protected and S41 List priority species, development which would be likely to directly or indirectly harm such a species will not be permitted unless:

...

e) for legally protected species favourable conservation status is maintained.”

69. Policy S5 provided:

“...The Council will:

...

f) ensure that the provision of new infrastructure will only be approved where the planning authority has ascertained that it would not adversely affect the integrity of any European sites; and

g) all mitigation for impacts to European sites shall be considered as critical in the Infrastructure Delivery Plan and sufficient contributions, to ensure that provisions remain in the long-term, will be taken from the CIL pot for Habitat Regulations mitigation measures before funding is used for other types of infrastructure.”

70. Policy WE11 provided on Green Infrastructure:

“(g) appropriate suitable alternative natural green spaces required by Habitat Regulations to relieve recreational pressure on European sites; and strategic and detailed design requirements delivered as part of green infrastructure to mitigate the loss of foraging habitat and linear features used as flyways by Greater Horseshoe Bats will be identified in the proposed South Hams SAC Mitigation Strategy Supplementary Planning Document.” *(The accompanying text then cross-referred to paragraph 5.29, set out at paragraph 78 below)*

71. Natural England’s 2010 Planning Guidance on GHBs provides detailed advice on the adverse impact of development. It was intended to provide guidelines to ensure that the requirements of the Habitat Regulations 2010 could be met by new developments, including details of survey specifications. In my view, it is a valuable safeguard against harm to the SAC and GHB from ill-considered development.

72. Additionally, the Local Plan provided for mandatory site-specific bespoke mitigation plans, as recommended in the Habitats Regulations Assessment. These would necessarily require an impact assessment. In my view, the Council was entitled to conclude that bespoke GHB mitigation plans in relation to specific development sites would be both more appropriate and effective if undertaken at planning permission

stage, when the scope and details of the project would be known to the Council and the developer. The Local Plan was a high-level strategic document, setting out broad allocation policies, but without project detail.

73. I do not consider that this approach was contrary to the general principles expressed in the opinion of A.G. Kokott in *Commission v UK* C-6/04 and in *Hart District Council v The Secretary of State for Communities and Local Government* [2008] EWHC 1204 (Admin), per Sullivan J. at [55] – [56].
74. Importantly, this approach was approved by Natural England, the statutory consultee. The Council was entitled to give “significant”, “great” or “considerable” weight to the views of Natural England: see *Forest of Dean Friends of the Earth v Forest of Dean District Council* [2014] Env LR 3 at [80]; *Shadwell Estates Ltd v Breckland District Council* [2013] EWHC 12 (Admin) at [72].
75. The Council’s recent decision to grant outline planning application for housing at Chudleigh, and to defer the bespoke mitigation plan until the stage of approval of reserved matters, is not the approach expressly set out in the Local Plan, which provides that the plan must be “approved before planning permission is granted”. It would not be appropriate for me to express a view on the lawfulness of the Chudleigh decision, since it is the subject of a separate judicial review claim, but I agree with the Council that it does not provide a reliable basis for assessing the lawfulness and effectiveness of the Local Plan if the decision was contrary to it.
76. Natural England also recommended provision for bespoke settlement mitigation plans in three areas (excluding the Newton Abbot area which affects the Claimant), and the Council agreed to do this. Paragraph 5.29 of the Plan provided:

“Bespoke mitigation plans will be provided at the settlement level for Chudleigh, Bovey Tracey and Kingsteignton to provide a clear policy basis for developers who bring forward development in these locations, in order to ensure the South Hams SAC is protected with respect to in-combinations impacts from developments proposed in the Plan.”
77. Neither Natural England nor the Council considered it was necessary for this provision to be incorporated into the policies (as opposed to the accompanying text) nor that the settlement plans had to be completed before the Local Plan could be adopted. Natural England recommended that the settlement plans needed to be in place before any development took place whereas the Council did not commit to this. These were judgments for the Council to make; in my view, they do not render the Local Plan unlawful. In this context, it is significant that the Habitats Regulations Assessment did not recommend settlement plans, in addition to the site-specific bespoke mitigation plans. The Council was justified in concluding that, pending completion of the settlement plans, the mandatory obligation to approve a bespoke GHB mitigation plan for each site, which would have to be compliant with the general GHB policies, including consideration of ‘in-combination’ effects of other development, would meet the requirements of the Habitats Directive and Regulations.
78. The Local Plan provided for the preparation of a strategic GHB mitigation strategy. Paragraph 5.29 provided:

“The greater horseshoe bat is a European protected species ... [The] caves are a designated Special Area of Conservation and have very strong protection (as set out above). This species has particular needs and there are particular roosts, flyways and foraging areas which they use. They are very sensitive to changes in these areas, and therefore it is important that the areas are identified and protected, and if possible their potential enhanced. Further, more detailed, guidance has been prepared by Natural England .... The Council, in collaboration with the other planning authorities with responsibilities for the South Hams SAC, will prepare and publish, as a supplementary planning document (SPD) a Greater Horseshoe Bat Mitigation Strategy. This will eventually replace the above guidance published by Natural England. The proposed Mitigation Strategy SPD will identify the requirements for and provision of measures necessary to mitigate the likely effects of all types of development (both alone and in combination with other projects) in all areas where there could be an adverse effect on the integrity of the South Hams SAC.”

79. Thus, the Council made provision for a mitigation strategy in the terms recommended in the Habitats Regulations Assessment, which did not require that it be completed before adoption of the Local Plan, nor that there should be a moratorium on development until it was completed.
80. The strategy was intended to be a Supplementary Planning Document to provide further support to the Local Plan. It was not envisaged that it would be prepared in advance of the Local Plan; this would not be realistic as a document prepared jointly between a number of local planning authorities would take time to produce and agree. Paragraph 5.29 (adopting the wording of the Habitats Regulations Assessment) provided that this strategy would “eventually” replace the Planning Guidance by Natural England, implying that this would not occur immediately. In the meantime, the existing Planning Guidance published by Natural England would remain in place to guide any decisions on planning applications. The Habitats Regulations Assessment expressly recognised in its recommendations and conclusions that “Any applications received in advance of the completion of this work [i.e. the new strategic mitigation strategy] will have to consider the in-combination impacts which are likely to require greater consideration of other plans and projects and greater evidence base” (paragraph 13.6 of the June 2013 assessment).
81. In my judgment, the Council’s approach was a legitimate exercise of judgment by the Council which was not unlawful. Importantly, it was approved by Natural England, the statutory consultee.
82. The Claimant’s complaint that the mitigation provided for by the Plan was neither effective nor enforceable, and so undeliverable, is not supported by the evidence. In reality, it reflects a difference of opinion on the merits of the planning policies adopted by the Council and approved by the Inspector, rather than grounds for a legal challenge.

83. The Inspector gave careful consideration to the provision for the protection of the GHB in the Local Plan, and concluded that it was sufficient, and complied with the requirements of the Habitats Directive and the Regulations. He did not consider that the safeguards proposed in the plan – the strategic mitigation strategy, settlement and site mitigation plans – had to be in place in advance of adoption of the Local Plan. He attached considerable weight to the fact that the proposals were not objected to by Natural England. On the evidence, the Inspector was entitled to conclude that the housing policies were capable of delivery, whilst still according sufficient protection to the GHB. He said, at paragraph 137:

“The discussion of all of the issues throughout this report indicates that the Plan is reasonably robust and has sufficient flexibility to deliver the outcomes intended, particularly with regard to housing and employment growth, together with continued environmental protection.”

84. This was a planning judgment with which the Claimant disagreed but, in my view, cannot successfully challenge in law. For the reasons I have already given, I consider that the Inspector was entitled to conclude that the Local Plan met the statutory requirements and was sound, applying the criteria in the NPPF.

#### **Inspector’s reasons**

85. The Claimant submitted that the Inspector failed to give adequate reasons for rejecting the Claimant’s objections and the evidence of Professor Altringham.
86. The relevant tests were set out by Lord Brown in *South Bucks District Council and another v Porter (No 2)* [2004] 1 W.L.R. 1953:

“36. The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the principal important controversial issues, disclosing how any issue of law or fact was resolved. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision. The reasoning must not give rise to a substantial doubt as to whether the decision-maker erred in law, for example by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds. But such adverse inference will not readily be drawn. The reasons need refer only to the main issues in the dispute, not to every material consideration. They should enable disappointed developers to assess their prospects of obtaining some alternative development permission, or, as the case may be, their unsuccessful opponents to understand how the policy or approach underlying the grant of permission may impact upon future such applications. Decision letters must be read in a straightforward manner, recognising that they are addressed to parties well aware of the issues involved and the

arguments advanced. A reasons challenge will only succeed if the party aggrieved can satisfy the court that he has genuinely been substantially prejudiced by the failure to provide an adequately reasoned decision."

87. The Inspector explained at paragraph 15 of his report:

"A raft of policies, EN8 – EN12, are directed specifically at protecting biodiversity, important habitats, priority species and flora. Natural England raised no objection to the broad approach of these policies. The detailed policies for site allocations include appropriate criteria to mitigate and/or offset any impact on protected species or habitats, with particular reference to bats, given the proximity of the South Hams Special Area of Conservation (SAC) .... On balance, subject to provisions relating to some specific sites, I agree the benefits of new housing outweigh the environmental disadvantages at those particular locations."

88. The Inspector considered the issue of GHB protection at site level. For example, in relation to Policy NA3, at paragraphs 70 to 75 of his report. At paragraph 75 he concluded:

"In summary, after careful consideration of the many objections to its development, I have come to the same conclusion as the Council that the NA3 allocation would provide for a sustainable urban extension to Newton Abbot and is sound...Other issues, such as the need to protect the strategic bat flyway, could be resolved, in this instance through detailed masterplanning; there is adequate space for a green corridor along the ridge...There is no objection from Natural England that protected species or habitats would be harmed."

89. The Inspector considered the impact on the SAC at paragraphs 128 and 129, in particular at Chudleigh (the area closest to the SAC):

"...Throughout the Plan each policy pertaining to a site where there is known bat activity includes criteria requiring protection of flyways and/or a bespoke bat mitigation plan. The latter criteria were included in the Plan following preparation of the HRA, which has been agreed by Natural England... (at 128)

"...I give significant weight to the advice of Natural England that the Plan will have no adverse effects on the South Hams SAC and conclude that the allocations at Chudleigh are justified and sound" (at 129).

90. Applying the test in *South Bucks*, I have no doubt that the Inspector's reasons were adequate and intelligible.

### **Consultation on the Strategic Environmental Assessment**

91. Under Regulation 13(2)(b) of the Environmental Assessment of Plans and Programmes Regulations 2004, the Council was obliged to take steps to draw the attention of those interested in or affected by the proposals to the existence of the environmental information in the SEA and to invite comments on it.
92. It is conceded by the Council that, when the SEA was published in October 2012, and the Addendum issued in June 2013, it failed expressly to invite the public to comment on those documents, which it ought to have done.
93. However, in my judgment, the interests of the Claimant have not been “substantially prejudiced” by this failure, and therefore under s.113(6) & (7) PCPA 2004, there is no basis upon which to quash the Local Plan.
94. I have concluded that there was no substantial prejudice for the following reasons:
- i) The SEA was published in October 2012 as part of the environmental report which accompanied the Local Plan. It was published on the Council’s website.
  - ii) The text of the SEA stated it was “being published for consultation alongside the publication of the Proposed Submission Local Plan”.
  - iii) The Claimant was aware of the SEA and the Addendums when it made its written representations to the Inspector.
  - iv) The Inspector’s examination hearings included specific discussion on the adequacy of the SEA, in which the Claimant had the opportunity to participate.
  - v) The Council invited representations on the Further Addendum in December 2013, making it clear that it was published for public consultation on its contents. It substantially incorporated (and updated) the assessments set out in the SEA and the June 2013 Addendum. It was the subject of a letter to all plan participants inviting their comments.
  - vi) The Claimant is an organisation which has taken an active part in the local residents’ campaign against a proposed local housing development. It counts among its Committee members the local Councillor for the area (Cllr Colclough), who was actively promoting an alternative site to the Council in September 2012 when the SEA and the Local Plan was being considered by the Council at its key meetings.
95. It seems to me highly likely that the Claimant was aware that the SEA was published for consultation, and that it accessed the SEA at a sufficiently early stage to inform its consultation responses to the Local Plan. In my view, the Claimant is seeking to rely on a procedural failing which has not caused it any substantial prejudice.

### **Conclusion**

96. For the reasons set out above, the claim is dismissed.

