

**IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM QUEEN'S BENCH DIVISION
THE ADMINISTRATIVE COURT
MR. JUSTICE MITTING
[2008] EWHC 475 (Admin)**

Royal Courts of Justice
Strand, London, WC2A 2LL

28/01/2009

Before :

**LORD JUSTICE PILL
LORD JUSTICE RIX
and
LADY JUSTICE ARDEN**

Between:

**The Queen on the Application of Buglife – The
Invertebrate Conservation Trust** **Appellants**

- and -

**Thurrock Thames Gateway Development
Corporation** **Respondents**

- and -

Rosemound Developments Limited **Interested Party**

**Mr M Fordham QC and Miss E Dixon (instructed by Messrs Richard Buxton) for the Appellants
Mr T D Straker QC and Miss C Bolton (instructed by Berwin Leighton Paisner LLP) for the
Respondents**

**Mr W Hicks QC and Mr R Taylor (instructed by Messrs Wragge & Co) for the Interested Party
Hearing dates : 18 & 19 November 2008**

Lord Justice Pill :

1. This is an appeal against a decision of Mitting J dated 22 February 2008 whereby he refused an application for judicial review made by Buglife–The Invertebrate Conservation Trust (“the appellants”) to quash a decision of Thurrock Thames Gateway Development Corporation (“the respondents”) to grant planning permission to Rosemound Developments Limited (“the interested party”) on the site of the former power station in Thurrock. Permission was granted for the construction and operation of a distribution depot. The respondents are the local planning authority for the area for the relevant purposes.
2. The appellants’ aim, as the national Invertebrate Conservation Trust, is to protect the site, and in particular its flower-rich grassland, for invertebrates. It is said to be one of the most important

sites in Britain for rare and endangered invertebrates and three species of principal importance for the purpose of conserving biodiversity, and listed in the United Kingdom Biodiversity Action Plan (“UKBAP”), are present on the site. These are the brown-banded carder bee, the five-banded weevil wasp and the salt marsh short-spur beetle. Other species have been listed since the decision impugned. Over 900 invertebrate species are believed to be present on site. The proposed development would destroy about 50% of the habitat and about 70% of the herb-rich grassland which provides a foraging area for many insects such as bees and wasps.

3. Use of the site as a power station ended in 1993. The application site was the ash lagoon for the power station. A Site of Special Scientific Interest (“SSSI”) is adjacent to the site.
4. For the appellants, Mr Fordham QC makes his submissions in the context of statutory duties upon the Secretary of State. Under section 41(1) of the National Environment and Rural Communities Act 2006 (“the 2006 Act”) (formerly section 74 of the Countryside & Rights of Way Act 2000 (“the 2000 Act”) the Secretary of State is required to publish a list of the living organisms and types of habitat which in her opinion are of principal importance for the purpose of conserving biodiversity and, under section 41(3):

“(a) to take such steps as appear to him reasonably practicable to further their conservation,

(b) to promote the taking by others of such steps.”

In January 1994 UKBAP was published. It set out action plans for 391 species including the three mentioned above. Local authorities are required to ensure that the habitat requirements of the species are taken into account in relevant development policies, plans and proposals. The duty was reinforced in the 2006 Act by the requirement in section 40(1) (which came into force on 1 October 2006):

“Every Public Authority must, in exercising its functions, have regard, so far as is consistent with the proper exercise of those functions, to the purpose of conserving biodiversity.”

5. In August 2005, the Office of the Deputy Prime Minister (“ODPM”) issued Circular 06/2005 entitled “Biodiversity and Geological Conservation” and Planning Policy Statement 9 (“PPS9”) entitled “Biodiversity and Geological Conservation”. A guide to good practice was issued by the ODPM in March 2006. It will be necessary to refer to the important policy statement PPS9 in more detail.
6. The Local Government Planning & Land Act 1980 (“the 1980 Act”) provides for the designation of urban development areas (section 134(1) and (3)), if the Secretary of State is of the opinion that it is expedient in the national interest to do so. Section 135(1) provides that an urban development corporation shall be established “for the purposes of regenerating” such an area. Sub-section (2) provides:

“The object is to be achieved in particular by the following means (or by such of them as seem to the corporation to be appropriate in the case of its area), namely, by bringing land and buildings into effective use, encouraging the development of existing and new industry and commerce, creating an attractive environment and ensuring that housing and social facilities are available to encourage people to live and work in the area.”

7. The respondents were established by The Thurrock Development Corporation (Area and Constitution) Order 2003 (23 June 2003), made under the 1980 Act, sections 134 and 135. It was established “for the purposes of regenerating the area designated” (paragraph 3(1)), which is an area about 12 miles by about 8 miles on the north bank of the River Thames comprising the Borough of Thurrock. The explanatory note to the Order provides:

“This Order designates the Borough of Thurrock as an urban development area, and establishes an urban development corporation to regenerate the area.”

8. The Thames Gateway is claimed to be the largest regeneration area in Western Europe. Thurrock’s contribution to the job creation target is set at 26,000 jobs by 2021. The respondents claim that regeneration of brown field sites, by which I understand them to mean previously developed sites, in the Thurrock area, will be critical if that target is to be met.
9. Considerable attention has been given, both during the events leading up to the planning decision and at the hearing before this court, to the representations of Natural England. In section 32(1) of the Natural Environment & Rural Communities Act 2006, Natural England, the successor to English Nature as from 1 October 2006, is specified as the conservation body for England. In discharging its functions under the Act, it must, by virtue of section 33(2) of the Act, have regard to:

“(a) Actual or possible ecological changes, and

(b) The desirability of contributing to sustainable development.”

Its functions include:

“providing advice to the appropriate authorities on the development and implementation of policies for or affecting any nature conservation matter.”

Natural England has the responsibility for providing statutory advice to local planning authorities for designated sites, species and habitats of principal importance, protected species and biodiversity action plan, habitats and species (letter of 23 October 2006).

10. The planning application was made on 4 April 2006 and was accompanied by an immensely detailed environmental statement dated March 2006. That statement was required by the Town & Country Planning (Environmental Impact Assessment (England & Wales) Regulations 1999) (“the 1999 Regulations”). The planning authority must take the environmental information into consideration (regulation 3(2)). The statement must include “a description of the measures envisaged in order to avoid, reduce and, if possible, remedy significant adverse effects” (schedule 4, part 2). The environmental statement identified the species present at the appeal site and stated that it is “an extremely diverse and nationally important assemblage.” “Impacts are considered to be permanent, with the majority being of moderate to major significance prior to mitigation” (10.113).
11. At paragraph 10.143, it is stated: “Residual impacts for loss of the mosaic of habitats, which form part of a non-statutory site but support an invertebrate population of national importance are considered to be moderate.” “A mitigation strategy is therefore of the utmost importance in reducing the impacts on this node and ensuring that its function and diversity are maintained into the future. The main tool for ensuring that this is the case is the management strategy” (10.121). Potential mitigation/enhancement measures are stated to be:

“Management and enhancement of retained habitat, creation of linking corridors. Management and enhancement of SSSI. Creation of new areas of herb-rich grassland, maintenance of bare ground and varied topography” (Table 10.3).

12. Paragraph 10.124 provides:

“The management plan will be produced in consultation with English Nature, the Essex Wildlife Trust and Buglife to ensure the retained habitats are managed to provide optimal conditions for invertebrates across the site, an initial draft is provided at appendix 10.11. This will include the removal of areas of scrub to create new areas of herb-rich grassland, maintenance of the majority

of communities in their current state such as the reedbeds, lichen heath and saline communities, creation of herb- rich grassland in areas previously covered by bare ground and maintenance of some areas of bare ground.”

A management plan will also be prepared for the SSSI south of the site (10.125), on which there are no relevant planning proposals.

13. In their “Assessment” of the evidence, the respondents’ officers stated:

“It is clear that the proposed development would involve substantial development on the northwestern area of the site resulting in the loss of some habitat. As such, the various nature conservation and ecology bodies, including the statutory consultee Natural England, all raised objections to the proposal despite the applicants proposing a series of measures aimed at mitigating the impact of the development on ecology. The mitigation measures included the maintenance and enhancement of approximately half of the application site for landscaped ecology areas and the rewetting and management of the adjoining SSSI (the applicants advised that the planning application for the development works involved in their proposals for the southern lagoon was recently submitted.) . . .

Lengthy negotiations have taken place between the applicants and Natural England and following additional work from the applicants it was apparent that there remained only one issue of contention between them. Essentially, while Natural England support the enhancement and maintenance of the ecology areas within the development site, they are concerned that these areas would need time to establish. If development were to commence on site while these areas were still in their infancy, with works in the southern lagoon taking place at a similar time scale, together with the possible development of the separate planning unit (identified in the submitted documents as a “future Development Area”) they believe that there would be no refuge or habitat for the creatures that occupy the Northern ashfield. As such, Natural England are looking for the development to be phased to ensure that development has a less dramatic influence on the ecology of the area and allows the “new” ecological areas to become established long enough to become viable habitats. Such a phasing scheme would mean that the rewetting of the southern lagoon would also be delayed to allow it to provide habitat during the development process on the northern lagoon. The applicants have submitted a plan detailing how the development could be phased to reflect Natural England’s concerns. Natural England has subsequently withdrawn their objection, advising that they “believe the proposals provide an opportunity to secure the long term conservation and enhancement of this important ecological hub in West Thurrock”. In light of the above, it is considered that subject to the measures proposed to be incorporated into the Section 106 Agreement and the conditions set out below, the proposal satisfactorily addressed Policies LN13 and LN16 of the Local Plan.”

14. The possibility of alternative sites was raised by the appellants in their submissions to the respondents and alternative sites were suggested, including the site of the former power station and disused playing fields to the north east. These representations were incorporated in the officers’ report to committee.
15. There were both outline and detailed applications for planning permission, the detailed application being for “development comprising class B8 use (distribution) and ancillary uses (vehicle operating centre and workshop)”. The Brief Summary of the report prepared by the Officers for the detailed application, having set out the proposal, provided:

“The site is designated as an Area of Local Nature Conservation Significance and Ecological Corridors (adjacent to a site of Special Scientific Interest) in the adopted Thurrock Borough Local Plan (1997).”

The equivalent summary on the outline application added:

“The main consideration in determining this application is the effect of the proposal on the nature conservation interests of both the application site and the adjoining SSSI.”

16. The report summarised the effect of PPS9 and the submissions of consultees, including the appellants. Detailed consideration was given to the representations of Natural England. Thurrock Council stated that if they were still in a position to determine the application, they would have refused it. The reasons given were the loss of an important nature conservation habitat, unsatisfactory design and unsatisfactory transport and access arrangements.
17. The officers’ recommended approval “subject to the completion of a section 106 [Town and Country Planning Act 1990] obligation and the imposition of planning conditions.”
18. Permission was granted on the outline application by resolution on 6 November 2006, subject to 30 conditions. The written grant is dated 12 February 2007. No such grant was issued for the detailed application which is probably now of no value because the proposed user of the site when permission was sought, Royal Mail, has gone elsewhere.
19. Conditions 29 and 30 provide:

“29. Prior to the commencement of the development hereby permitted or remediation of the site, a Wildlife Protection Plan for this development, incorporating, but not necessarily limited to, detailed measures for wildlife protection during all phases of development (including remediation, site preparation, construction activities and service installations), shall be submitted to, and agreed in writing by, the Local Planning Authority. The Wildlife Protection Plan for development shall include; (a) appropriate plan(s) showing Wildlife Protection Zones where construction activities are restricted and where specific protective measures will be installed, implemented and employed (b) details of protective measures including both physical measures and sensitive working practices to avoid impacts during construction, (c) line of responsibility and communication including appointment of a suitably qualified ecological clerk of works to advise on site. Development and remediation works shall be undertaken in strict accordance with the agreed measures.

Reason: In the interests of safeguarding the ecological and nature conservation interests of the application site and adjoining Site of Special Scientific Interest, furthermore in accordance with policies LN13 and LN16 of the Thurrock Borough Local Plan 1997.

30. Prior to the commencement of the development or remediation of the site a phasing plan for the whole of the development hereby approved shall be submitted to, and approved in writing by, the Local Planning Authority. The phasing plan shall take account of the need to provide suitable compensatory habitat. Development and remediation shall be undertaken in strict accordance with the agreed phasing plan.

Reason: To ensure that the development has regard to the need to provide suitable compensatory habitats, in the interest of nature conservation.”

20. The reason for approval is stated to be:

“Having taken all material considerations into account, it is considered that subject to compliance with the attached conditions, the proposal would be in accordance with the development plan and would not cause unacceptable harm to the amenities of the area or prejudice highway safety or convenience.”

21. Under the heading “Informative”, it is stated:

“The Local Planning Authority has considered and assessed the content of the Environmental Assessment (EA) submitted with the application as well as consultation responses received from

statutory bodies on particular technical matters. Consideration has also been given to the statutory planning policy framework and the views expressed by third parties.

Subject to the mitigation measures identified in the EA being carried out, the conditions of the permission being complied with and the terms of the Planning Obligation met, the Local Planning Authority concludes that the proposed development is acceptable in the long term.

It is accepted that there may be short term harm to some of the existing wildlife habitat. However, the proposal will result in the long term management of the site which will secure the continued presence of the habitat which is of nature conservation value. In addition the proposal will facilitate the enhancement and continued maintenance of the adjacent nature conservation site of national importance (SSSI)."

22. Put in summary form, Mr Fordham QC's submission, for the appellants, as expressed orally, is that the respondents have erred in three respects; first they have granted planning permission without first examining possible alternative locations; secondly, they have failed to satisfy themselves whether the desirability of protecting the site for its wildlife is clearly outweighed by the need for the development and, thirdly, they have failed to ensure that the mitigation measures proposed are subject to and part of the environmental assessment. In that context, the importance of phasing is such, it is submitted, that it was necessary to have in place a phasing plan which had been subject to environmental assessment, before permission was granted. Only then could the extent of damage be assessed. These issues were not addressed when the permission was granted, it is submitted. It is not submitted that a decision to permit the approved development would, on the basis of the evidence and planning guidance, be irrational but the issues raised were not confronted, as they should have been, in the officers' reports on which the Committee acted and the decision to grant planning permission was unlawful.

23. The submissions largely depend on an analysis of PPS9. Two paragraphs of the document have received particular attention at this hearing. "Key principles" are set out in six sub-paragraphs of paragraph 1. It is provided that local planning authorities should adhere to them "to ensure that the potential impacts of planning decisions on biodiversity and geological conservation are fully considered." Sub-paragraph (vi) provides:

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

24. Paragraphs 15 and 16, under the heading "Species Protection", provide:

"15. Many individual wildlife species receive statutory protection under a range of legislative provisions, and specific policies in respect of these species should not be included in local development documents . . .

16. Other species have been identified as requiring conservation action as species of principal importance for the conservation of biodiversity in England. Local authorities should take measures to protect the habitats of these species from further decline through policies in local development documents. Planning authorities should ensure that these species are protected from the adverse effects of development, where appropriate, by using planning conditions or obligations. Planning authorities should refuse permission where harm to the species or their

habitats would result unless the need for, and benefits of, the development clearly outweigh that harm.”

25. Reference has also been made to paragraph 13:

“The re-use of previously developed land for new development makes a major contribution to sustainable development by reducing the amount of countryside and undeveloped land that needs to be used. However, where such sites have significant biodiversity or geological interest of recognised local importance, local planning authorities, together with developers, should aim to retain this interest or incorporate it into any development of the site.”

Paragraph 8 of the PPS9 deals with SSSIs. While the appeal site is not within an SSSI, it is noted that the “clearly outweigh” test also applies in that context.

26. Mr Fordham’s central criticism is that the respondents have not grappled, when taking their decision, with the three issues he has raised. First, consideration was not given to alternative sites as required, it is submitted, by paragraph 1(vi) PPS9.
27. It is submitted that the duty to look for alternative sites (paragraph 1(vi)) was triggered and only if no such sites are available can the possibility of mitigation on the appeal site arise. Paragraph 1(vi) of PPS9 is so worded that only if the local planning authority is satisfied that the development cannot reasonably be located on any alternative site that would result in less or no harm does the question of adequate mitigation measures arise. This application should have failed at the first hurdle. The grant of permission on the basis that significant harm can adequately be mitigated against does not accord with paragraph 1(vi). Further, the mitigation measures, which in any event are only aspirational, it is submitted, do not avoid a residual impact on the site. That is assessed as “moderate”.
28. Mr Fordham accepted the general proposition expressed by Laws LJ in *R (Scott-Jones v North Warwickshire Borough Council)* [2001] EWCA Civ 315, paragraph 30, “that the consideration of alternative sites would only be relevant to a planning application in exceptional circumstances.” In *Phillips v First Secretary of State & Ors* [2003] EWHC Admin 2415, however, Richards J, at paragraph 38, stated an exception to that general proposition:

“Where, as a matter of principle, consideration of alternative sites can also be relevant is where the development plan or policy guidance makes it relevant – a situation that was not before the court on the facts of *Scott-Jones*”.

Mr Fordham accepted that ownership was a factor when considering the merits of development on a site but it does not permit an applicant to get away from 1(vi).

29. The environmental statement recognised the need to consider reasonable alternative sites where there may be significant harmful effects (10.3(5)). Under that part of the statement headed “Alternatives and Design Evolution”, it was stated, at paragraph 3.9:

“Royal Mail Group, the anticipated occupier of the site, have also conducted an extensive search, for which planning status, access to the main road network, and absence of residential properties have been key considerations. The search concluded that the Northern Ashfield represents the most suitable site to accommodate Royal Mail Group within a wide area of Essex and East London (figure 3.1). Royal Mail Group identified the search area based on their operational requirements and known availability of potentially suitable sites, buildings.”

30. In the body of the Statement alternative sites are dealt with in a single paragraph, 3.8. It is stated:

“No alternative sites have been considered suitable for the proposed development, as the application site is owned by the applicant and is also a brown-field site. In view of its location

and infrastructure links it is therefore considered that the application site is ideal for redevelopment, particularly for a commercial scheme.”

31. Secondly, it is submitted that paragraph 16 of PPS9 was simply not considered. Because of the protected species on site, the provisions of paragraph 16 also take effect. The test in paragraph 16 is triggered by short term harm. Consideration was limited to the management of the site and the development of habitat. It is only when the need for, and benefits of, the development “clearly outweigh” harm to the species or their habitats that planning permission should be granted. Permission was granted in this case without a finding that the harm was clearly outweighed by the need and benefits.
32. Thirdly, it is submitted that there is an error of law in the absence of an evaluation of a phasing plan. No such plan has been produced. A sufficient assessment, with the consultation it must involve, is possible only if the phasing plan is known. What is suitable under condition 29 attached to the permission may depend on its timing and public consultation about that is essential.
33. Mr Fordham relies on the decision of this court in *Smith v Secretary of State for the Environment Transport & Regions and Others* [2003] EWCA Civ 262. Citing decisions of Sullivan J, Waller LJ stated, at paragraph 25:

“It is at the outline consent stage that the planning authority must have sufficient details of the proposed development, sufficient details of any impact on the environment, and sufficient details of any mitigation to enable it to comply with its Article 4(2) obligation [in the then current environmental impact assessment regulations].”

Waller LJ added, at paragraph 27:

“The planning authority will have failed to comply if they attempt to leave over questions which relate to the significance of the impact of the environment, and the effectiveness of any mitigation.”

He concluded, at paragraph 33:

“The decision-maker is not however entitled to leave the assessment of likely impact to a future occasion simply because he contemplates that the future decision-maker will act competently. Constraints must be placed on the planning permission within which future details can be worked out, and the decision-maker must form a view about the likely details and their impact on the environment.”

34. The decision-maker needs to identify the category of case where matters cannot properly be left over. Can the decision-maker say with confidence that enough is known to make it safe to leave a question open? In the present case, it is submitted, phasing was not just a matter of detail. Notwithstanding the purpose of an urban development area, the decision-maker cannot approach an application on the basis that a site will be developed commercially. The site, in its existing condition, could be managed by a body, such as Essex Wildlife Trust, which has made representations about this planning application. It is submitted that the section of the minutes of 6 November 2006 headed “Informative” (paragraph 21 above) cannot bear the weight sought to be placed on it by the respondents. Benefits are stated by way of long term management, retention of the habitat and enhancement of the SSSI.
35. Mr Fordham also relies on *Bellway Urban Renewal Southern v Gillespie* [2003] EWCA Civ 400, a decision of this court. The issue in *Gillespie* was whether an environmental impact assessment was required before planning permission was granted and whether proposals for remedial measures included in the application may be taken into account in making that decision. It was

held that such an assessment was required. However, in giving a judgment, with which Arden LJ agreed, I stated:

“In some cases the remedial measures will be modest in scope, or so plainly and easily achievable that the Secretary of State can properly hold that the development project would not be likely to have significant effects on the environment even though, in the absence of the proposed remedial measures, it would be likely to have such effects.”

36. Everything turns on the circumstances of the particular case (*R (Jones) v Mansfield District Council* [2003] EWCA Civ 1408 and *R (Catt) v Brighton & Hove City Council & Anr* [2007] EWCA Civ 298) at paragraph 33.
37. The present issue is a different one. It goes not to whether an environmental assessment is required prior to permission but whether, and if so to what extent, remedial measures may be taken into account when reaching a decision on harm to species or their habitats. Mr Fordham submits that the test proposed in *Gillespie* as to leaving matters open is a narrow one and should be applied in the present case. The test is not met by the experimental and provisional mitigation measures placed before the respondents, it is submitted.
38. It is central to the appellants’ submission that, in reaching their decision, the respondents have not grappled either with the effect of PPS9, including the need to consider alternative sites, or, adopting in this context the principle in *Gillespie* and the approach of Waller LJ in *Smith*, the fundamental problem of phasing.
39. As to the adequacy of the information available to the respondents in the environmental statement, the respondents rely on the analysis of Sullivan J in *R v Rochdale Metropolitan Borough Council Ex parte Milne* [2001] Env LR 22, at paragraphs 107 to 110:

“107 The assessment regulations are part of a statutory planning framework which requires the local planning authority in dealing with an application to have regard to all material considerations: see section 70(2) of the 1990 Act above.

108 It is for the local planning authority to decide whether it has sufficient information in respect of the material considerations. Its decision is subject to review by the courts, but the courts will defer to the local planning authority’s judgment in that matter in all but the most extreme cases. Regulation 4(2) reinforces this general obligation to have regard to all material considerations in the case of a particularly material consideration; “environmental information” which has been provided pursuant to the assessment regulations.

109 There is no reason why the adequacy of this information, which includes the sufficiency of information about the site, design, size and scale of development should not be determined by the local planning authority . . .

110 The question whether such information does provide a sufficient “description of the development proposed” for the purposes of the assessment regulations is, in any event, not a question of primary fact, which the court would be well equipped to answer. It is pre-eminently a question of planning judgment, highly dependent on a detailed knowledge of the locality, of local planning.”
40. The respondents and interested party submit that paragraph 1(vi) of PPS9 should not be read as if it were a statute. The primary concern is to prevent harm to biodiversity and requires an assessment of the harm to biodiversity which granting the permission would cause. On the basis of very full information, the respondents were entitled to conclude that the harm contemplated by paragraph 1(vi) did not require the respondents to look elsewhere. On the very full information available to them, they were entitled to conclude that the development on this site could proceed. For present purposes, paragraph 1(vi) should be read with paragraph 16 which contemplates the

need for, and benefits of, the development as a factor in the decision. The appeal site is in an area to be regenerated. There was evidence of its suitability as a site for the type of development proposed and also evidence of such mitigation and management as the circumstances required.

41. It is submitted that the respondents were also entitled to take into account the evidence that the “no development” option would lead to a deterioration in the special ecological interest of the site, as described in the environmental statement. In the environmental statement, the “no development” alternative was rejected. Reference was made (paragraph 3.6) to “continued deterioration of the special ecological interest of the site, including the adverse impact on the natural environment arising from motor bike activity and lack of management of the natural environment on the site and adjacent SSSI”. There is said to be “continued unauthorised use of the site for motor bike activity”. That was to be taken into account along with the adverse impact recognised.
42. It is submitted that each of the appellants’ three points is legalistic and should not detract from the overall assessment which the respondents were entitled to make and did make. To ignore the proposed mitigation measures and management plan when considering both paragraph 1(vi) and paragraph 16 of PPS9, and when striking the necessary balance, would not accord with commonsense and would lead to irrational results. Read as a whole PPS9, envisages the decision maker coming to an overall view with the long term in mind.
43. The respondents rely on the position of Natural England and its representations to the Committee. Natural England made their formal and final representations to the respondents by letter of 23 October 2006, that is two weeks before the meeting at which it was resolved to grant planning permission. The representations descend to considerable detail on the subject of planning conditions, the proposed section 106 agreement and phasing. They followed earlier discussions in which the applicants for permission were also involved. Specific proposals were made as to what should be included in the planning conditions and in the section 106 agreement. Provision was proposed for a Wildlife Protection Plan during construction activities. Natural England’s proposals were accepted by the respondents and incorporated in the relevant documents.
44. In relation to phasing, Natural England stated that it was “happy to have this addressed through a suitably worded planning condition consistent with the requirements set out below in section entitled ‘Phasing’“:

“As mentioned in previous consultation advice, in Natural England’s view, careful phasing of the proposed developments is required. We are particularly concerned to see that in any one year sufficient forage areas are available to offset the loss of existing areas to development. If the northern lagoon is developed in one stage without adequate new, compensatory, habitat available and functioning at that time, the effects on the nationally significant invertebrate assemblage could be dramatic.

It can take at least two or three years for such supporting habitats to mature sufficiently. Ideally from Natural England’s perspective, only the first part of the Northern Lagoon would be developed in the first three years, while compensatory habitat matured.

It is appreciated that scrub clearance and similar works in the northern area have been taking place in advance of the grant of planning permission, in order to give these areas a “head start”. The offer to do the same in areas of the southern lagoon is also a positive step.

Nevertheless, Natural England advises that if planning permission is granted, conditions are imposed requiring the submission and approval of a detailed phasing plan to show:

- o Parts of the Northern Lagoon area to be protected from development, at least in the interim;

- o The timings of development in those parts of the site;
- o How this is to be integrated into the Wildlife Protection Plan;
- o How this relates to the provision of compensatory invertebrate habitat and the retention of existing areas within the site.

It will then be possible to assess whether sufficient habitat has been retained at any one stage to ensure that the invertebrate assemblage will survive.

I should stress that I cannot say whether or not Natural England would object to a particular detailed phasing plan until one comes forward. Although we have discussed possible areas for interim retention – for instance the Area 2 within the southern part of the Northern Lagoon – that will not necessarily be enough. I would urge that every effort is made to retain as much of the existing habitat as possible – for instance by reviewing the proposals to construct the road along the western edge of the site to see if an engineering solution can further reduce its effects. Until the full picture is available when a detailed phasing plan comes forward, it will not become clear what the precise impacts on the invertebrates will be.”

45. The “summary position” of Natural England was then stated. After referring to the lengthy negotiations with the applicants for permission, whose attitude was stated to be “progressive”, it was stated:

“Despite this, Natural England has been unable to agree a package that fully mitigates in the short term for all likely impacts. This is largely caused by the constraints of site and land ownership, and the limited options for further reducing scale and phasing the development. However, while we believe the reduction of herb-rich forage is likely to adversely impact on the invertebrate assemblage in the short term, it is our judgement (particularly if management and aftercare is delivered via competent nature conservation body) that the proposed package of measures provides an appropriate scale of compensation to ensure that the effects on the area may be overcome within an acceptable timeframe. Indeed, over the longer term, if the future of retained area and compensatory habitats are secure there is the possibility of a long term nature conservation gain for the area. We believe a competent nature conservation body is best equipped to increase the recovery rate of important habitats and ensure that the area supports an invertebrate resource of comparable quality to its current state.

Natural England regards the aftercare and management of the ecology area and southern lagoon as significant components of the compensation package and vital elements of delivering a sustainable development solution at this location. We believe the proposals provide an opportunity to secure the long term conservation and enhancement of this important ecological hub in West Thurrock. Therefore, subject to the proposed amendments in the draft S106 agreement and the attachment of suitably worded planning conditions as suggested, Natural England withdraws its objection to these planning applications.”

46. The first conclusion to be drawn from these representations is that Natural England, the statutory consultee, with its expertise in conservation matters, has, following detailed discussion and scrutiny, withdrawn its objection to the planning application. A further significant feature of its case, in relation to the application of PPS9, is its judgment that not only may adverse effects be overcome within an acceptable time frame but that there is a possibility of a long term nature conservation gain for the area. In that context, the “Invertebrate Resource” is specifically mentioned. Natural England consider that there is an opportunity to enhance this important ecological hub in West Thurrock. The relevance in this context of the SSSI adjoining the appeal site, and the Southern Lagoon, is also considered.
47. A further feature of its representations is that, although Natural England plainly acknowledged the need for careful phasing, and the reasons for that need, it is prepared to deal with it on a

rolling basis, supported by the planning condition, and do not accept that phasing arrangements must be specified in detail before a permission is granted. Natural England recognised the appropriateness of proceeding by way of condition and implicitly acknowledge the difficulty, both for the developer and for the conservation body, in attempting to create, in advance, a blue-print for the entire development. Monitoring in the course of development is the appropriate way to secure a satisfactory outcome in the circumstances of this case.

Conclusion

48. None of the three points taken by the appellants is without force but in my judgment the planning permission should stand. The possibility of alternative sites was barely considered in the officers' report. However, the obvious advantages of the application site for a distribution depot in the context of a planning application in an urban development area, taken together with the limited adverse effects, as assessed, including on the conservation of biodiversity, the opportunities for mitigation and the positive benefits for the environment, render the respondents' approach appropriate and lawful. The respondents were entitled to take the overall and long term view they did, as demonstrated in the section of the minutes of the meeting of 6 November 2006 headed "Informative" set out at paragraph 21 above. That was an approach fairly based on the information before them, including the officers' reports and detailed representations from Natural England.
49. There was no sentence-by-sentence analysis of PPS9. However, its overall tenor was not ignored, the adverse effects being carefully analysed. The respondents were entitled to conclude that the harm was not, in the terms of the circular, significant. They were entitled to take the mitigation proposed, and the assessment of its effect, into account when making their decision. They were entitled to give considerable weight to the representations of Natural England, the expert statutory consultees. Indeed, it would have been surprising if, having regard to the public interests involved, they did not give them such weight. The planning conditions imposed and the detailed section 106 agreement were, as Natural England accepted, a valuable safeguard. Natural England withdrew its objection to the planning application.
50. As to phasing there will be cases, as with mitigation, in which a permission cannot properly be granted in the absence of appropriate, and enforceable, proposals for mitigation, or a pre-determined phasing plan, or both. Further consultation procedures may also be required. That will depend on the circumstances, as does a decision whether an environmental statement is required at all (*Gillespie*) or a decision whether the planning authority have sufficient information (*Milne*). In this case, the respondents were entitled not to require a complete blue-print of phasing in advance of the grant of permission. They had made an assessment, considered proposals for mitigation, required a section 106 agreement and imposed a phasing condition. That was, as Natural England recognised, sufficient to meet the case. What is in the event appropriate by way of phasing will depend on the detailed development involved and a close monitoring of it in relation to the emerging effect on the environment, including on invertebrates. Provision for that is made.
51. The judge stated (paragraph 34) that a "benevolent construction" should be given to planning decisions and to the reports of planning officers. I accept that there must be strict limits to that benevolence, with its connotation that the approach should be kindly and charitable. In the present context, it is the breadth and generality of the respondents' approach that is under challenge rather than its benevolence. A phrase-by-phrase analysis of PPS9, which is not to be construed as a statute, does not appear in the officers' report or in the minutes. Considerable evidence on the main issues was, however, available and was sufficiently analysed by the respondents, and by Natural England, in the context of the respondents' overall duty to have regard to the purpose of conserving biodiversity.
52. I consider that the approach of the respondents, and their conclusion, were justified in this case. In analysing this planning decision, consideration of the larger picture, the main issues, should

not be defeated by over attention to detail, with the risk of thereby losing, in common parlance, the wood for the trees. I agree with the judge's conclusion and I would dismiss the appeal.

Lord Justice Rix :

53. I agree.

Lady Justice Arden :

54. I also agree.