

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

Royal Courts of Justice
Strand, London, WC2A 2LL

25/07/16

B e f o r e :

MR JUSTICE HICKINBOTTOM

Between:

**THE QUEEN ON THE APPLICATION OF
ELIZABETH JANE WILKINSON**

Claimant

- and -

SOUTH HAMS DISTRICT COUNCIL

Defendant

- and -

**SOUTH DEVON RURAL
HOUSING ASSOCIATION LIMITED**

Interested Party

**Annabel Graham Paul (instructed by Harrison Grant Solicitors) for the Claimant
Saira Kabir Sheikh QC (instructed by The Council Solicitor) for the Defendant
The Interested Party was not represented and did not appear**

Hearing date: 19 July 2016

Mr Justice Hickinbottom :

Introduction

1. This claim concerns the decision of the Defendant planning authority ("the Council") of 9 December 2015 to grant the Interested Party housing association ("the Developer") outline planning permission for 32 new dwellings and associated highway at land at Forder Lane, Dartington, Devon ("the Site"). Forder Lane is to the north of the Site. Another road called Gidley's Meadow lies to the south.
2. The central part of the Site is currently occupied by 18 one-bedroom affordable housing dwellings known as Brimhay Bungalows, which were originally constructed in the 1960s by the

Dartington Hall Trust but are now owned by the Developer. They are currently inhabitable and inhabited, but all fail to meet the Decent Homes Standard. Under the proposal, they would be demolished, in favour of 12 new affordable one-bedroom flats that would be let; eight dwellings of one to three bedrooms, used by people with learning disabilities for supported living; and 12 open market dwellings that would facilitate the development and make it self-funding.

3. The bungalows as they currently stand form an approximate quadrant with gaps at each corner. The central area comprises private communal gardens, used by the public as well as the residents, across which there is an unregistered footpath joining Forder Lane with Gidley's Meadow, frequently used as a route to the local primary school to the south of the Site. The eastern and western parts of the Site are landscaped open land associated with the bungalows, but, beyond a fence in the eastern part, there is semi-natural woodland sloping down to a stream which forms the boundary of the Site.
4. The Claimant Mrs Elizabeth Wilkinson lives in one of the bungalows on the Site. She opposes the development: if it goes ahead, she will have to leave her home and be relocated.
5. The claim was issued on her behalf on 20 January 2016, the Claimant relying upon three grounds of challenge, namely:

Ground 1: The Council erred in its approach to the loss of open space.

Ground 2: There is evidence of dormice in the woodland on the Site, which will be cleared as part of the development. Under EU Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora made on 21 May 1992 ("the Habitats Directive"), the dormouse is a European Protected Species ("EPS"). In interfering with the dormouse habitat, the Council accepted that the proposed development would be in breach of the Habitats Directive. It is contended that the Council erred in its approach to the derogation from its obligations under the Directive.

Ground 3: The Council failed to take into account material considerations, namely (i) the public use of the route across the Site and the application for that route to be recognised as a public right of way, and (ii) the request for the open space on the Site to be listed as an Asset of Community Value.

6. On 7 March 2016, Lang J gave permission to proceed on all three grounds; and declared the claim to be covered by the Aarhus Convention, so that the cost capping provisions of CPR rule 45.43 apply.
7. Before me, Ms Annabel Graham Paul appeared for the Claimant, and Ms Saira Kabir Sheikh QC for the Defendant. At the outset, I thank both for their respective contributions.
8. I will deal with the grounds in turn.

Ground 1: Open Space

9. Ms Graham Paul submitted that the Officer's Report (and thus, in their turn, the members of the Council's Development Management Committee ("the DMC") which determined to grant planning permission for the development) failed properly to consider the loss of open space which is inherent in the development. In particular, they failed to appreciate that the loss of open space proposed would be contrary to both national and local policy, and so did not consider the loss of space in the context that it would be a breach of policy.

10. This challenge thus focuses upon the Officer's Report. Most local planning authorities delegate many of their planning functions to a committee, which acts on the basis of information provided by case officers in the form of a report. Such a report usually also includes a recommendation as to how the application should be dealt with. With regard to such reports, the proper approach is uncontroversial, the relevant principles for the purposes of this claim being as follows.
- i) When challenged, officers' reports are not to be subjected to the same exegesis that might be appropriate for the interpretation of a statute: what is required is a fair reading of the report as a whole (see, e.g., *Morge v Hampshire County Council* [2011] UKSC 2 ("*Morge*") at [36] per Baroness Hale of Richmond JSC).
 - ii) In construing reports, it has to be borne in mind that they are addressed to a "knowledgeable readership", including council members who sit on planning committees "who, by virtue of that membership, may be expected to have a substantial local and background knowledge" (*R v Mendip District Council ex parte Fabre* (2000) 80 P & CR 500 ("*Fabre*"), per Sullivan J). That background knowledge includes "a working knowledge of the statutory test" for determination of a planning application (*Oxton Farms*, per Pill LJ).
 - iii) The court thus need to focus upon the substance of the report to see whether it has sufficiently drawn the decision-making council members' attention to the proper approach required by the law and material considerations, and not to insist on "elaborate citation of underlying materials". Otherwise, reports are liable to become over-defensive and lengthy to the extent that the willingness and ability of council members to read and digest them effectively will be undermined (*R (Maxwell) v Wiltshire Council* [2011] EWHC 1840 (Admin) at [43] per Sales J (as he then was)).
 - iv) The assessment of how much and what information should go into a report to enable the planning committee to perform its function is itself a matter for the officers, exercising their own expert judgement (*Fabre* at page 509). However, of course, if the material included is insufficient to enable the committee to perform its function, or if it is misleading, the decision taken by the committee on the basis of a report may be challengeable.
 - v) In the absence of contrary evidence, it is a reasonable inference that members of the planning committee follow the reasoning of the report, particularly where a recommendation is adopted.
 - vi) Consequently:

" [A]n application for judicial review based on criticisms of the planning officer's report will not normally begin to merit consideration unless the overall effect of the report significantly misleads the committee about material matters which thereafter are left uncorrected at the meeting of the planning committee before the relevant decision is taken" (*Oxton Farms, Samuel Smiths Old Brewery (Tadcaster) v Selby District Council* (18 April 1997) 1997 WL 1106106, per Judge LJ).
11. This ground of challenge also concerns the proper approach to relevant planning policy. This is equally uncontroversial, the relevant principles being as follows.
- i) Section 70(2) of the Town and Country Planning Act 1990 ("the 1990 Act") provides that, in dealing with an application for planning permission, decision-makers must have regard to the provisions of "the development plan", as well as "any other material

consideration”, i.e. any other consideration which serves a planning purpose. What amounts to a material consideration is a matter of law.

- ii) “The development plan” sets out the local planning policy for an area, and is defined by section 38 of the Planning and Compulsory Purchase Act 2004 (“the 2004 Act”) to include adopted local plans. Section 70(2) of the 1990 Act makes clear that the development plan is a material consideration; but it is more than that, because section 38(6) of the 2004 Act gives it a particular status:

“If regard is to be had to the development plan for the purpose of any determination to be made under the planning Acts the determination must be made in accordance with the plan unless material considerations indicate otherwise.”

- iii) Relevant central government policies are material considerations. Since March 2012, such policies have been set out mainly in the National Planning Policy Framework (“the NPPF”).
 - iv) Planning decision-makers cannot have due regard to relevant policies unless they understand them. They must therefore proceed on the basis of a proper understanding of relevant policies as properly construed, the true interpretation of such policies being a matter of law for the court. Where they have misunderstood or misapplied a policy, or failed to take reasonable steps to acquaint themselves with the information that will enable them to give proper informed answers to the relevant questions, that may found a challenge to the resulting decision, if it is material, i.e. if their decision would or might have been different if they had properly understood and applied the guidance (*Tesco Stores Ltd v Dundee City Council* [2012] UKSC 13 at [17]-[23] per Lord Reed).
 - v) Whereas what amounts to a material consideration is a matter of law, the weight to be given to such considerations – the part any particular material consideration should play in the decision-making process, if any – is a question of planning judgement, and is a matter entirely for the planning decision-maker. The court will intervene on (and only on) conventional public law grounds, including where the authority has failed to take into account, or properly construe or apply, the relevant development plan or other material policy (*Tesco Stores Ltd v Secretary of State for the Environment* [1995] 1 WLR 759 at page 780 per Lord Hoffman). However, where the decision-maker has erred in law, then, if the resultant decision is challenged, the court is entitled to intervene; and, although judicial review relief is discretionary, is usually bound to intervene unless satisfied that the decision-maker would have arrived at the same result even if he had not erred.
12. Turning to the policies that are relevant to this ground, reflecting section 336 of the 1990 Act (which defines “open space” to include “any land... used for the purposes of public recreation”), Annex 2 to the NPPF defines “open land” as “all open space of public value”, i.e. to include privately owned open space if it is of public value.
13. Paragraph 74 of the NPPF provides, so far as relevant, as follows:
- “Existing open space... should not be built on unless:
- an assessment has been undertaken which has clearly shown the open space... to be surplus to requirements; or
 - the loss resulting from the proposed development would be replaced by equivalent or better provision...”.

14. In respect of the Site, the relevant local development plan includes the South Hams Local Development Framework (July 2010). Policy DP8 provides:
 - “1. All open space... will be protected. Any loss of [this use] will only be permitted where there will be no harm to the character and openness of the surrounding area; and;
 - (a) there is a proven excess of such provision and the proposed loss will not result in a shortfall in the plan period; or
 - (b) the community will gain greater benefit from the provision of suitable alternative open space... nearby...
 - ...
 3. Public open space... will be provided where new development consists of 2 or more dwellings...”.
15. The loss of the communal green in the bungalow quadrant as open space was raised as a “key issue” by Dartington Parish Council, who objected to the proposed development; and, contrary to the passing suggestion of Ms Graham Paul otherwise, the Officer’s Report made clear that, if the development were to proceed, open space would be lost. Indeed, it said in terms that “the aesthetic feel of being within the Site would... change from a low-density development to a high density development and *open space and habitat would be lost*” (emphasis added). Further, the DMC members were aware of the open space that would be lost: the plans that accompanied the application made clear the open space involved.
16. The Officer’s Report dealt with the issue as follows:

“Objectors consider that the loss of green space and habitat is detrimental to the community. It is noted, however, that the gardens and landscaped areas are privately owned and would be replaced by, albeit in some instances smaller, similar provision. Objectors have stated that the central garden area has been used by the public throughout the time the development has existed as has the footpath through the development. Given that the current legal status of the land is as privately owned and that the footpath is a permissive route, this is an adverse impact that can be afforded only limited weight in the balance.”

I shall return to the footpath, to which reference is made, when I deal with Ground 3 (see paragraphs 59-65 below).
17. Ms Graham Paul submits that this is the only part of the report which deals with this issue, and that the DMC members appear to have proceeded on the basis of it: the minutes do not refer to any discussion of the issue at the meeting at which the application was approved. She contends that the author of this passage fell into error in two, albeit related, ways. First, the fact that the open space was privately owned is irrelevant to the issue of its loss. Second, and more importantly, the officer treated the loss of open space as an adverse impact that needed to be weighed, with all other material considerations, in the general planning balancing exercise which the DMC had to conduct. That was wrong, because Policy DP8 and paragraph 74 of the NPPF give open space a particular status in planning terms. Notably, the proposed development would breach the local development plan, and so, by virtue of section 38(6) of the 2004 Act, the DMC were bound to refuse the application “unless material considerations indicate[d] otherwise”. That requires a different approach to that adopted here by the Officer’s Report, and apparently, in their turn, the DMC. Had the correct approach been adopted, it cannot be said that the resulting determination of the application would have been the same, particularly as the DMC vote was close (in fact, the application was granted by eight votes to four).

18. It seems to me that the Council's response to this ground has not been entirely clear or consistent. In paragraphs 12-15 of its Summary Grounds of Defence (substantially repeated in paragraphs 13-15 of Ms Sheikh's skeleton argument), it is suggested that Policy DP8 and the Policies CS6 and CS8 in the Council's Core Strategy Document (also part of the local development plan), which promote affordable housing and the infrastructure needed to service and deliver sustainable development, are "mutually irreconcilable"; and the DMC were therefore required to prefer one over the other – and they, lawfully, preferred the latter. However, insofar as that suggested that, even if the development would be in breach of Policy DP8, it was not in breach of the development plan as a whole, (i) I am unconvinced that the policies are "mutually irreconcilable", and (ii) the first time this argument was put was in the Council's summary grounds: there is no evidence at all that the officer or committee approached it in that way.
19. In any event, Ms Sheikh did not put the Council's argument in that way before me. As I understood her argument, she accepted that the proposed development would be in breach of Policy DP8, and thus in breach of the development plan. However, she submitted that, looking at the Officer's Report fairly and as a whole, the DMC members would have appreciated that it would be in breach, and would have approached the planning balancing exercise with that well in mind. In making that submission, she stressed the following.
- i) She said that the DMC members were aware that open space would be lost, and the extent of that loss; and that that loss amounted to an adverse effect. I agree (see paragraph 15 above).
 - ii) She submitted that we could be confident that the DMC members were aware of the provisions of Policy DP8. The relevant planning policies are listed at the end of the Officer's report, and these include that policy. There is no reference to paragraph 74 of the NPPF; but that can be explained because that does not add anything of substance to Policy DP8.
 - iii) We could also be confident, she said, that the DMC approached the breach of Policy DP8 inherent in this proposal in the correct way. The members were experienced. The correct approach to open space is well- and long-established. In the Officer's Report, just above the list of relevant policies, it is confirmed that the planning application had been considered in accordance with section 38(6) of the 2004 Act. There is nothing of any substance to suggest that, in the context of the breach of Policy DP8, it was not.
 - iv) In any event, Ms Sheikh submitted, even if the approach was wrong in law, it was immaterial; as, if the correct approach had been adopted, the determination of the application would nevertheless have been the same, i.e. it would have been granted. There were many issues for the DMC to consider; and the open space issue was but a minor issue amongst them.
20. After careful consideration, I prefer the submissions of Ms Graham Paul.
21. Whilst I fully accept that the court should be restrained when considering criticism of officers' reports, and I mark the associated deference properly given to the knowledge, expertise and experience of councillors who are members of planning committees, the passage from the Officer's Report which I have quoted (paragraph 16 above), which is the only relevant passage in the report, clearly treats the adverse impact of the loss of open space (with the loss of the footpath) as something which should simply be weighed in the general planning balance as being against approval. If that were right, I accept that it might well have been open to the DMC to give it little weight. Weight is quintessentially a matter for the planning decision-makers. However, as Ms Sheikh frankly and properly conceded, if there was a breach of Policy

DP8 – unappreciated by the DMC – then that would be the wrong approach to open space. The presumption in section 38(6) of the 2004 Act would have applied.

22. I am not persuaded that, as a result of the mere mention of Policy DP8 in the annex which lists relevant policies, the DMC members would have appreciated the breach of the development plan which the loss of open space involves: particularly, as Ms Graham Paul pointed out, Policy DP8 deals with, not only the protection of existing open space, but the requirement to make positive provision for public open space where (as in this case) a new development comprises two or more dwellings. The Officer's Report, unfortunately, did not hint at the loss of open space being a breach of the development plan; and, in my judgement, in all the circumstances of this case, it cannot be simply assumed that the DMC members appreciated that it was – and, so, it cannot be assumed that they approached the open space issue in the correct, lawful way. I accept that it would not have taken very much to have made the DMC aware of the breach of Policy DP8 that was inherent in the proposed development; but, as a matter of fact, on all the evidence, I find that the members of the DMC were unfortunately misled and did not appreciate that such a breach was involved.
23. Nor am I persuaded that that error was immaterial. Four members of the DMC were of the view that the planning balance in any event was against granting permission. I appreciate that there were many planning issues with which the members had to grapple, the open space issue being but one. However, the Parish Council had identified it as a "key" issue; and, without pre-empting for one moment what the DMC's decision might have been (or might be on reconsideration), I cannot say with any confidence that the DMC would have arrived at the same result even if the error I have identified had not occurred.
24. For those reasons, Ground 1 is made good. The legal error identified is material; it cannot be said that the decision of the DMC would have been the same if the error had not been made; and this ground alone warrants the quashing of the decision to grant planning permission, and the remitting of the application to the Council for reconsideration.

Ground 2: The Habitats Directive

25. The Habitats Directive establishes a coherent European ecological conservation scheme by requiring Member States (amongst other things) to take measures to establish a system of protection in respect of identified animal and plant species.
26. Thankfully, it is unnecessary for the purposes of this claim to burrow down deeply into the Habitats Directive. For the purposes of this claim, the relevant provisions of the Directive, and implementing domestic law, are as follows.
 - i) Article 12(1) requires Member States to establish "a system of strict protection" for identified animal species (i.e. EPS), which include the dormouse, by prohibiting their deliberate disturbance and the destruction or deterioration of their breeding sites and resting places.
 - ii) Article 16(1) permits Member States to derogate from those requirements for "imperative reasons of overriding public importance" ("IROPI"), provided that "there is no satisfactory alternative" and that "the derogation is not detrimental to the maintenance of the populations of the species concerned at a favourable conservation status".

"Favourable conservation status" is defined in article 1(i), as follows:

"conservation status of a species' means the sum of influences acting on the species that may affect the long-term distribution and abundance of its populations within [the European territory of the Member State to which the Treaty applies]"

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

- population dynamics data on the species concerned indicate that it is maintaining itself on a long-term basis as a viable component of its natural habitats; and
 - the natural range of the species is neither being reduced nor is likely to be reduced for the foreseeable future; and
 - there is, and will probably continue to be, a sufficiently large habitat to maintain its populations on a long-term basis.”
- iii) In England, the Habitats Directive is given effect by the Conservation of Habitats and Species Regulations 2010 (SI 2010 No 490) (“the Habitats Regulations”). To ensure compliance with the Directive, the Habitats Regulations, (a) make it a criminal offence deliberately to disturb or to damage or destroy the breeding site or resting place of an EPS (regulations 40 and 41); (b) impose a primary duty on “the appropriate authority” and “the nature conservation bodies” to exercise its functions relevant to nature conservation “so as to secure compliance with the requirements of the [Directive]” (regulation 9(1)); and (c) impose a duty on any “competent authority” to have regard to the requirements of the Directive so far as they may be affected by the exercise of their functions (regulation 9(3)). In respect of the planning application with which this claim is concerned, the Council, as the relevant planning authority, was a “competent authority”. In respect of England, “the appropriate authority” is the Secretary of State for the Environment, Food and Rural Affairs; and “the appropriate nature conservation body” is Natural England (regulation 5(1)(a) and (b)).
- iv) Therefore, it is a role of Natural England (but not of the Council) to ensure compliance with the Habitats Directive. In that role, one of Natural England’s functions is the granting of licences to permit derogations from the protection otherwise afforded by the Directive to EPS. In line with article 16(1) of the Directive, such licences may be granted under regulation 53(2)(e) if there are IROPI, i.e. “imperative reasons of overriding public interest including those of a social or economic nature...”; but regulation 53(9) proscribes the grant of a licence unless Natural England is satisfied “that there is no satisfactory alternative” and “that the action authorised will not be detrimental to the maintenance of the population of the species concerned at a favourable conservation status in their natural range”. Therefore, reflecting article 16 of the Directive, under the Habitats Regulations, a licence cannot be issued unless three conditions are satisfied: (i) there are IROPI, (ii) there is no suitable alternative; and (iii) a favourable conservation status will be maintained.
27. IROPI is clearly an important concept; but one which has been the subject of little authoritative consideration.
28. The European Union has issued some relevant guidance, namely “Guidance document on the strict protection of animal species of Community interest under the Habitats Directive 92/43/EEC” (February 2007).
29. With regard to article 16, the guidance advocates a restrictive approach to derogation (see, e.g., paragraph 37 to the effect that recourse to derogation “must be a last resort”, although that must be viewed with some caution: see *R (Prideaux) v Buckinghamshire County Council* [2013] EWHC 1054 (Admin) (“*Prideaux*”) at [112] per Lindblom J as he then was). The relevant guidance summary states:

“Derogation provisions need to be interpreted narrowly; they must deal with precise requirements and specific situations. It is up to the competent authority with the territorial

overview to ensure that the totality of derogations in a Member State does not lead to effects that go against the objectives of the Directive.”

30. In respect of IROPI, the text of the guidance provides as follows (paragraph 20-24 of section III):
- “20. The third reason for granting a derogation covers ‘imperative reasons of overriding public interest’. This concept is not defined in the Directive but the paragraph mentions public interest reasons such as public health, public safety, reasons of social or economic nature, reasons with beneficial consequences of primary importance for the environment, and also covers other reasons not mentioned, as the list is not exhaustive.
21. In other fields of Community law where similar concepts appear, for instance the free movement of goods, the European Court of Justice has held overriding requirements or public interest reasons can justify national measures restricting the principle of freedom of movement: it has been recognised public health, environmental protection, and the pursuit of legitimate goals of economic and social policy as such imperative requirements.
22. The same concept also appears in article 6(4) of the Directive [which concerns special areas of conservation, including the interference with such sites and derogation from a Member State’s obligations in similar terms to article 16]. So far, the Court has not given clear indications for the interpretation of this specific concept....
23. First, it is clear from the wording that only public interests, promoted either by public or private bodies, can be balanced against the conservation aims of the Directive. Thus, projects that are entirely in the interests of companies or individuals would generally not be considered as covered.
24. Secondly, the ‘overriding’ character of this public interest must be underlined. This qualification implies that not every kind of public interest of a social or economic nature is sufficient, in particular when seen against the particular weight of the interests protected by the Directive. Careful balancing of interests is needed here. In this context, it also seems reasonable to assume that a public interest is in most cases likely to be overriding only if it is a long-term interest: short term interests that would only yield short-term benefits would not be sufficient to outweigh the long-term interest of species conservation.”
31. I was also referred to two authorities which have considered IROPI: Counsel’s diligent researches identified no others.
32. First, *Solvay v Région Wallonne* [2012] (Application No C-182/10) was a European Court of Justice case concerning a major project for a trans-Belgian railway and associated stations. The European Court was asked whether, under article 6(4) of the Habitats Directive, the creation of the management centre of a private company was capable of being regarded as IROPI. The court found that it could not. In typically terse reasons, the court said:
- “75. An interest of justifying, within the meaning of article 6(4) of the Habitats Directive, the implementation of a plan or project must be both ‘public’ and ‘overriding’, which means that it must be of such importance that it can be weighed up against that directive’s objective of the conservation of natural habitats and wild fauna and flora.
76. Works intended for the location or expansion of an undertaking satisfy those conditions only in exceptional circumstances.

77. It cannot be ruled out that that is the case where a project, although of a private character, in fact by its very nature and by its economic and social context presents an overriding public interest and it has been shown that there are no alternative solutions.
78. In the light of those criteria, the mere construction of infrastructure designed to accommodate a management centre cannot constitute an imperative reason of overriding public interest within the meaning of article 6(4).”

These reasons are anything but clear; but it seems that the court may have held heavy in the balance against there being IROPI the fact that the case concerned the construction of a management centre of a *private* company, which lacked the necessary element of *public* interest.

33. The only identified domestic authority is *Elliott v Secretary of State for Communities and Local Government* [2012] EWHC 1574 (Admin), which concerned proposals by the London Development Agency for the regeneration of Crystal Palace Park, a major development. Some of the funding for the project was to be provided through the residential development of open land, that would involve the cutting down of trees. There was evidence that the removal of the trees would have some – albeit minor – adverse effect on the breeding and foraging of EPS bats. Natural England did not object to the proposals. The Secretary of State’s inspector – with whom the Secretary of State agreed – considered that the benefits of the proposals might amount to IROPI. That was challenged.
34. Keith J dealt with the issue, by refusing the challenge, shortly. He said this:

“55. ... What the Secretary of State had to consider was whether there were imperative reasons of overriding public interest for permitting the development despite the adverse impact which they would have on the foraging and roosting of the bats. That involved a balancing exercise in which the relatively modest impact which he thought the [developer’s] proposals would have on the bats’ habitats when steps to mitigate that impact had been implemented had to be weighed up against the overall benefits to the local community and to our national heritage, as well as to foraging bats in the long term, which the implementation of the proposals would provide. [The judge then quoted from Solvay at [74], quoted in paragraph 32 above].

56. The court went on to say at [76] and [77] [again quoted above] that ‘[w]orks intended for the location or expansion of an undertaking [will] only in exceptional circumstances’ satisfy the condition that the development ‘must be of such importance that it can be weighed up against [the] directive’s objective of the conservation of natural habitats...’. But you cannot get from that that if a particular feature of a set of proposals was included only because it would provide some of the funding for the development as a whole, and if it happened to be that aspect of the development which would have an impact on the conservation of natural habitats, there cannot have been imperative reasons for overriding public interest for permitting development.”
35. Even with the dearth of authoritative assistance, it seems to me that, in relation to the IROPI provisions, the following propositions can be made.
 - i) Generally, article 16 derogations must be construed restrictively.
 - ii) The decision as to whether there are IROPI involves an exercise balancing the adverse impacts of the proposed development upon the conservation aims of the Habitats Directive (i.e. the adverse impacts on the relevant EPS, taking into account the proposed mitigation etc) and the public interest benefits of the proposal if implemented, to assess

whether those benefits justify those adverse impacts. In terms of benefits, the focus is upon those that are in the *public* interest.

- iii) Given that the public interest is involved, in making that assessment, a wide margin of appreciation is afforded to the relevant national authorities. However, whilst weight is usually a matter for the body assigned to make the evaluative decision, this assessment involves the particular consideration and weighting of the interests protected by the Directive, so that it is not a simple balancing exercise. That is implicit in the use of the terms “imperative” and “overriding”.
 - iv) The balancing exercise is fact-sensitive, and must be performed in the context of the specific situation. Whilst it may possibly be easier to show IROPI where the proposed development is of a regional or national scale – because the public interest in the project going forward may be very great – simply because the project is relatively modest does not mean that there will not be IROPI if (e.g.) the adverse impact on the protected species is negligible or otherwise very small.
 - v) An assessment will be challengeable on usual public law grounds. However, although what is capable of constituting IROPI is a matter of law, given the wide margin of appreciation allowed, the court should be slow to interfere with the assessment of the relevant national authority, which is expert and assigned by Parliament to the task.
36. As I have described, the Council as a planning authority is a “competent authority” with an obligation to have regard to the requirements of the Directive so far as they may be affected by the exercise of their functions (regulation 9(3) of the Habitats Regulations: see paragraph 26(iii) above). However, as I have already indicated, the primary obligation to exercise its functions “so as to secure compliance with the requirements of the [Directive]” lies upon Natural England as “the appropriate nature conservation body”. It is in the exercise of that primary obligation that Natural England have the function of considering any application for a licence to derogate from the Directive obligations (i.e. a EPS Licence). In considering any application, Natural England will have to consider whether there are IROPI, a satisfactory alternative and continuing favourable conservation status for the relevant species.
37. The obligation upon a planning authority in considering an application for a development that will or might impact on an EPS is different: in exercising that function, it only has to have regard to the requirements of the Directive. In considering this, the courts have emphasised that this burden on the authority is not unduly onerous. That is unsurprising, given that the development cannot proceed without Natural England in fact granting an appropriate EPS Licence; and, if it does proceed without that licence, despite having planning permission for the development, then there is a criminal sanction.
38. In *Morge* at [29], Lord Brown of Eaton-under-Heywood JSC put it thus:
- “... Now, however, I cannot see why a planning permission (and, indeed, a full planning permission save only as to conditions necessary to secure any required mitigating measures) should not ordinarily be granted save only in cases where the planning committee conclude that the proposed development would both (a) be likely to offend article 12(1) and (b) be unlikely to be licensed pursuant to the derogation powers. After all, even if development permission is given, the criminal sanction against any offending (and unlicensed) activity remains available and it seems to me wrong in principle, when Natural England have the primary responsibility for ensuring compliance with the Directive, also to place a substantial burden on the planning authority in effect to police the fulfilment of Natural England’s own duty.”

That was succinctly summarised by Lindblom J in *Prideaux* at [96], as follows:

“If a proposed development is found acceptable when judged on its planning merits, planning permission for it should normally be given unless in the planning authority’s view the proposed development would be likely to offend article 12(1) and unlikely to be licensed under the derogation powers.”

39. Ms Graham Paul suggested that “likely” here may mean “on the balance of probabilities”, as it generally does in the common law. However, we are dealing with European concepts; and, whilst not of course formally a screening process, the duty on the authority to have regard to the Habitats Directive aims and obligations effectively acts as a gate which a developer may have to get through on a planning application before Natural England (which is responsible for licensing) has had any opportunity to consider whether a licence ought to be granted. In my view, “likely” here connotes no more than “serious possibility”, as it does in the context of (e.g.) “likely significant effects” for the purposes of environmental impact screening (*Bateman v South Cambridgeshire District Council* [2011] EWCA Civ 157). A planning authority may therefore grant planning permission unless it is satisfied that there is no serious possibility that Natural England will grant an EPS Licence. That ensures that the body with the primary obligation to consider derogation (i.e. Natural England) is enabled to do so in all cases except those in which a licence will almost inevitably not be granted; it is consistent with Lord Brown’s apparent view that circumstances in which a planning authority should be proscribed from giving planning permission on this basis may be relatively infrequent; it will ensure that development with otherwise positive planning attributes will not flounder in circumstances in which the appropriate authority (i.e. Natural England) might be satisfied that there should be a derogation; and it puts the special conservation interests protected by the Habitats Directive at no risk, because they will be fully considered by Natural England as and when an application for a licence is made to it.
40. I now turn to the facts of the claim, insofar as they are relevant to this ground.
41. As part of the proposed development, it is uncontroversial that there will be a loss of part of the semi-rural woodland in the eastern part of the Site which I have briefly described.
42. In the preliminary ecological appraisal of the Site, prepared by Dominic Sheldon BSc ACIEEM of Green Ecology for the Developer and lodged with the planning application, that woodland is described as containing suitable habitat for dormice and, indeed, as having “a high potential to support dormice”, the habitat being “well connected to the wider landscape” (Summary, page 1). Mr Sheldon said there was no evidence of dormice being recorded on the Site during the investigations that he had conducted; but, he said, dormice had been recorded approximately 220m to the north of the Site, and he considered it “highly likely” that they would be present within this habitat that formed part of the Site (paragraphs 4.3.3 and 7.4.2). The removal of the semi-natural woodland would likely kill, injure or disturb dormice and destroy a resting place, in breach of the Habitats Directive/Regulations, so that (i) replacement woodland equal to the amount removed would be required as part of the development, and (ii) an EPS Licence issued by Natural England would be required (paragraph 7.1.9). A dormice survey would be required to inform the licence (also paragraph 7.1.9).
43. In the meantime, a nut survey was proposed, with a view to finding evidence of dormice on the Site. That is necessarily season restricted; and it was in the event conducted in January 2015. A further report was prepared in April 2015, which took into account the results so that survey.
44. The survey revealed a single dormouse-chewed hazelnut within the woodland in the eastern part of the Site. That confirmed the presence of at least one dormouse on the Site. However, in this final report, Mr Sheldon concluded that:
 - i) The semi-natural woodland within the Site offered limited suitable habitat for dormice (paragraph 4.3.3).

- ii) Dormice had been confirmed as being present on the Site, “albeit in extremely limited numbers” (paragraph 6.2).
 - iii) Provided the identified mitigation was followed, “the evaluation of the impacts on dormice... is predicted to be negligible” (also paragraph 6.2).
- 45. Natural England were consulted on the application. However, in their response of 29 January 2015, they simply stated that they had not assessed the application for impacts on protected species.
- 46. In reporting to DMC members, the Officer’s Report accepted that an EPS Licence for dormice would be required, and that it was reasonable to consider that it would be granted. It said:

“The Ecological Survey acknowledges that the removal of some semi-natural woodland will require a European Protected Species Licence for dormice. Accordingly, the LPA has considered the proposal against the ‘3 derogation tests’ (with respect to requirements under the Habitats Regulations). As has been detailed earlier within this report, it is considered that there is an Imperative Reason of Overriding Public Interest (namely the replacement of existing bungalows that do not meet the Decent Homes Standard with new affordable and supported housing units), there is No Satisfactory Alternative (improving existing unit would be uneconomical), and the ecologist has indicated that taking into account mitigation and compensation, that the Favourable Conservation Status of the dormice can be maintained.

Accordingly, the 3 derogation tests are considered met, and it is reasonable to consider that the proposal will be successful in obtaining a EPS Licence.”
- 47. There is no evidence of any discussion of this issue at the DMC meeting of 1 July 2015, which approved the application.
- 48. Ms Graham Paul submitted that, in the circumstances of this case:
 - i) This development could never constitute IROPI (see paragraph 42 of her skeleton argument); or, more precisely, the public benefits of the proposed development – a small scale development of affordable and supported housing, effectively facilitated by open market housing as part of the development – could never, as a matter of law, justify adverse impacts on the habitat of an EPS. If it were otherwise, IROPI could be made out for almost any housing scheme, thereby extending the concept beyond the extraordinary (and, thus, rare) circumstances to which Solvay said it was confined.
 - ii) There was a satisfactory alternative to the development. On the initiative of the local community and Parish Council, an alternative scheme, which comprised 14 affordable dwellings and six open market houses and did not involve the loss of the dormice habitat, had been designed *pro bono* by the former Daily Telegraph Housebuilder of the Year and Founder of Living Villages, Bob Tomlinson. The scheme was worked up, and the minutes of the 1 July 2015 meeting confirmed that “the Case Officer advised that [the] application was likely to receive support...”, which he did in an email dated 26 June 2015 to one of those leading the community proposal.
 - iii) There was no evidence that the development would not be detrimental to the favourable conservation status of the dormouse.
- 49. If she were wrong in that primary submission, she submitted:

- i) Even if the project could as a matter of law be sufficient to form the basis of IROPI, on the evidence in this case, the Council's assessment that Natural England were not unlikely to grant an EPS Licence was Wednesbury unreasonable.
 - ii) The question of whether this development is capable of being the basis of IROPI is a question of European law, of uncertain answer, and therefore this court should refer that question to the Court of Justice of the European Court.
50. I am unpersuaded by these arguments: Ms Graham Paul, despite her able efforts, has failed to persuade me that the Council erred in law in its assessment that the development was not unlikely to be granted an EPS Licence by Natural England as a derogation from the article 16 obligations.
51. I will deal with the three derogation criteria, in turn.
52. With regard to IROPI:
- i) As I have explained, the DMC members were required to balance the public interest in the project proceeding, against the adverse impact that the project would have upon the dormice habitat. This balance had to be focused on the particular situation of the Site.
 - ii) With regard to the public interest, Ms Sheikh submitted with considerable force that that went beyond the general public interest in making more social housing available. In this case, the Site currently comprised houses that fell below acceptable standard, and the housing association owner wished to have social housing on the Site that was of an appropriate standard. The cost of refurbishing the current bungalows would be prohibitive. The proposed development would allow the Site to be occupied by social and supported housing of an appropriate standard. There are, here, clear social benefits to the proposed scheme. IROPI expressly includes reasons that are concerned with social benefits.
 - iii) In respect of adverse effects on the habitat of dormice, Ms Sheikh conceded that there was evidence of dormice – or, at least, a dormouse – in the semi-natural woodland on the Site; and therefore the DMC properly proceeded on the basis that dormice might be killed or their habitat destroyed or disturbed by the development, such that an EPS Licence would be required. However, Mr Sheldon considered the Site offered only limited habitat for dormice; the nut survey disclosed the positive presence of only a single dormouse on the Site, and Mr Sheldon considered that dormice on the site were “in extremely limited numbers”; and he concluded that the adverse impact of the development on any dormice would be “negligible”.
 - iv) In the circumstances, although this project is of course not the largest of developments, I cannot say that the DMC erred in law in considering that Natural England may conclude that the public interest benefits of the proposed development so outweighed the adverse impact on the habitat of dormice and otherwise the aims of the Habitats Directive that there were, here, IROPI. Of course, whether Natural England in fact do so will be entirely a matter for them, performing an assessment upon the evidence as they have it. That will be better evidence than was before the DMC; for example, Natural England will have the benefit of a dormouse survey that will inform the extent to which the development will adversely affect dormice habitat.
 - v) In coming to that conclusion, I very much have in mind the need not to impose too great a burden upon the Council as planning authority in this context, given that Natural England are not only assigned by Parliament to assess whether there are IROPI in a

particular case and have particular experience and expertise to do so, but they will also have better evidence upon which to make the assessment.

- vi) I find further comfort in my conclusion because, although I accept that there is very little authoritative guidance upon IROPI, in my view such guidance would better be given by the court in a case in which Natural England have come to a final view and the relevant criteria can therefore be considered in a case where the issue is more crystallised and possibly determinative. In this case, I am concerned only with the satellite issue of whether the Council erred in law in proceeding on the basis that Natural England might grant a licence on the basis that there are IROPI.

53. With regard to satisfactory alternative:

- i) It was common ground that, in this context, the considerable amount of planning jurisprudence as to the proper approach to planning decision where there is an alternative development is not applicable or relevant. Whether there is a “satisfactory alternative” to a development that impinges upon the protective obligations in the Habitats Directive is a different concept.
- ii) The fact that the alternative has to be “satisfactory” makes clear that, here too, there is an assessment that requires the exercise of judgement. Some further assistance with regard to the concept in this context is given by Lindblom J in *Prideaux* at [112] and following. Judging what is, or may be, a satisfactory alternative in a particular case requires a focus on what is sought to be achieved through the derogation; it is not necessary for a planning authority to consider every possibility; and, for something to be a “satisfactory alternative” for these purposes, it must be “a real option, not merely a theoretical one”.
- iii) Ms Graham Paul submitted that there was a satisfactory alternative in this case, namely the community-led project to which I have already referred. That appeared to have had some support from one of the planning officers (see paragraph 48(ii) above). However, that officer said that it would be a “fundamental problem” for the scheme if the housing trust as landowner would not make the land available for it. In fact, the housing authority had taken the view that, despite the enthusiasm of the community promoters and the comments of the planning officer, the plan was not financially viable as it was not self-funding. The extent of the financial viability of the counter-proposal may be controversial, but the DMC was entitled to give considerable weight to the view of the land owner, and the extent to which that reflected on the question whether the proposal was a realistic one.
- iv) In connection with possible alternatives, the Officer’s Report identified the right test: it said that there was no “viable alternative of development that would ensure the re-provision and enhancement of AH and social services” (by which, as I understand it, is meant social housing and accommodation for supported living). In the event, the report simply dealt with refurbishment, saying that it was uneconomical. The community-led alternative was late running, but was dealt with at the 1 July 2015 meeting itself. The minutes record:

“Finally the community had discussed an alternative application and the Case Officer advised that their application was likely to received support, however, a full application had not yet been received and there was a duty to determine the application that had been submitted on its merits.”

54. I accept that that is phrased more in terms of traditional planning jurisprudence than satisfactory alternatives in this context. However, the report identified the right test; the proposed development was designed to ensure the provision of appropriate quality social housing; and, at

the time the DMC considered the planning application, there was simply no realistic alternative with the public interest benefits which the proposed development offered. Certainly, in my view, the DMC did not err in considering that Natural England might conclude that there was no satisfactory alternative.

55. With regard to the third criterion, favourable conservation status, I can be brief. Ms Graham Paul submitted that the Officer's Report erred in saying that "the ecologist (Mr Sheldon) has indicated that taking into account mitigation and compensation, that the Favourable Conservation Status of the dormice can be maintained"; because Mr Sheldon offered no opinion on favourable conservation status. However, he did say that, provided the identified mitigation was followed, "the evaluation of the impacts on dormice... is predicted to be negligible" (see paragraph 44(iii) above). In the circumstances, in my view, for the officer to say that Mr Sheldon had indicated that favourable conservation status could be maintained was a fair reflection of Mr Sheldon's report, and was not in any way misleading.
56. The only evidence of a dormouse on the Site was the single dormouse-chewed nut to which I have referred. The DMC clearly had sufficient evidence to base an opinion that Natural England might conclude that the proposed development would lead to no detriment or risk to the favourable conservation status of the dormouse.
57. I can deal with Ms Graham Paul's alternative submissions briefly.
- i) First, she submitted that, even if (contrary to her primary submission) the project could as a matter of law be sufficient to form the basis of IROPI, on the evidence in this case, the Council's assessment that Natural England were not unlikely to grant an EPS Licence was Wednesday unreasonable. However, in this context, I am not sure that there is much if any room for an alternative Wednesday argument. I am satisfied that the DMC, on the evidence before them, were entitled to conclude that it was not "unlikely" that Natural England would grant an EPS Licence under the powers to derogate.
 - ii) Second, if her other submissions on IROPI did not find favour, Ms Graham Paul requested a reference to the Court of Justice of the European Union on the question of whether this development is capable of being the basis of IROPI. I should say that this was not a submission pressed before me at the hearing. I consider that reticence warranted. Article 267 of the Treaty on the Functioning of the European Union permits a court to make a reference to the Court of Justice of the European Union "if it considers that a decision on the question is necessary to enable it to give judgement". That is, in essence, a threshold test. If it is met, the court has a discretion as to whether to make a reference or not. I accept that there is little authoritative guidance on IROPI; and, in an appropriate case, it may be necessary to make a reference to the European Court under article 267. However, in my firm view, this is not such a case. I doubt whether the threshold test is satisfied; but, in any event, given that Natural England (the authority in England with the principle responsibility for derogations) have yet to consider the application for an EPS Licence, a reference would be premature; and, in the light of the inevitable delay to which a reference would lead, I would in any event decline to exercise my discretion to refer.
58. In any event, for the reasons I have given, I do not consider that the Council erred in its approach to the Habitats Directive, nor in its obligations under the Directive and Habitats Regulations. This ground is consequently dismissed.

Ground 3: Failure to take into account Material Considerations

59. Finally, Ms Graham Paul submitted that the DMC erred in failing to take into account two material considerations.

60. First, as I have described, there is a footpath across the Site, used particularly by school children attending the school to the south of the Site. The evidence appears to be that it has been used for some years. In the passage I have already quoted (see paragraph 16 above), the Officer's Report said that the footpath was "a permissive route" across private land, and so the adverse impact of its loss "can be afforded only limited weight in the balance".
61. Ms Graham Paul submits that that was erroneous and misleading; because the path has been used for many years, and may well amount now to a public right of way by dint of its length of usage. An application to the highway authority (the County Council) was made between the date of the Officer's Report and the 1 July 2015 meeting for the recognition of that right of way. The County Council had written to the Council asking for the possible right of way to be taken into account as a material consideration.
62. As I understand it, the application to the County Council has not yet been determined; and I was told that the application has in effect been stayed at the request of the applicant. In any event, the officer advised the 1 July 2015 meeting that an application had been made for the recognition of the footpath as a public right of way; but, it is minuted, "Until this was confirmed, the application for the public right of way had little weight".
63. I do not consider there was any error here. There either is or there is not a public right of way. The application for its recognition by the highway authority will proceed to determination. If it does not recognise the right of way, then the point is immaterial. If it does recognise the right of way, then there are procedures under the 1990 Act and the Highways Act 1980 for an application to be made for the stopping up or re-routing of that right of way. In any event, the Officer's Report recognised the matter as a material consideration; and, in the circumstances, was entitled to advise that limited weight should be given to the issue.
64. Finally, Ms Graham Paul submitted that the DMC erred in failing to take into account the request which had been made to have the communal green area treated as an Asset of Community Value. However, even assuming the designation of land as an Asset of Community Value is of planning moment – Ms Sheikh denies that it is automatically a material consideration – the request was subsequently turned down; and so the consideration was, in the event, of no materiality.
65. Thus, this ground, too, fails.

Conclusion

66. For the reasons I have given, I shall allow the judicial review on Ground 1 but refuse it on both Grounds 2 and 3.