Neutral Citation Number: [2015] EWCA Civ 681

Case No: C1/2014/1148

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
ADMINISTRATIVE COURT
Mr Justice Sales
[2014] EWHC 406 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Thursday 9th July 2015

Before :

LORD JUSTICE RICHARDS
LORD JUSTICE McFARLANE
and
LORD JUSTICE CHRISTOPHER CLARKE

- -

Between :

Ashdown Forest Economic Development Llp	**Appellant**
- and -	
(1) Wealden District Council	
(2) South Downs National Park Authority	**Respondents**

(Transcript of the Handed Down Judgment of
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Official Shorthand Writers to the Court)

David Elvin QC and Charles Banner (instructed by **King Wood Mallesons LLP**) for the **Appellant**
Douglas Edwards QC and David Graham (instructed by **Wealden and Rother Shared Legal Service**) for the **Respondents**

Hearing date : 11 June 2015

- -

Judgment
As Approved by the Court

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Lord Justice Richards :

1. This appeal concerns a single policy in the Wealden District (incorporating part of the South Downs National Park) Core Strategy Local Plan ("the Core Strategy"), adopted on 19 February 2013. The Core Strategy forms part of the statutory development plan for the administrative areas of Wealden District Council ("the Council") and the South Downs National Park Authority. The Council had the main role in preparing it for adoption, and for convenience I will refer to the Council as the decision-maker.

2. The appellant is a corporate vehicle controlled by four landed estates whose property interests are affected by the Core Strategy. It brought a claim under section 113 of the Planning and Compulsory Purchase Act 2004 ("the 2004 Act") seeking to quash the Core Strategy in whole or in part. The claim was dismissed by Sales J (as he then was) on all grounds. Permission to appeal was subsequently granted by Lewison LJ, limited to a single ground.

3. The ground on which permission was granted concerns a policy in the Core Strategy relating to the protection of Ashdown Forest, which is a special protection area ("SPA") designated under Directive 2009/147/EC on the conservation of wild birds, and a special area of conservation ("SAC") designated under Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora ("the Habitats Directive"). The policy is numbered WCS12 and includes the following material passage:

> "**WCS12 Biodiversity**
>
> …
>
> In order to avoid the adverse effect on the integrity of the Ashdown Forest Special Protection Area and Special Area of Conservation it is the Council's intention to reduce the recreational impact of visitors resulting from new housing development within 7 kilometres of Ashdown Forest by creating an exclusion zone of 400 metres for net increases in dwellings in the Delivery and Site Allocations Development Plan Document and requiring provision of Suitable Alternative Natural Green Space and contributions to on-site visitor management measures as part of policies required as a result of development at SD1, SD8, SD9 and SD10 in the Strategic Sites Development Plan Document. Mitigation measures within 7 kilometres of Ashdown Forest for windfall development, including provision of Suitable Alternative Natural Green Space and on-site visitor management measures will be contained within the Delivery and Sites Allocations Development Plan Document and will be associated with the implementation of the integrated green network strategy. In the meantime the Council will work with appropriate partners to identify Suitable Alternative Natural Green Space and on-site management measures at Ashdown Forest so that otherwise acceptable development is not prevented from coming forward by the absence of acceptable mitigation."

4. The appellant challenges the policy in so far as it relates to new housing development within 7 km of Ashdown Forest, contending that it was adopted in breach of the Council's duty under Directive 2001/42/EC on the assessment of the effects of certain plans and programmes on the environment ("the SEA Directive"), as implemented by The Environmental Assessment of Plans and Programmes Regulations 2004 ("the SEA Regulations"), to assess reasonable alternatives to a 7 km zone. The 400 metre exclusion zone is not challenged.

The legal framework

The plan-making process

5. The position of a core strategy within the statutory development plan and the statutory process for its adoption are summarised at paragraphs 10-18 of the judgment of Sales J. It is unnecessary to repeat any of that here. I should, however, note that the Council was under a duty to carry out a sustainability appraisal ("SA") in respect of each successive draft of the Core Strategy and that the environmental assessments referred to below could lawfully be incorporated by reference within the SA.

The SEA Regulations

6. It is common ground that in preparing the Core Strategy the Council was required to carry out an environmental assessment in accordance with the SEA Regulations. Regulation 12 provides:

> "**Preparation of environmental report**
>
> 12(1) Where an environmental assessment is required by any provision of Part 2 of these Regulations, the responsible authority shall prepare, or secure the preparation of, an environmental report in accordance with paragraphs (2) and (3) of this regulation.
>
> (2) The report shall identify, describe and evaluate the likely significant effects on the environment of –
>
> (a) implementing the plan or programme; and
>
> (b) reasonable alternatives taking into account the objectives and the geographical scope of the plan or programme.
>
> (3) The report shall include such of the information referred to in Schedule 2 to these Regulations as may reasonably be required …."

The information referred to in Schedule 2 includes, in paragraph 8:

> "An outline of the reasons for selecting the alternatives dealt with, and a description of how the assessment was undertaken including any difficulties (such as technical deficiencies or lack of know-how) encountered in compiling the required information."

7. Regulation 13 provides that every draft plan or programme for which an environmental report has been prepared in accordance with regulation 12, and its accompanying environmental report, shall be made available for the purposes of consultation in accordance with provisions laid down by the regulation.

8. Regulation 16 provides that as soon as reasonably practicable after the adoption of a plan or programme, the responsible authority shall take steps which include the provision of information as to "how environmental considerations have been integrated into the plan or programme" and "the reasons for choosing the plan or programme as adopted, in the light of the other reasonable alternatives dealt with".

9. The requirement to assess reasonable alternatives applies most obviously to matters such as the type of development proposed or the selection of areas for development, as in *City and District Council of St Albans v Secretary of State for Communities and Local Government* [2010] JPL 10; *Save Historic Newmarket Ltd and Others v Forest Heath District Council* [2011] JPL 123 21; *Heard v Broadland District Council* [2012] EWHC 344 (Admin), [2012] Env LR 23; and *R (Buckinghamshire County Council and Others) v Secretary of State for Transport* [2013] EWHC 481 (Admin). It can relate to the plan or programme as a whole or to specific policies within the plan or programme. We were not taken to any case comparable to the present, where the requirement to assess reasonable alternatives is said to apply to a policy directed specifically towards ensuring that the environment is not harmed by development provided for by the plan; but there appeared to be no dispute between the parties that the requirement is capable in principle of applying to such a policy (or, therefore, to the 7 km zone in policy WCS12).

10. In *Heard v Broadland District Council* (cited above), at paragraphs 66-71, Ouseley J held that where a preferred option – in that case, a preferred option for the location of development – emerges in the course of the plan-making process, the reasons for selecting it must be given. He held that the failure to give reasons for the selection of the preferred option was in reality a failure to give reasons why no other alternative sites were selected for assessment or comparable assessment at the relevant stage, and that this represented a breach of the SEA Directive on its express terms. He also held that although there is a case for the examination of the preferred option in greater detail, the aim of the Directive is more obviously met by, and it is best interpreted as requiring, an equal examination of the alternatives which it is reasonable to select for examination alongside whatever may be the preferred option.

The Habitats Regulations

11. Article 6(3) of the Habitats Directive requires *inter alia* that any plan or project likely to have a significant effect on a designated site must be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. The relevant implementing regulations are The Conservation of Habitats and Species Regulations 2010 ("the Habitats Regulations"), which make provision in regulation 61 for the assessment of plans or projects generally, and in regulation 102 for the assessment of land use plans. Regulations 61 and 102 are in materially the same terms but I will quote the latter since it is the more obvious provision to apply to a core strategy:

"**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 the site's conservation objectives.

…

(4) In the light of the conclusions of the assessment, and subject to regulation 103 (considerations of overriding public interest), the plan-making authority … 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)."

12. This gives rise in practice to a two-stage process: (1) a screening stage, to determine whether there is a likelihood of significant effects on the relevant site(s) so as to require an appropriate assessment, and (2) unless ruled out at the screening stage, an appropriate assessment to determine in detail whether the plan will cause harm to the integrity of the relevant site(s). At the first stage, "likelihood" is equivalent to "possibility". Advocate General Sharpston described the process as follows in her opinion in Case C-258/11, *Sweetman v An Bord Pleanala* [2013] 3 CMRL 16:

"47. It follows that the *possibility* of there being a significant effect on the site will generate the need for an appropriate assessment for the purposes of art. 6(3). The requirement at this stage that the plan or project be likely to have a significant effect is thus a trigger for the obligation to carry out an appropriate assessment. There is no need to *establish* such an effect; it is … merely necessary to determine that there *may be* such an effect.

48. The requirement that the effect in question be 'significant' exists in order to lay down a *de minimis* threshold ….

49. The threshold at the first stage of art. 6(3) is thus a very low one. It operates merely as a trigger, in order to determine whether an appropriate assessment must be undertaken of the implications of the plan or project for the conservation objectives of the site. The purpose of that assessment is that

> the plan or project in question should be considered thoroughly, on the basis of what the Court has termed 'the best scientific knowledge in the field' ….
>
> 50. The test which that expert assessment must determine is whether the plan or project in question has 'an adverse effect on the integrity of the site', since that is the basis on which the competent authorities must reach their decision. The threshold at this (the second) stage is noticeably higher than that laid down at the first stage …."

The evolution of policy WCS12

13. The version of the Core Strategy submitted to the Secretary of State in August 2011 for independent examination by an inspector (the submission draft) included the following text under the heading "Environment":

> "3.32 In accordance with advice from Natural England it will be necessary to reduce the recreational impact of visitors resulting from new housing development within 7 kilometres of Ashdown Forest by creating an exclusion zone of 400 metres for net increases in dwellings, requiring the provision of Suitable Alternative Natural Green Spaces (SANGS) in Uckfield and Crowborough and requiring contributions to on site management measures at Ashdown Forest …."

14. That passage was not reflected in the specific policies of the draft and, in particular, did not feature in draft policy WCS12. The distinction between text and policy in a plan was considered in *R (Cherkley Campaign Limited) v Mole Valley District Council* [2014] EWCA 567, by reference to statutory provisions and policy guidance which, we were told, also governed the Core Strategy in the present case. I said at paragraph 16 of my judgment in the *Cherkley* case that the supporting text "is plainly relevant to the interpretation of a policy but is not itself a policy or part of a policy, it does not have the force of policy and it cannot trump the policy". Whilst Mr Elvin QC, for the appellant, was at pains to stress the distinction between text and policy, I do not think that it has any real importance for the present case.

15. At an early stage, the Secretary of State's inspector prepared a list of "matters, issues and questions". We have it in the form of a draft issued on 3 November 2011. It included:

> "**Matter 14: The Environment, Climate Change and Sustainable Construction** (WCS12)
>
> *Main issue – Whether the Core Strategy makes appropriate provision for the protection of the natural environment and other environmental assets and for sustainable construction*
>
> a) Has it been demonstrated that the Core Strategy would have no likely significant effects upon internationally important nature conservation sites?

> b) Has the proposed 400m 'exclusion zone' around the Ashdown Forest Special Protection Area (SPA) been justified by the evidence base?
>
> c) Has the proposed 7km zone around the Ashdown Forest SPA, within which contributions to Suitable Alternative Natural Green Spaces (SANGS) would be sought, been justified by the evidence base?
>
> d) Is there adequate evidence that the scale of SANGS required can be identified and are deliverable? …."

16. Mr Elvin suggested that the inspector was not asking about consideration of alternatives to the 7 km zone because at that stage it did not form part of the policy; and he contrasted other "matters", such as the spatial strategies and the distribution and location of housing development, in respect of which the inspector did ask whether alternatives had been considered. I think that this is to attribute altogether too subtle a thought process to the inspector. The inspector referred to policy WCS12 in the heading to "Matter 14", and he raised the issue whether the Core Strategy made appropriate provision for the protection of the environment. I think it probable that he did not ask about alternatives to the 7 km zone because at that stage he did not think of it, not because the zone was referred to in the text rather than in the policy.

17. There were detailed responses by the Council and others to the questions asked, making no reference to the consideration of alternatives to the 7 km zone.

18. At a hearing on 19 January 2012 the inspector asked, in relation to question c) under Matter 14, whether the Council should consider alternatives to the Thames Basin Heath approach on which, as explained below, the 7 km zone was based. The ensuing discussion centred on the validity of the Thames Basin Heath approach and did not take the question of alternatives any further.

19. In a letter to the Council dated 5 March 2012, the inspector referred to modifications to address the concerns he had with the Core Strategy. Some modifications had already been proposed by the Council but he considered further modifications to be necessary. In relation to the Ashdown Forest SPA he said this:

> "22. The Habitats Regulations Assessment (HRA) has addressed the impacts of possible additional disturbance and urbanising effects from residential development on the SPA and indicates that it cannot be concluded that the CS would not lead to adverse effects on the ecological integrity of the SPA. Avoidance and mitigation measures are required including (i) a 400m zone around the SPA where residential development will not be permitted, (ii) a 7km zone where new residential development will be required to contribute to Suitable Alternative Natural Greenspaces (SANGs), and access strategy for the Forest and a programme of monitoring and research. The measures are regarded as critical infrastructure in the Infrastructure Delivery Plan (IDP). This approach is supported by NE [Natural England]. I am satisfied that it is justified by

> the evidence base (including the 7km zone which is broader than those used elsewhere but justified by local factors).
>
> 23. The main impact of these measures would be on the towns of Crowborough and Uckfield and villages within the buffer zones. I have seen evidence that there is a reasonable expectation that suitable SANGs could be provided relating to the SDAs [Strategic Development Areas] in the towns. There is a large supply of open spaces within the District, many under the ownership or management of town or parish councils. NE is confident that SANGs can be delivered. However, for windfall planning applications and smaller sites where SANGS cannot be provided on site there is the possibility that otherwise acceptable development might be delayed while suitable SANGs are identified and brought forward.
>
> 24. The CS does not refer to these measures in a policy but includes text suggested in the HRA in supporting justification. The Council has proposed a modification to the plan that would include a policy reference to them being taken forward in subsequent DPDs [Development Plan Documents]. The Strategic Sites DPD is not expected to be adopted until March 2014 and the Delivery and Site Allocations DPD in March 2015. To avoid otherwise acceptable development being delayed it is important that, with appropriate partners, the Council identifies suitable SANGs and develops an on-site management strategy for the Forest as soon as possible in accordance with the conclusions of the HRA. While accepting the general thrust of the Council's approach I propose to add a further modification to the policy to reflect this."

20. The inspector's further modification was in substantially the form subsequently to be found in the adopted version of policy WCS12. It was duly included in a Proposed Modifications document issued for consultation in April 2012.

21. Whilst the responses to consultation included objections to the 7 km zone, they did not suggest that there had been any failure by the Council to consider reasonable alternatives to the 7 km zone. The nearest one gets is a response on behalf of one of the members of the appellant company which, *inter alia*, queried "whether in real terms enough assessment work has been done to explore other opportunities and mitigation measures to address this particular environmental issue". By this stage, of course, any point that Mr Elvin had on the distinction between policy and supporting text had fallen away, since the 7 km zone was now proposed within the policy.

22. The inspector's report on the examination into the Core Strategy, dated 30 October 2012, contained passages substantially similar to those quoted above from his letter of 5 March 2012 and concluded that with the recommended main modifications set out in an appendix to the report, including materially the same modification to policy WCS12 as previously considered, the Core Strategy was sound.

The Habitats Regulations Assessment

23. The basis for the inclusion of a 7 km zone can be seen from the Assessment of the Core Strategy under the Habitats Regulations ("the Habitats Regulations Assessment") which accompanied the submission draft of the Core Strategy in August 2011.

24. Paragraph 4.1 of that document referred to a screening process carried out during spring 2009, the findings of which had been endorsed by Natural England. According to paragraph 4.2, the screening exercise revealed that several European sites were at risk from negative effects and that the Core Strategy therefore required further assessment to establish whether there would be adverse effects on ecological integrity. Likely significant effects identified at that stage were summarised in a table (Table 4.1) which included two entries for the Ashdown Forest SPA. The relevant entry related to "disturbance" caused by the "development of 9,600 dwellings, esp. those to the north". The pathway, as it was described, was "recreational pressure leading to increasing visitor activity", and the receptors were identified as the Dartford warbler and the nightjar. Paragraph 4.2 stated further:

> "It is possible that the findings of the screening exercise could be superseded upon more detailed analysis during the Appropriate Assessment stage. Wherever changes to screening findings are made, the decision and clear justification is set out in the relevant section of the Appropriate Assessment presented in Chapters Five to Eight."

25. Paragraph 4.3 explained that the purpose of the appropriate assessment stage was "to further analyse likely significant effects identified during the screening stage, as well as those effects which were uncertain or not well understood and taken forward for assessment in accordance with the precautionary principle". The assessment "should seek to establish whether or not the plan's effects, either alone or in combination with other plans or projects, will lead to adverse effects on site integrity".

26. The key part of the document is chapter 6, headed "Disturbance: Ashdown Forest SPA". The chapter first described the potential impact of increased visitor numbers on the ecological integrity of the site. In a lengthy section under the subheading "Other Considerations", it referred to a field survey in 2008 which had examined visitor access patterns and had been the subject of further analysis to explore the relationship between visitor intensity and bird territories within the SPA. It then referred to "policy precedent" relating to the Thames Basin Heaths SPA, for which the relevant policy required that a minimum of 8 hectares of SANG should be provided for every 1,000 net increase in population as a result of new residential development within 5 km of the SPA, to offset the impact of increasing visitor pressure. It stated that the 5 km threshold "aims to 'capture' around three quarters of all visitors to the heaths, including 70% of drivers and all pedestrians". Returning to Ashdown Forest, it described a model which could be used to predict the additional number of visitors to each access point, and therefore to the whole Forest, arising from the development of a specific number of dwellings in defined areas. It then explained in detail how the model was applied so as to reach a conclusion stated in these terms:

> "At Ashdown Forest it is proposed that the threshold distance within which SANGs should be provided is set at **7km from the SPA boundary** (Figure 6.1). This is considered to be sufficient to capture a similar proportion of visitors to Ashdown Forest, as compared to the avoidance measures adopted in relation to the Thames Basin Heaths SPA." (Emphasis in the original.)

27. Mr Elvin submitted, and I accept, that the process set out in that part of the chapter (and to be found more particularly in the detail I have omitted) was one of *extrapolation* so as to produce a result for the Ashdown Forest SPA – a 7 km zone – comparable to the 5 km zone adopted for the Thames Basin Heaths SPA. There was no consideration of a 5 km zone for the Ashdown Forest SPA as an *alternative* to a 7 km zone. Likewise, although the tables and figures looked at settlements located up to 15 km from the Ashdown Forest SPA, they did so only in the application of the model and as part of the process of extrapolation, not because a 15 km zone was under consideration as an alternative to a 7 km zone.

28. A little later, chapter 6 set out findings and recommendations:

> "**6.6 Appropriate Assessment Findings**
>
> Based on the information given above, **it cannot be concluded that the Core Strategy will not lead to adverse effects on the ecological integrity of Ashdown Forest SPA** if allowed to proceed unchecked. In accordance with the precautionary principle, avoidance and/or mitigation measures are required to remove or reduce the effects.
>
> **6.7 Recommendations**
>
> A series of avoidance and mitigation measures are recommended in **Table 6.3**, which aim to eliminate the risk of adverse effects at the Ashdown Forest SPA ….
>
> **6.8 Residual and In Combination Effects**
>
> It is considered that, subject to the measures outlined in **Table 6.3** being successfully adopted and implemented, effects connected with increasing recreational pressure can be satisfactorily avoided and reduced. Assuming this is the case, there are no further effects associated with the Core Strategy in relation to disturbance, and therefore the plan can **proceed to adoption without further tests under the Habitats Regulations** in this respect. As assessment of in combination effects is not required, because the effects of the Core Strategy are removed." (Emphasis in the original.)

The recommendations in Table 6.3 included, in substance and so far as material, the provisions relating to a 7 km zone that were subsequently included in policy WCS12.

29. In a later chapter summarising recommendations and outcomes, it was stated at paragraph 9.2 that the report demonstrated that adverse effects associated with the Core Strategy in relation to, *inter alia*, disturbance from recreation at the Ashdown Forest SPA "can be overcome provided the avoidance and mitigation package presented in Table 9.1 [which included the 7 km zone] is successfully adopted and implemented".

30. The conclusion reached in the Habitats Regulations accorded with the advice of Natural England. The notes of a meeting between Natural England, the Council and the Council's environmental consultants on 8 June 2010 recorded that Natural England would object to a housing allocation within 400 metres of the Ashdown Forest SPA and that:

> "In addition, any net increase in dwelling numbers within 7 kilometres of the Ashdown Forest will require the provision of SANGs with the provision of 8 hectares of land per net increase of 1000 population …."

31. Similarly, in a letter to the Council dated 15 April 2011 and commenting on the proposed submission draft of the Core Strategy, Natural England stated:

> "We support Sections 3.30 to 3.33 on the Environment and the broad mitigation measures that will be required in order to avoid likely significant effects on designated sites. We feel that the proposed avoidance and mitigation measures of SANGS and contributions for onsite access management will ensure that housing within 7 km will not have a likely significant impact on Ashdown Forest …."

The judgment of Sales J

32. The Habitats Regulations Assessment was at the centre of the reasons given by Sales J for rejecting the appellant's case that the Council, in breach of the requirement in regulation 12(2)(b) of the SEA Regulations, had failed to consider reasonable alternatives to the 7 km zone.

> "106. … As the Commission guidance at para. 4.7 and the court in *Save Historic Newmarket Ltd* at [15] and in *Heard v Broadland DC* at [12] explain is permissible, the Habitats Regulations Assessment was issued with and incorporated by reference into the Sustainability Appraisal and hence into the environmental report required under the SEA Directive and the Environmental Assessment Regulations; and in the Sustainability Appraisal itself, WDC [Wealden District Council] made clear that it adopted the protection recommendations set out in the Habitats Regulations Assessment. Chapter 6 of the Habitats Regulations Assessment contained a detailed discussion of the issue of disturbance of wildlife at Ashdown Forest through increased recreational pressure associated with new residential development in its vicinity. The protective 7 km SANG zone was stated by

WDC's expert environmental consultants to be required to avoid harm to the Ashdown Forest protected site from increased residential development, and this was also the advice of Natural England.

107. The basis for this requirement was set out in the Habitats Regulations Assessment ….

108. Accordingly, in my view, the principled reasoning and evidence base which justified the selection of a protective zone set at 7 km were clearly set out in the relevant environmental report. Indeed, on a fair reading of the Habitats Regulations Assessment/environmental report I think one could say that three alternatives had been canvassed (a 5 km zone in accordance with the precedent at the Thames Basin Heaths; a 15 km zone; and a 7 km zone), and that clear reasons had been given for selecting the 7 km solution chosen to be included in the Core Strategy, namely that the Thames Basin Heaths protective zone was considered to provide a good model for controlling increased visitor numbers to the precautionary level considered appropriate by experts and that an extension of the protective zone around Ashdown Forest to 7 km was assessed to be necessary to provide the same level of protection. Read in this way, I think that the Habitats Regulations Assessment did in fact include a comparative assessment to the same level of detail of the preferred option (a 7 km zone) and two reasonable alternatives, a 5 km zone and a 15 km zone.

109. But even if one does not read the Habitats Regulations Assessment in that way, but rather just as a principled set of reasons for choosing a 7 km protective zone, in line with Mr Pereira's submissions, the reasons given explain clearly why that solution was chosen and, by clear implication, why other solutions were not chosen. Adjusting para. [70] of Ouseley J's judgment in *Heard v Broadland DC* for the circumstances of this case, the reasons given for selecting the 7 km protective zone as the relevant mitigation measure were in substance the reasons why no other alternatives were selected for assessment or comparable assessment. No other alternative would achieve the objectives which the 7 km zone would achieve. Again, the objectives of the SEA Directive to contribute to more transparent decision-making and to allow contributions to the development of a strategic plan by the public have been fulfilled in the circumstances of this case. WDC had explained the reasons for choosing a 7 km zone and members of the public were in a position to challenge those reasons and WDC's assessment during the examination of the proposed Core Strategy, should they wish to do so.

110. Mr Elvin sought to suggest that WDC should have commissioned further work to assess other possible options

> which might have resulted in equivalent visitor densities in relation to bird population density as between Ashdown Forest and the Thames Basin or Dorset Heaths. I do not accept this suggestion. As the Habitats Regulations Assessment made clear, it was largely unknown exactly how and to what extent increased recreational visits might affect the protected bird populations, and any attempt to marry up visitor densities and bird densities in such a precise way would have been a spurious and potentially misleading exercise, which would not have met the points made by WDC's expert environmental advisers and Natural England. Neither of them suggested that there was any alternative which might be suitable and which should be examined further. A decision-maker is entitled, indeed obliged, to give the views of statutory consultees such as Natural England great weight: see *Shadwell Estates Ltd v Breckland DC* [2013] EWHC 12 (Admin), at [72]. No-one else raised any sustained or developed argument in the course of the iterative process of development of the Core Strategy in favour of a different solution. WDC was entitled to proceed to adopt the solution proposed by both Natural England and its own expert advisers without seeking to cast around for other potential alternatives to examine. To have done so would have been a completely artificial exercise in the circumstances.
>
> …
>
> 112. In these proceedings, the Claimant has adduced evidence from Karen Colebourn, an ecological consultant, giving her opinion about possible mitigation measures "which may be suitable at Ashdown Forest", including decreasing car park capacity or increasing the cost of parking, creation of special dog exercise areas, provision of information and education for dog owners and improvement of strategic walking routes. This is opinion evidence put forward not in the context of the iterative process resulting in adoption of the Core Strategy, but well after the event. No concrete, worked through proposals are set out and there is no evidence to suggest that such measures would actually work by themselves. I accept Mr Pereira's submission that it cannot sensibly be contended on the basis of Ms Colebourn's evidence that no reasonable planning authority would have failed to identify these as "reasonable alternatives" so as to be obliged to assess such ideas or their efficacy in the Sustainability Appraisal. I am fortified in this view by the fact that the Inspector did not consider that further assessment work was required in relation to this part of the Core Strategy."

The appellant's case

33. The appellant's essential case, as I have said, is that there was a failure to comply with the duty under regulation 12 of the SEA Regulations to assess reasonable alternatives to the 7 km zone.

34. Mr Elvin's main submission is that the judge was wrong to rely as he did on the Habitats Regulations Assessment as meeting the appellant's complaint on this issue. It was not the function of that assessment to consider alternatives, and the exercise undertaken did not in fact involve any consideration of alternatives. The focus of the exercise was the elimination of risk: the 7 km zone was recommended as one of the avoidance and mitigation measures "which aim to eliminate the risk of adverse effects at the Ashdown Forest SPA" (paragraph 6.7). For that purpose it was sufficient to conclude that the 7 km zone, in conjunction with other measures that are not in issue, would eliminate the risk of adverse effects. The question whether it was necessary to go that far to eliminate the risk, or whether the risk could be eliminated by other means, was not posed. There was simply no discussion of alternatives.

35. Mr Elvin submitted that the judge was wrong to find that the reasons why alternatives were not chosen were implicit in the reasons given for choosing a 7 km zone: given the nature of the exercise (the ruling out of risk), the choice of a 7 km zone did not mean that there were no alternatives. In any event, he submitted that reasons have to be *explicit*, not implicit, in order to meet the requirements of the SEA Regulations.

36. As to alternatives that might have been considered, Mr Elvin referred to two types of possibility. One involved variants on the approach based on the Thames Basin Heaths precedent, producing a different radius from the 7 km adopted. The other avoided a zonal approach and involved alternative means of mitigating the additional recreational pressure arising from new development. He submitted that the fact that such alternatives were not raised at the time by the appellant or other objectors was immaterial, since the duty was on the Council to consider reasonable alternatives and to consult on them.

The Council's case

37. Mr Edwards QC submitted that under regulation 12 of the SEA Regulations a local planning authority, as the primary decision-maker, has a *discretion* to identify what, if any, reasonable alternatives there are. This is a matter of judgment, informed by the objectives of the plan (see regulation 12(2)(b)). Reasonable alternatives can be considered at different levels: alternatives to the plan as a whole, or to specific elements or policies within it. How far to drill down into the plan for the purpose of identifying alternatives is itself a matter of judgment. In respect of its decision with regard to reasonable alternatives, an authority "has a wide power of evaluative assessment, with the court exercising a limited review function" (per Sales J in the judgment under appeal, at paragraph 91; see also, most recently, *R (Friends of the Earth) v Welsh Ministers* [2015] EWHC 776 (Admin), per Hickinbottom J at paragraphs 85-89). Any decision as to whether there are reasonable alternatives and what those alternatives are is subject to challenge on normal public law principles. Only where the authority judges there to be reasonable alternatives is it necessary for it to carry out an evaluation of their likely significant effects on the environment, in accordance with regulation 12(2) and paragraph 8 of Schedule 2. Where the authority reasonably concludes that there are no reasonable alternatives, no such evaluation is needed.

38. Mr Edwards pointed to the clear advice of Natural England that a 7 km zone would be "required", which in his submission provided important context for the Council's approach. He also pointed out that there was no suggestion in any of the responses to

consultation that the Council should take a different approach towards protection of the Ashdown Forest SPA: no tangible alternative approach was put forward.

39. Mr Edwards took us through the detail of the relevant part of the Habitats Regulation Assessment. In his submission, it was "pretty obvious" that the Council, having started from a 5 km zone, recognised that this would not provide sufficient protection and rejected it; and it was plain that the Council also considered a 15 km zone, which can be seen on the plans albeit not mentioned in the text. Thus it was "pretty obvious" that in using the Thames Basin Heaths approach and setting the zonal figure at 7 km for the Ashdown Forest SPA, the Council was of the view that anything less than 7 km would not achieve the necessary protection and anything more would be unnecessary. The reasons for selecting the preferred option may themselves tell you why alternatives are considered to be unrealistic.

40. In Mr Edwards's submission, it was not unreasonable for the Council not to consider either of the two types of possible alternatives suggested by Mr Elvin. It was not unreasonable to adopt the specific approach based on the Thames Basin Heaths SPA precedent, having regard *inter alia* to the advice given by Natural England and by the Council's own consultants and to the fact that the consultation on this approach did not produce any suggestion of a different approach. As to on-site mitigation, the adopted policy referred to on-site visitor management measures in combination with the provision of SANGs, and it was not unreasonable in the circumstances to consider such measures as complementary rather than as an alternative to a zonal approach. Mr Edwards also advanced a point that the power to control access to, and to manage, Ashdown Forest lies with the Conservators and not with the Council; but he accepted that this would take him nowhere if the Conservators agreed to the course of action proposed and he sensibly did not pursue the point.

41. Mr Edwards also relied on the inspector's final report, with its finding that the relevant procedural requirements were met and its endorsement of the soundness of the Core Strategy.

Discussion

42. I accept Mr Edwards's submission that the identification of reasonable alternatives is a matter of evaluative assessment for the local planning authority, subject to review by the court on normal public law principles, including *Wednesbury* unreasonableness. In order to make a lawful assessment, however, the authority does at least have to apply its mind to the question. A fundamental difficulty faced by the Council in the present case, and not satisfactorily addressed in Mr Edwards's submissions, is that there is in my view no evidence that the Council gave *any* consideration to the question of reasonable alternatives to the 7 km zone. If the Council had formed a judgment that it was not appropriate to "drill down" into the plan as far as the specific details of policy WCS12 for the purpose of identifying alternatives, or that there were no reasonable alternatives to the 7 km zone, then it would be in a relatively strong position to resist the appellant's claim. But in the absence of any consideration of those matters, it is in a very weak position to do so.

43. The witness statements of Ms Marina Brigginshaw, the Council's Planning Policy Manager, describe in some detail the process leading to the adoption of the Core Strategy and engage with a variety of specific points raised in the evidence of the

appellant, but they do not suggest at any point that the Council did consider the question of reasonable alternatives to the 7 km zone.

44. The Council's case that the question of reasonable alternatives was considered depends on inferences to be drawn from the Habitats Regulations Assessment. As to that, however, it seems to me that the points made by Mr Elvin are well founded.

45. First, it was not the function of the Habitats Regulations Assessment to consider alternatives. What mattered for the purposes of that assessment was that the Core Strategy should not lead to any adverse effects on the integrity of the Ashdown Forest SPA. The avoidance and/or mitigation measures recommended in it were put forward in accordance with the precautionary principle with the aim of *eliminating the risk* of adverse effects. They were considered to meet that aim. It does not follow that there were no alternative means of ensuring the necessary protection of the SPA.

46. Sales J took the view, at paragraph 108 of his judgment, that on a fair reading of the Habitats Regulations Assessment three alternatives had been canvassed: a 5 km zone in accordance with the Thames Basin Heaths precedent, a 7 km zone, and a 15 km zone. With respect, and as already indicated at paragraph 27 above, I do not accept that the report can be read in that way. The report did not consider the 5 km as an alternative to a 7 km zone but simply as the starting point for a process of extrapolation leading to the 7 km zone. Nor was there was any suggestion of a 15 km zone as an alternative: a 15 km radius was simply used in the course of the process of extrapolation leading to the 7 km zone.

47. Sales J's alternative analysis, at paragraph 109 of his judgment, is that if the report is to be read just as a principled set of reasons for choosing a 7 km zone, "the reasons given explain clearly why that solution was chosen and, by clear implication, why other solutions were not chosen". Again, I respectfully differ from the judge's view. It comes back to the same point about the purpose of the Habitats Regulations Assessment and the nature of the exercise undertaken in it. It was sufficient that the measures recommended in it, including the 7 km zone, would eliminate the risk of adverse effects on the Ashdown Forest SPA. The reasons why the 7 km zone would serve that purpose did not amount by necessary implication to reasons why there were no alternative means of ensuring the necessary protection of the SPA. The report did not state or suggest that nothing short of a 7 km zone would suffice or that no other measures were possible. The report simply explained why a 7 km zone was considered to meet the aim of eliminating the risk.

48. I should add for completeness that I do not accept that anything turns on the advice of Natural England that any net increase in dwelling numbers within a 7 km zone would "require" the provision of SANGs. In my view, this cannot be read as advice that the 7 km zone was the only option available, nor is there any evidence that the Council treated it as such. Nor do I accept that anything turns on the inspector's endorsement of the soundness of the Core Strategy.

49. In those circumstances it is unnecessary to examine Mr Elvin's submission that reasons have to be explicit in order to meet the requirements of the SEA Regulations. The primary reason why Lewison LJ granted permission to appeal was that the appellant's case on this point had a real prospect of success. Anything we said on it

would, however, be *obiter* and in my view the point is better left for consideration when a decision on it is needed.

50. At paragraph 110 of his judgment, Sales J pointed to the fact that neither Natural England nor the Council's environmental consultants suggested that there was any alternative that might be suitable and should be examined further, nor did anyone raise sustained or developed argument in favour of a different solution in the course of the iterative process of development of the Core Strategy. I find this a particularly troubling feature of the appellant's case, only marginally lessened by the fact that the inspector did at one point ask whether the Council should consider alternatives to the Thames Basin Heath approach (see paragraph 18 above). But it seems to me that Mr Elvin is correct in his submission that it was the duty of the Council to consider the question of reasonable alternatives. If the Council had considered the question, it might have concluded, in the absence of any suggestions to the contrary, that there were no reasonable alternatives, and have given reasons in support of that conclusion. The fact that nobody suggested alternatives cannot, however, validate the Council's failure to consider the question at all.

51. My conclusion, arrived at with a degree of reluctance, is that policy WCS12, in so far as it relates to the 7 km zone, was adopted in breach of the duty under regulation 12 of the SEA Regulations relating to the assessment of reasonable alternatives. That makes it necessary to consider the question of relief.

Relief

52. In terms of general approach to the question of relief, Mr Elvin accepted that the court retains its traditional discretion in the matter, provided that the substance of a claimant's EU rights is met. He referred to *Walton v Scottish Ministers* [2012] UKSC 44, [2013] PTSR 51, in which Lord Carnwath considered the EU authorities, in particular Case C-201/02, *R (Wells) v Secretary of State for Transport, Local Government and the Regions* [2005] All ER (EC) 323 and Case C-41/11, *Inter-Environnement Wallonie ASBL v Region Wallonne* [2012] 2 CMLR 623, and concluded:

> "138. It would be a mistake in my view to read these cases as requiring automatic 'nullification' or quashing of any schemes or orders adopted under the 1984 Act where there has been some shortfall in the SEA procedure at an earlier stage, regardless of whether it has caused prejudice to anyone in practice, and regardless of the consequences for wider public interests. As *Wells* … makes clear, the basic requirement of European law is that the remedies should be 'effective' and 'not less favourable' than those governing similar domestic situations. Effectiveness means no more than that the exercise of the rights granted by the Directive should not be rendered 'impossible in practice or excessively difficult'. Proportionality is also an important principle of European law.
>
> 139. Where the court is satisfied that the applicant has been able in practice to enjoy the rights conferred by the European legislation, and where a procedural challenge would fail under

> domestic law because the breach caused no substantial prejudice, I see nothing in principle or authority to require the courts to adopt a different approach merely because the procedural requirement arises from a European rather than a domestic source."

53. Mr Elvin submitted that the non-compliance with the requirements of EU law, as implemented in the SEA Regulations, was in this case one of substance. He pointed in this connection to the late stage at which the 7 km zone became part of policy WCS12, as distinct from the text of the Core Strategy, and the late opportunity for consultation on it in that form; a point to which I attach little weight, since there was in reality an opportunity to raise concerns about it in response to consultation on the draft Core Strategy even when the 7 km zone featured only in the text, not in the policy.

54. More important is Mr Elvin's submission that it cannot be said that a quashing order and a requirement to reconsider the issue of reasonable alternatives would make no difference. That submission brings in reference to some material that I have not covered so far or have touched on only incidentally. First, the first witness statement of Ms Karen Colebourn, an ecological consultant instructed by the appellant, sets out various measures which in her opinion may be suitable at Ashdown Forest and expresses the view that "there were no 'knock-out' reasons why any or all of these measures could properly have been discounted without assessment on the basis that they were not reasonable alternatives to a 7 km SANGS zone"; and her second witness statement contains an extended critique of the Council's failure to assess alternatives. Sales J refers to that evidence at paragraph 112 of his judgment. I agree with Sales J that the evidence does not assist the appellant's case that the Council was in breach of duty. In the context of relief, however, it does indicate that the possibility of reasonable alternatives cannot be dismissed out of hand.

55. Secondly, there is evidence that the effect of policy WCS12 has been to prevent new residential development within the 7 km zone because of the unavailability of SANGs and notwithstanding the willingness of developers to make a financial contribution towards the provision of SANGs. The delay caused by the absence of SANGs provision is a matter of real concern.

56. Thirdly, Natural England's own stance has changed, at least partly in reaction to this concern. This appears from correspondence with the Council on which Ms Colebourn relies in her second witness statement. In a letter of 15 April 2013, Natural England stated:

> "We are aware that the current approach is a matter of concern, and that the SANGS requirement in particular is seen by developers as an obstacle to housing delivery. Our expectation is that a combination of different measures would be most effective in protecting the forest from the effects of an increase in recreational disturbance but we are mindful that reliance on SANGS for this does present a risk of delay in putting in place a scheme which would stream line the granting of planning permission for housing. In order to avoid such a delay, our advice is that a strategic scheme of avoidance and mitigation

> measures can be put in place, in a phased approach, so that at no point is it necessary to refuse planning permission on strategic (non case specific) grounds relating to recreational disturbance on the SPA and SAC.
>
> Our understanding is that in the next two to three years, approximately about 800 houses are likely to come forward in your two authority areas and figures have been provided to indicate that this will increase visitor numbers on the forest by about 1.7% ….
>
> In order to ensure that we are aware of the options to safeguard the SPA and SAC which will be least burdensome to developers, we have explored with the Conservators of Ashdown Forest their views on access management and monitoring. They have indicated to us that in principle they would be willing to take on additional resources, as part of a broader programme of measures, to increase the level of monitoring and wardening on the forest. Our advice is that this could be made sufficient to address at least the potential increase in visitor numbers on the scale indicated above ….
>
> Early implementation of a scheme for increased monitoring and wardening would not only have benefit itself in enabling development to proceed, but with the monitoring built in, it should also provide information to inform the balance of measures put in place over the longer term. This would help to ensure their effectiveness in safeguarding the SPA and SAC, at lowest cost to development."

57. In a letter of 21 June 2013, Natural England made clear that its suggestion for bringing forward what it described as "Strategic Access, Management and Monitoring (SAMM)" as an interim solution to release some limited development was not intended to unpick the measures in the Core Strategy regarding SAMMs and SANGs but that "the two schemes are intended to be complementary and we consider that no part of policy WCS12 prevents them form being introduced in a phased way".

58. All of this suggests that there is scope for consideration of possible alternatives to the 7 km zone, whether in terms of an interim approach to enable development within the 7 km zone to proceed pending the availability of the SANG required by the existing policy, or in terms of an approach departing altogether from a 7 km zone. It tells strongly in favour of the grant of the relief sought by the appellant. Moreover, to quash the relevant part of policy WCS12 would not leave a serious lacuna in protection pending adoption of a replacement policy. Development would still be subject to the screening/assessment requirements of regulation 61 of the Habitats Regulations; and if the avoidance of adverse effects on the Ashdown Forest SPA could only be achieved by the provision of SANG, a requirement to that effect could be imposed on a site-specific basis. It seems to me that that is a more appropriate approach than to rely on a point made by Mr Edwards, that if policy WCS12 is retained in its existing form, it will remain open to an applicant for planning permission to adduce evidence to persuade the authority that the proposed

development is certain not to harm the Ashdown Forest even without the provision of SANG.

59. I have considered the various other points in Mr Edwards's skeleton argument upon which he relied in support of the submission that there should be no quashing order. I think it unnecessary to list them. In my view none of them has any significant weight.

60. In conclusion, I am satisfied that we should grant the quashing order sought by the appellant, limited to the part of policy WCS12 relating to the 7 km zone. The precise form of order can be left for agreement between counsel or can be the subject of written submissions in the event of disagreement.

Lord Justice McFarlane :

61. I agree.

Lord Justice Christopher Clarke :

62. I also agree.