



Neutral Citation Number: [2022] EWHC 390 (Admin)

Case No: CO/1634/2021 & CO/1794/2021

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

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 25/02/2022

**Before :**

**MR JUSTICE HOLGATE**

**Between :**

**THE QUEEN**

**on the application of**

**CAMILLA SWIRE**

**Claimant**

**- and -**

**CANTERBURY CITY COUNCIL**

**Defendant**

**-and-**

**REDROW HOMES LIMITED**

**Interested  
Party**

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**Daniel Kolinsky QC and Ben Fullbrook (instructed by Richard Buxton Solicitors) for the  
Claimant**

**Megan Thomas QC (instructed by Canterbury City Council) for the Defendant**

**Andrew Tabachnik QC and Philippa Jackson (instructed by Redrow Homes Ltd) for the  
Interested Party**

Hearing dates: 12 and 13 January 2022

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**Approved Judgment**

## Mr. Justice Holgate:

### Introduction

1. On 12 November 2018 the defendant, Canterbury City Council (“CCC”) granted outline planning permission (“the OPP”) on land at Cockerling Farm, Thanington, a site lying about 2.25km to the south west of the city centre, on the western edge of the built up area. In summary, the permission was for:
  - up to 400 dwellings, including affordable housing;
  - up to 3,716 sq m of commercial space in the B1 Use Class;
  - a community building or leisure centre (Use Classes D1-D2) of up to 200 sq m;
  - “new highway infrastructure including spine road with accesses onto Milton Manor Road and Cockerling Road and a network of internal roads, footpaths and cycle route”;
  - no less than 18 ha of open space;
  - associated landscaping, utilities infrastructure, sustainable drainage system and earthworks reserved.
2. Condition 1 requires “details of the layout, scale and appearance of any buildings to be erected, means of access to and within the site and the landscaping of the site (referred to as “the reserved matters”) to be submitted and approved by the local planning authority (“LPA”) in writing before any development is commenced. The reason for condition 1 stated that “no such details have been submitted” (i.e. for approval at the stage of granting outline planning permission). Condition 2 requires plans and particulars of the reserved matters to be submitted to the authority for approval and the development to be carried out in accordance with those approved details.
3. The permission allows for the development to be carried out in phases. The phases were to be defined under condition 7 (see below). Condition 3 required an application to be made for approval of the first phase of development within 3 years, that is by 12 November 2021. Condition 4 requires the final application for approval of reserved matters for the final phase of the development to be made by 12 November 2023. Condition 4 also requires each phase to be begun within 2 years from the date of the final approval of reserved matters for that phase.
4. The site has an area of 41.75 ha and is irregular in shape. To the north lies the Ashford Road (A28), to the west Milton Manor Road and to the south Cockerling Road. To the east and north the site adjoins the suburban area of Thanington. The site comprises mainly open arable fields and areas of scrub, coppice and woodland. Existing levels fall across the site by about 25m from the south west to the north/north east. There is a dry valley running in a north/south direction in the eastern part of the site.
5. Beyond the northern boundary of the site, the land continues to fall down to the River Stour which flows from south west to north east. The site lies on the southern

edge of the Stour Valley. About 7.5km downstream there is an internationally important wetland site at Stodmarsh, designated as a Ramsar site, a Special Area of Conservation (“SAC”), a Special Protection Area (“SPA”) and Site of Special Scientific Interest (“SSSI”). In addition, the Larkey Valley SSSI lies immediately to the south of Cockering Road.

6. The site forms just over one third of a strategic site allocation in the Canterbury District Local Plan adopted in 2017. That allocation is for the development of up to 1,150 dwellings and 1.5ha of employment land. The report of the Inspector who conducted the Examination of that plan stated that the allocation would accord with the strategy of focusing development in the urban areas, particularly Canterbury, and is a sustainable location for development.
7. In July 2016, the defendant had previously granted outline planning permission on an adjacent area of land of about 73 ha lying to the south east of the subject site for 750 dwellings, up to 4000 sq m of business floorspace, a primary school, a nursing home, a hospice and community uses. The site is being developed by Pentland Homes Limited. The Pentland site forms the other part of the strategic site allocation.
8. Redrow Homes Limited (“RHL”), the Interested Party, is the developer of the subject site.
9. The claimant, Camilla Swire, is a local resident who has long expressed her concerns about what are said to be deficiencies in the planning procedures followed for the two sites.
10. In 2018 the claimant issued two claims for judicial review against CCC, one to challenge the OPP on the subject site and the other to challenge the decision to vary conditions in the outline planning permission for the Pentland site. The focus of the challenge was on the alleged lack of master-planning for the overall allocation. Stuart-Smith J (as he then was) refused permission at a renewal hearing, describing some of the arguments advanced as “lacking either realism or merit” and “more than faintly ridiculous”. Undeterred, the claimant applied for permission to appeal, which was refused by Hickinbottom LJ on 5 November 2019.
11. The claimant accepts that the OPP granted in November 2018 on the subject site can no longer be challenged. The significance of an outline planning permission is that (a) it is not open to a planning authority to revisit matters which have been approved in principle at the outline stage and (b) *some* development must be acceptable on the site within the ambit of the outline permission (*Paul Newman New Homes Limited v Secretary of State for Housing, Communities and Local Government* [2021] PTSR 1054 at [17]).
12. The development the subject of the OPP was EIA development for the purposes of The Town and Country Planning (Environmental Impact Assessment) Regulation 2017 – SI 2017 No. 472 (“the EIA Regulations”). An Environmental Statement (“ES”) was submitted with the application and the EIA process carried out leading up to the grant of the OPP. It is common ground that the application for permission was accompanied by parameter plans and an indicative master plan, so that the details to be approved would remain within the scope of the likely significant environmental effects assessed for the project (see e.g. *R v Rochdale Metropolitan Borough Council ex parte Milne*

(No.1) [2000] Env. L.R. 1; *R v Rochdale Metropolitan Borough Council ex parte Milne* (No.2) [2001] Env. L.R. 22).

13. Condition 6 requires the development permitted to be carried out in accordance with six approved parameter plans “in respect of those matters not reserved for later approval”. One of the plans is entitled “Vehicular Access and Movement Parameter Plan: 2780-012F”. Condition 6 did not refer to the indicative masterplan. But condition 8 prevents any development from taking place until a masterplan for the whole site substantially in accordance with the “Indicative Masterplan” within the ES (drawing 2780-002 Rev. K) is submitted and approved. Both drawings 2780-002 Rev. K and 2780-012F show the spine road running through the site in a broadly east-west orientation between two connections with the existing highway network, one on Cockering Road and the other on Milton Manor Road.
14. The first claim for judicial review, CO/1634/2021 (“JR1”), challenges the decision of CCC on 23 March 2021 to approve details of a masterplan under condition 8 of the OPP. The claimant says the approval is unlawful because the masterplan “materially strays outside the parameters of the OPP”, in that a section of the spine road at the western end and the roundabout connection with Milton Manor Road do not accord with the vehicular access parameter plan (Ground 1). Put shortly, the masterplan approved under condition 8 conflicts with condition 6. In addition, the claimant submits under ground 2 that there was a failure to comply with requirements for firstly, EIA and secondly, Habitats Regulations Assessment (“HRA”) under The Conservation of Habitats and Species Regulations 2017 (SI 2017 No. 1012) (“the Habitats Regulations”). At the hearing before me, the claimant decided not to pursue ground 3, on the basis that it added nothing to ground 2. Under ground 4 the claimant contends that the masterplan approved by CCC under condition 8 did not comply with that condition because, in part, the information submitted on the sustainable urban drainage system (“SUDS”) was only “indicative” or “illustrative”.
15. On 2 August 2021 Swift J granted the claimant permission to proceed with JR1.
16. In CO/1794/2021 (“JR2”) the claimant challenges the decision of CCC dated 8 April 2021 to approve under s.96A of the Town and Country Planning Act 1990 (“TCPA 1990”) a “non-material amendment” (“NMA”) of the OPP. This decision amends the OPP in two respects. First, it amends condition 9. In its original form, condition 9 prevented an application for approval of reserved matters for any phase from being *submitted* until the “design code parameters” for that phase had been submitted and *approved*. Now condition 9 allows such reserved matters to be submitted, but *not approved*, before the approval of the relevant design codes. In other words, the two applications may be progressed in tandem, so long as the design codes for that phase are approved first. Second, conditions 11, 15, 18, 21, 25, 26, 33 and 34 of the OPP have been amended to allow “initial earthworks” approved under condition 10 to be carried out before the approval of details under those conditions. The original form of the OPP prevented *any* development from taking place until details under all of those conditions had been approved.
17. Under ground 1 of JR2 the claimant contends that that part of the defendant’s decision which amended conditions 11, 15, 18, 21, 25, 26, 33 and 34 is unlawful, because a failure to define “initial earthworks” in the OPP as amended under s.96A renders these conditions void for uncertainty. Then Mr. Kolinsky QC, who together with Mr.

Fullbrook appeared for the claimant, took Grounds 2 and 3 together. He submitted that the defendant breached its “*Tameside duty*”<sup>1</sup> by failing to take reasonable steps to obtain information from RHL about the nature of the “initial earthworks”, so as to be able to consider whether the amendment sought by RHL would not prejudice the matters to be addressed under conditions 11, 15, 18, 21, 25, 26, 33 and 34. Further or alternatively, the claimant says that the defendant’s conclusions on the application under s.96A of TCPA 1990 were irrational. Lastly, under ground 4 the claimant challenges the first part of the defendant’s decision under s.96A, namely that the amendment of condition 9 was not a “material” change to the OPP. It is said that that decision was irrational.

18. On 2 August 2021 Swift J granted the claimant permission to proceed with JR2 in respects of grounds 1, 2 and 3 but refused permission for ground 4. The claimant renewed her application for permission in respect of ground 4 at the substantive hearing before me.
19. Since CCC decided to approve the non-material amendments on 8 April 2021, the authority has granted a number of approvals under various conditions of the OPP. These are the subject of five further applications by the claimant for judicial review, JR3 to JR7. On 4 August 2021, Swift J refused permission to apply in respect of JR3. The claimant renewed her application but that matter has not progressed further pending the determination of JR1 and JR2. On 3 November 2021 Lang J stayed JR4 and subsequently JR5, JR6 and JR7 have been stayed, all to await the determination in the High Court of JR1 and JR2. The claimant says in paragraph 7 of her skeleton that JR3 to JR7 are parasitic upon the decision which she seeks to impugn in JR1 and possibly also the decision impugned in JR2 (see paragraph 46).
20. I thank Counsel for their written and oral submissions. Although some of the submissions sought to go into detailed, sometimes technical aspects of material placed before the defendant, it is unnecessary for me to refer to all of those matters in this judgment. Although I have taken the points into account, they do not impact materially on my conclusions on the issues, whether the points were made by the claimant or by an opposing party.

## **Factual Background**

21. Before dealing with the grounds of challenge, it is necessary to set out the factual background in a little more detail.
22. Before the defendant was asked to consider the application for approval of a masterplan under condition 8, RHL had previously made an application under s.73 of TCPA 1990 on 17 August 2020 to vary conditions 6, 7, 8, 11 and 28 of the OPP so as to show (1) the western access from the spine road onto Milton Manor Road at a position about 5m south of that indicated on the parameter plan 2780-012F and (2) the spine road curving southwards at its western end so as to meet that junction.
23. An earlier screening opinion dated 8 January 2020 had considered this variation in the western access arrangements correctly *as a part of the whole development* of the site. CCC stated that that development *as a whole* would constitute EIA development. But

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<sup>1</sup> *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014, 1065A-B.

the authority also suggested that RHL might wish to prepare a “Statement of Conformity”, which would take into account the existing EIA and assess whether the s.73 changes, or any changes in baseline conditions since the previous ES, would be likely to result in materially significant environmental effects not addressed in that ES and therefore whether any further environmental information or mitigation needed to be provided.

24. In paragraph 27 of the claimant’s skeleton it was suggested that the bend introduced at the western end of the route would result in the spine road running through a valley, as if to imply that that had not been the case for the alignment shown in parameter plan 2780-012F. In fact, that is not correct. The relocation of the junction by only 5m does not result in the road running through some valley not previously assessed. The dry valley mentioned in paragraph 4 above lies in the eastern part of the overall site and is not affected by these changes. Mr. Kolinsky did not suggest otherwise. But the claimant contends that the western realignment affects the provision of semi-natural greenspace or parkland at the western end of the project, more specifically in an area to the south of the original alignment of the western end of the spine road.
25. In July 2020 Natural England updated its advice to local planning authorities on the potential for increased waste water discharge from development in the Stour Valley catchment, which includes RHL’s land, to affect adversely the designated ecological sites at Stodmarsh. The relevant concern relates to the levels of phosphorous and nitrogen affecting those sites. One possible way of addressing this risk is to require new development to achieve “nutrient neutrality”. However, Natural England went on to say that they would be unable to provide advice to LPAs on nutrient strategies for individual applications.
26. The application for the approval of a masterplan under condition 8 was made on 22 September 2020. It was accompanied by a Masterplan Statement which also showed the junction between the spine road and Milton Manor Road in the same location as in the s.73 application, about 5m to the south of the access indicated on parameter plan 2780-012F. The difference in the position of these two locations is shown on a plan produced for RHL and agreed between the parties at the hearing of these claims. It is also agreed that the realignment of the spine road at its western end is the same in the application for masterplan approval as in the s.73 application.
27. The Masterplan Statement says that the undulating topography of the site presents constraints for the formation of new roads, both the spine road and roads serving the development parcels, which are mainly located in the central and eastern parts of the site. The formation of the spine road adjacent to Milton Manor Road involves a “fair degree of re-profiling of the land”. There is a steep slope to the south and the land to the north will need to be raised. There is no suggestion that the topography of this part of the site has changed between the OPP and the masterplan approval. These observations must also have been obvious in relation to the route originally shown for the spine road and access junction.
28. RHL withdrew their s.73 application on 13 August 2021, apparently without any reasons. By then both the masterplan under condition 8 and the application under s.96A had been approved (23 March 2021 and 8 April 2021 respectively) and Swift J had granted permission for JR1 and JR2 to proceed (2 August 2021).

29. On 8 October 2021 CCC granted consent for initial or preliminary earthworks under conditions 1 and 10 of the OPP. In October RHL began to carry out those earthworks.

### **Ground 1**

#### *Principles for the interpretation of planning permissions*

30. The parties agree that this ground depends upon the true interpretation of relevant conditions in the OPP. That issue is an objective question of law for the court to determine.
31. The principles governing the interpretation of planning permissions and related documents, and which materials may be taken into account, are well-established in the authorities and do not require lengthy citation or analysis here (see e.g. *Trump International Golf Club Scotland Limited v Scottish Ministers* [2016] 1 WLR 85; *Lambeth London Borough Council v Secretary of State for Housing Communities and Local Government* [2019] 1 WLR 4317; *DB Symmetry Limited v Swindon Borough Council* [2021] PTSR 432; *R v Ashford Borough Council ex parte Shepway District Council* [1999] PLCR 12; *Patel v Secretary of State for Housing, Communities and Local Government* [2021] EWHC 2115 (Admin); *Norfolk Homes Limited v North Norfolk District Council* [2021] PTSR 863).
32. In general, the same principles apply to the interpretation of a planning permission as apply to other legal documents. The question is what would a reasonable reader understand the words used in a permission to mean, read in the context of the conditions and the consent as a whole. The court has regard to the natural and ordinary meaning of the words used, and the purpose of the consent and other conditions casting light on those words. The context in which a planning permission or a condition must be interpreted includes the legal framework within which permissions are granted. Accordingly, the reasonable reader must be treated as being equipped with some knowledge of planning law and practice.
33. Because the interpretation of a planning permission is an objective question of law, it is irrelevant to ask what were the intentions of the parties involved in its genesis (e.g. the developer or the local authority) or to have regard to the subsequent conduct of any such party (*Lewison: The Interpretation of Contracts (7<sup>th</sup> Edition)* paras. 1.04 to 1.05 and chapter 3 section 19; *Norfolk Homes* at [40] to [42]).
34. It follows that the making of the subsequent s.73 application and the statements made on behalf of RHL in related application documents are irrelevant to ascertaining the true meaning of the relevant conditions in the OPP. Put another way, those who promoted the s.73 application may have acted on a correct or an incorrect interpretation of the OPP. The issue for the Court still comes back to the *objective* meaning of the permission itself.

#### *Conditions 6 and 8*

35. The submissions of the parties began by considering the relationship between conditions 6 and 8 of the OPP.
36. Condition 6 states: -

“The development hereby permitted shall be carried out in accordance with the following approved plans, in respect of those matters not reserved for later approval:

- Land Use Parameter Plan: 2780-01 OD
- Open Space Parameter Plan: 2780-01 5C
- Vehicular Access and Movement Parameter Plan: 2780-012F
- Pedestrian and Cycle Access Parameter Plan: 2780-011 D
- Density Parameter Plan: 2780-013C
- Building Heights Parameter Plan: 2780-014C

REASON: In the interests of sustainable development and to ensure that the development is carried out in accordance with the development as approved and the assumptions underpinning the Environmental Impact Assessment ”

37. Condition 8 states: -

“No development shall take place until a Masterplan for the entire application site, which shall substantially be in accordance with the Indicative Masterplan within the Environmental Statement (drawing no. 2780-002 Rev K), has been submitted to and approved in writing by the Local Planning Authority. This shall include the following:

- Principles of the proposed layout design that demonstrate how the surrounding urban and rural context have been taken into account
- Principles of land form topography as existing and proposed
- Details of how the development will achieve Garden City principles
- Land use plan showing the location of the residential development, employment floorspace, open space, community hub, including densities of development
- Movement corridors within the site (including principal roads, public transport corridors, footpaths, cycleways and green corridors) and demonstrating how these relate to existing movement networks in the wider area
- Key infrastructure (including SUDs, significant utility provision
- Landscape corridors and open space network

- Public open space

REASON: To ensure high quality design and coordinated development against which to assess reserved matters applications and to ensure a satisfactory appearance to the development.”

### *The parties' submissions*

38. The claimant points out that although the masterplan submitted for approval under condition 8 must be “substantially in accordance with” the Indicative Masterplan 2780-002 Rev K, condition 6 requires the development to be carried out “in accordance with” the approved parameter plans, unqualified by the word “substantially”. The claimant suggests that the control under condition 6 is tighter than under condition 8. Thus, according to Mr. Kolinsky, even if the junction with Milton Manor Road were to be located 1m from that shown on the access parameter plan 2780-012F, the development would be in breach of condition 6. He says that the details of the junction must be in the same location as was shown on that plan simply by a circle, apart perhaps from a variation which is truly *de minimis*. He adds that although details of the means of access to and within the site are reserved for subsequent approval under condition 1, those details must accord with the parameter plan.
39. Mr. Kolinsky accepts that one consequence of the claimant’s construction is that no effect is given to the words “in respect of those matters not reserved for later approval” in condition 6. The condition would be understood as if it had said “the development shall be carried out in accordance with the parameter plans...”. It would also mean that the developer would have to make a s.73 application each time a detailed proposal involved a relatively minor (but material) variation from a parameter plan or did not conform strictly with such plan. That construction does not sit well with the acceptance in *Rochdale No (2)* at [90] – [93] that, as a matter of judgment, a planning authority may grant an outline planning permission which allows for flexibility in the subsequent details of the project approved under that consent, provided that that flexibility has been taken into account in the assessment carried out at the outline stage.
40. On the other hand, CCC and RHL submit that full effect should be given to the words in condition 6 “in respect of those matters not reserved for later approval”. The upshot is that condition 6 does not require the development to accord with the parameter plans at all, if the subject-matter falls within the ambit of one or more of the reserved matters in condition 1. That is also a startling proposition. At first sight it would mean that, for example, such fundamental aspects of the project as scale and layout need not conform to the parameter plans at all. Such matters as density and height could be increased under condition 1 as a substantial departure from the relevant parameter plans. The claimant says that this rival interpretation would undermine the inclusion of Condition 6 in order to satisfy the principles in the *Rochdale* cases.

### *Discussion*

41. These differences between the parties are highly polarised. Neither stance is attractive. Fortunately, there is no need for the Court to adopt either, applying the interpretative principles to which I have referred, including common sense (Lewison LJ in *DB Symmetry* at [60]).

42. The degree of conformity required by condition 6 depends upon a combination of inter-related factors: the meaning and effect of the words “in accordance with”, the nature of the parameter plans to which condition 6 relates, and how condition 6 sits with other conditions of the OPP. It became common ground during the hearing that there are a number of conditions which were included in the OPP in order to achieve compliance with the principles in the *Rochdale* decisions in the circumstances of this case, namely conditions 5 to 13. Those conditions are set out in the Annex to this judgment.
43. The phrase “in accordance with” in condition 6 means “in agreement or harmony with; in conformity to; according to” (Oxford English Dictionary). The dictionary examples given show that a draftsman of a planning permission may go further by adding language so that, for example, the development must be carried out “exactly” or “strictly” in accordance with particular plans. The natural meaning of the phrase “in accordance with”, taken by itself, does not connote that degree of conformity. The addition of such terms would not be tautologous. They would change the meaning of the phrase, certainly in the context of the document I have to construe.
44. Deciding whether a development is in conformity or harmony with parameter plans may well involve matters of planning judgment and degree.
45. The Land Use parameter plan (2780-010D) shows broad land use areas in terms of, for example, residential, business and community uses. The uses are not specified in any greater detail. The scale and nature of the plan should not be taken to have fixed precise boundaries for each area of land use. Whether the area of a detailed proposal accords with that plan will be a matter of judgment for the planning authority. The same applies to the Building Heights and Building Densities parameter plans (2780-014C and 2780-013C). The boundaries of the areas shown do not always align precisely with those shown on the Land Use plan. These plans are more in the nature of diagrammatic drawings. Their object is to show the principles of the overall scheme and its main components, with which the details subsequently submitted for approval must accord. However, the building heights and densities are expressed as maxima for the areas to which they relate.
46. Plan 2780-012F is entitled “Access and Indicative Road Alignment”. That is a fair description, given the nature of the drawing and the information it shows. The only internal road shown is the spine road running across the site from east to west with access points on to Milton Manor Road and Cockering Road. The thickness of the line drawn and the large circles (“blobs” as counsel called them during the hearing) indicate the diagrammatic nature of the drawing. It does not represent a precise alignment for the spine road. Nor does it show a precise location for each of the access points, which can properly be scaled off from the drawing so as to impose finite limits on positioning. Rather the drawing establishes the principle that the site must have two access points, one with Milton Manor Road towards the northern boundary of the site and the other on Cockering Road towards the south eastern corner of the site, both of which are connected by the east-west spine road.
47. Plainly, the defendant has proceeded on the basis that the alignment and western access point shown on the masterplan approved under condition 8 “accord with” the access parameter plan. By its very nature, that plan does not specify maxima or limits (as in the case of the heights and densities drawings). It establishes principles that are to be respected by the detailed design. Treated properly in the context of this large scheme,

a western junction which is only 5m south of the “blob” shown on 2780-012F can properly be said to accord with that plan. The same is true of the deflection introduced in the alignment of one relatively short section of the spine road at its western end so as to connect with the proposed location of the roundabout. The Masterplan Statement explains that the alignment of “the approach to the roundabout” has been adjusted to relate more closely to the site contours in this area.

48. The Open Space parameter plan (2780-015C) shows the western end of the spine road running through “proposed open amenity space” and a belt of woodland. The plan also shows “semi-natural greenspace”, sometimes referred to as parkland, to the south of the road at its western end, running down to the southern boundary of the site and extending eastwards and to the south of the south western residential area of the scheme. The masterplan approved under condition 8 shows that the alignment of the spine road would partially run through the northernmost element of the semi-natural greenspace shown in 2780-015C. But much of the road would still run through the open space amenity corridor as before. Moreover, a very substantial area of semi-natural greenspace would still remain to the south of the spine road and also to the south of the south-western residential area of the scheme (separating the site from the Larkey Valley SSSI).
49. The Pedestrian and Cycle Access parameter plan (2780-011D) shows how the whole of this large development site would be served by a network of pedestrian and pedestrian/cycle paths. Plainly, the presentation of this material is of a high-level or strategic nature. The precise positioning of such routes will depend upon the layouts which are approved for development areas. Many more routes will be provided than are shown on this diagram. Once again, the parameter plan sets out the principles for this network. The authority may still judge that alignments involving a variation of the routes shown on the parameter plan are in accordance with that plan.
50. Condition 6 does not deal with the approval of further plans. Instead, it requires that the development itself be carried out in accordance with the parameter plans. But that can only be a reference to the development which will be defined in detail by a series of approvals under conditions 7 to 13. Condition 6 must be read in that context.
51. Condition 5 sets parameters as regards the maximum number of dwellings and types of floorspace. The references to “no less than” are plainly a drafting or typing error and should read “no more than” so as to be consistent with the grant of permission itself.
52. Condition 7 requires that before any development may be carried out a phasing plan must be approved for the whole scheme which is “broadly in accordance with” the Indicative Phasing Plan in the ES.
53. Condition 8 requires the masterplan to include movement corridors within the site, including principal roads and public transport corridors, showing how these relate to “existing movement networks in the wider area”. Plainly that language includes the spine road. That is reinforced by the reference to public transport corridors and the requirement to demonstrate the relationship with the wider highway network.
54. Under Condition 11 (in its original form) no development may take place until an “overarching Open Space Strategy” has been approved, which is “in accordance with” both the Open Space parameter plan and the masterplan approved under condition 8.

This Strategy must *inter alia* demonstrate the quantum of open space to be provided on site in accordance with the parameter plan and identify the approximate location of the main areas of formal and informal open space to be provided. It is therefore plain that the locations, areas and boundaries of open space have not been fixed by the parameter plan referred to in condition 6. It would be surprising if condition 6 had been intended to apply so rigidly, given that so much design work remained to be carried out when the OPP was granted.

55. Condition 9 requires that before any application is made for approval of reserved matters for a phase approved under condition 7, the developer must obtain approval for the “design code parameters” for that phase. The condition states that those parameters “shall be in accordance with the principles and parameters established by the Design and Access Statement (which accompanied the application for outline permission), the approved parameter plans set out in Condition 6, the Masterplan approved under Condition 8 and the Open Space Strategy approved under Condition 11....”. It is clear that the words “principles and parameters” apply to all of the items referred to in that list. Thus, the parameter plans established principles and not precise, immutable boundaries. This approach is all of a piece with condition 11. In the same vein condition 9 requires a masterplan to be approved for each phase which shows *inter alia* movement corridors, using language similar to Condition 8. Once again that wording plainly includes the spine road. The alignment and detailed design of that spine road have to be approved under conditions 1 and 10.
56. Condition 10 specifies matters which are to be addressed in each application for approval of reserved matters. A design statement must be provided that shows how the proposals “accord with” the approved parameter plans and design code parameters. Condition 10 allows for the possibility of a “variation” in those matters subject to the provision of an adequate justification. Condition 10 then addresses details for access to a sub-phase, layout, scale and appearance, landscaping and access more generally. That last subject is to include details of the widths and configuration of highways.
57. Condition 12 requires an Ecological Mitigation Strategy for the whole site to be approved by the authority, in accordance with the mitigation principles and details submitted with the planning application and the ES. The details are to show the extent and location of mitigation works and habitat creation.
58. Condition 13 requires a Landscape and Ecological Management Plan to be approved for the whole site in accordance with the principles in the ES and green infrastructure parameter plan.
59. Lastly condition 28 requires that before the occupation of 250 dwellings the spine road, “as illustrated on parameter drawing 2780-12F”, shall be completed and open to traffic. The meaning and effect of the word “illustrated” here is clear beyond doubt. The alignment of the spine road was not fixed by the parameter plan. The principle of that route and of the two access points onto the highway network was determined by CCC’s approval of that plan. The route was illustrated by the parameter plan, leaving the alignment and design to be dealt with as a reserved matter.
60. I return now to the relationship between conditions 1 and 6 as regards the spine road and accesses. The two conditions have to be read together. The words in Condition 6 “in respect of those matters not reserved for later approval” do not enable details to be

approved under condition 1 which simply ignore or trump the relevant parameter plans referred to in condition 6. That is plain from, in particular, conditions 9 and 10. They govern the approval of reserved matters. The design code parameters must be in accordance with *inter alia* the principles and parameters established by the parameter plans and an application for approval under condition 9 must include a design statement that demonstrates how the proposals accord with the parameter plans and design code parameters. But the repeated use of the phrase “in accordance with”, along with the references to the principles of the parameter plans, also make it clear that the permission does not require rigid adherence to those plans, particularly where the plans are schematic or diagrammatic in nature, as in the case of 2780-012F.

61. Given the way in which conditions 1, 6, 9 and 10 interact, we can now see that the words in condition 6, “in respect of these matters not reserved for later approval”, are not otiose. They make it clear that those details of the development which fall outside the control of reserved matters, must nevertheless accord or harmonise with the parameter plans.
62. In view of this analysis, I conclude that there is no ambiguity about the proper interpretation of this set of conditions. Accordingly, the Court would not be justified in looking at extrinsic material. However, even if that exercise were to be carried out, I am satisfied that it would not alter the construction set out above. Indeed, the overall tenor of that material is supportive of that interpretation.
63. It is common ground that the masterplan and Masterplan Statement are “substantially in accordance with” the Indicative Masterplan in the ES (2780-002 Rev K). I have rejected the claimant’s interpretation of condition 6. CCC’s approval of the masterplan in the Masterplan Statement did not conflict with any of the parameter plans in condition 6 or involve any misinterpretation of the OPP. In approving the masterplan under condition 8, the defendant did not grant an approval going beyond the scope of OPP. I also reject the faint suggestion in the claimant’s skeleton that in approving the masterplan, CCC failed to take into account differences between that plan and the parameter plans. The defendant and RHL showed the court references in the documentation (including the Masterplan Statement and the delegated officer’s report) which sufficiently demonstrate that that aspect was taken into account by CCC.
64. Accordingly, ground 1 must be rejected.

## **Ground 2**

### *The Issues raised by the Claimant*

65. It is common ground that the approval of the masterplan under condition 8 of the OPP was a “subsequent consent” within the meaning of regulation 2(1) of the EIA Regulations. The claimant submits that CCC’s approval of the masterplan breached regulation 3 of the EIA Regulations, and is therefore unlawful, because EIA was not carried out in respect of the development. In particular, it is submitted that CCC failed to assess whether the environmental information before it was adequate to assess two elements of the masterplan which differed from the parameter plan 2780-012F, namely the relocation of the access onto Milton Manor Road by 5m to the south and the curved alignment of the western section of the spine road. The claimant says that that

realignment affected the provision of open space to mitigate impact upon the Larkey Valley SSSI.

66. Secondly, the claimant submits that the approval of the masterplan under condition 8 was unlawful because CCC failed to carry out a HRA in accordance with regulations 63 and 70 of the Habitats Regulations. The claimant says that such an assessment needed to be carried out before the masterplan was approved because of Natural England's change of stance on the potential effect of wastewater discharges on the SPA and SAC at Stodmarsh.
67. The claimant acknowledges that EIA and HRA were undertaken before the grant of the OPP, but submits that those assessments were inadequate to deal with the issues identified above.

### *Legal Framework*

68. For the purposes of the EIA Regulations, a "subsequent consent" means "a consent granted pursuant to a subsequent application". A "subsequent application" means an application for approval of a matter which is required under a condition in a planning permission, and which must be obtained before all or part of the development authorised by that permission may be begun (regulation 2(1)). I agree with the parties that an approval under condition 8 of the OPP is a "subsequent consent".
69. By regulation 3 CCC was prohibited from granting that subsequent consent "unless an EIA has been carried out in respect of that development".
70. Regulation 4 defines EIA as a process consisting of (a) the preparation of an ES, (b) the consultation, publication and notification required by the legislation and (c) the authority's decision-making under regulation 26 for assessing the environmental information and reaching conclusions on the significant effects of the development on the environment.
71. Regulation 18(1) requires that, subject to regulation 9, an "EIA application" (which includes an application for subsequent consent - regulation 2(1)), be accompanied by an ES. However, regulation 18(2) adds:

"A subsequent application is to be taken to be accompanied by an environmental statement for the purpose of paragraph (1) where the application for planning permission to which it relates was accompanied by a statement referred to by the applicant as an environmental statement for the purposes of these Regulations, but this is subject to regulation 9."

So, in the present case regulation 18(2) deemed that the requirement of regulation 18(1) was satisfied by the ES originally submitted for the application for outline permission, subject once again to regulation 9.

72. Regulation 9 applies where under sub-paragraph (1) (so far as is relevant): -
- (1) An application for subsequent consent has not itself been the subject of a screening opinion or screening direction; and

- (2) The application is not accompanied by an ES; and
- (3) The application for planning permission to which the subsequent application relates was accompanied by an ES.

Plainly regulation 9 includes situations to which regulation 18(2) applies and therefore was applicable in the present case.

73. Regulation 9(2) and (3) provide:

“(2) Where it appears to the relevant planning authority that the environmental information already before them is adequate to assess the significant effects of the development on the environment, they must take that information into consideration in their decision for subsequent consent.

(3) Where it appears to the relevant planning authority that the environmental information already before them is not adequate to assess the significant effects of the development on the environment, they must serve a notice seeking further information in accordance with regulation 25.”

74. Regulation 9 reflects some of the principles underlying EIA legislation. The planning authority should take into account the effects of the project on the environment at the earliest possible stage in the planning process (see e.g. *Preston New Road Action Group v Secretary of State for Communities and Local Government* [2018] Env. L.R. 18 at [58]). An application for outline permission should be accompanied by sufficient environmental information to enable the significant environmental effects of the project to be considered before outline permission is granted. The need for further EIA in relation to the approval of matters under a condition will depend on the extent of the environmental information at the outline stage. If sufficient information is given at that stage and *Rochdale* principles are followed, the risk will be minimised of environmental effects not being identifiable until an application is made for the approval of further details. In such cases, it will normally be possible for the authority to treat the EIA at the outline stage as sufficient for the purposes of a multi-stage consent. But further EIA will be needed if the submission of details for approval under a condition reveals that the development would have significant environmental effects which were not anticipated earlier and assessed (*R (Barker) v Bromley London Borough Council* [2007] 1 AC 470 at [21] – [24]).

75. The effect of regulation 62 of the Habitats Regulations is to apply the assessment provisions in regulations 63 and 64 to the grant of planning permission under Part 3 of TCPA 1990. Regulation 70(3) provides: -

“(3) Where the assessment provisions apply, outline planning permission must not be granted unless the competent authority is satisfied (whether by reason of the conditions and limitations to which the outline planning permission is to be made subject, or otherwise) that no development likely adversely to affect the integrity of a European site or a European offshore marine site

could be carried out under the permission, whether before or after obtaining approval of any reserved matters.”

76. Regulation 63(1) provides (so far as material) that where a project is likely to have a significant effect on a European site (i.e. the SAC and the SPA at Stodmarsh), the planning authority must make an “appropriate assessment” of the implications of the project for that site, having regard to its conservation objectives, before giving a consent for that project. The applicant for consent must provide such information as the authority may reasonably require for an assessment or to determine whether an assessment is required (regulation 63(2)). The planning authority must consult Natural England and, if it considers it appropriate, take the opinion of the general public (regulation 63(3) and (4)). Subject to the “overriding public interest” provisions in regulation 64, the planning authority may only agree to the project after having ascertained that it will not adversely affect the integrity of the European site (regulation 63(5)).
77. It is well-established that the issue of whether the planning authority has sufficient information for the purposes of EIA or HRA is essentially a matter of judgment for that authority, subject only to review on *Wednesbury* principles (see e.g. *R (Finch) v Surrey County Council* [2022] EWCA Civ 187 at [17(7)]; *Smyth v Secretary of State for Communities and Local Government* [2015] PTSR 1417 at [78]-[80]; *R (Mynydd y Gwynt Ltd) v Secretary of State for Business, Energy and Industrial Strategy* [2018] PTSR 1274 at [8]; *R (Plan B Earth) v Secretary of State for Transport* [2020] PTSR 1446 at [77]-[79]; *R (Spurrier) v Secretary of State for Transport* [2020] PTSR 240 at [119] and [432]-[434]).

#### *Discussion*

78. It is relevant to note that the roundabout on Milton Manor Road shown on the masterplan approved under condition 8 had previously been shown on a more detailed technical drawing produced by the developer’s highway consultant in 2017 and which formed part of the material considered by CCC when it determined the application for outline planning permission. The point is fairly made by the Claimant that the location shown on the parameter plan 2780-012F and on the “Indicative Masterplan” at that stage showed the roundabout about 5m to the north. Nevertheless, the location shown on the masterplan approved under condition 8 in March 2021 is the same as that shown on the highway consultant’s drawing included in the Transport Assessment as part of the ES for the outline application.
79. The officer’s report on the outline application approved in November 2018 referred to the proposed parkland at the western end of the development site, and down to its southern boundary, as helping to mitigate recreational pressure from the occupiers of the new homes on the Larkey Valley SSSI. The report also stated that from a landscape perspective, the retention of the western part of the site as open space, combined with “significant new planting”, would serve to screen the built development and maintain an open character for the north facing valley slopes of the Stour Valley.
80. The officer’s report on the outline application mentioned the impact of the proposed western roundabout only once. To the north west of the site, on the other side of Milton Manor Road, lies a listed chapel. The setting of the chapel is already affected by buildings and an aggregate works. The officer’s report stated that RHL’s proposal

minimised any harm to that setting by locating *built* development over 330m away in the central and eastern parts of the site and providing separation in the form of open space and enhanced landscaping. The report said that care would need to be taken in the detailed design of the roundabout (referring to high-level lighting columns), but that would be controlled under s.278 of the Highways Act 1980.

81. I have already referred to the screening opinion which preceded the s.73 application ([23] above). Because the application, if granted, would have resulted in a fresh outline permission for the entire development, it is wholly unsurprising that CCC decided that that project would constitute EIA development. However, CCC also stated that RHL could consider whether the alterations, involving a relatively modest element of the overall scheme, would give rise to any new or materially significant environmental effects not addressed in the ES accompanying the outline application and whether any further environmental information or mitigation needed to be provided. Two things are plain. First, CCC had well in mind the same factors as are required to be taken into account when applying regulation 9(2) and (3) of the EIA Regulations to an application for subsequent consent (previously reflected in *Barker*). Second, the authority acknowledged that no further environmental information might be needed for those changes in the project which were subsequently put forward in the application under condition 8 for approval of the masterplan.
82. The screening opinion took into account the views of statutory consultees. Natural England had no comments to make. Kent County Council (“KCC”) Ecology advised that the proposed changes would not have a significant impact on the adjacent Larkey Valley SSSI and no EIA would be required for ecology. Their initial concerns over the bisecting of the open space area had been addressed. KCC Highways had no objections to the proposed changes in terms of traffic movement and highway safety.
83. The claimant’s Solicitors made representations on the screening issue by letter dated 1 November 2019. The thrust of that letter was that the s.73 application should be considered as seeking permission for EIA development and an ES submitted. What the letter did not suggest was that the altered junction location and alignment of part of the Spine Road (or for that matter anything else) would result in any significant environmental effects not already assessed. The letter did not consider regulations 18(2) and 9(2) and (3) of the EIA Regulations. The same is also true of a further letter from the Solicitors sent on 10 January 2020, just after the screening opinion. Instead, this letter suggested that, in the light of the then recent decision in *Finney v Welsh Ministers* [2020] PTSR 455, RHL should be making an entirely new application for planning permission rather than “relying upon the s.73 procedure”, a different point altogether.
84. Ms. Thomas QC, on behalf of CCC, helpfully referred to passages in the EIA Addendum which RHL produced for their s.73 application. That document stated that the alteration of the spine road would not have materially different effects. For example, the function of the western parkland as alternative greenspace to offset recreational pressure on the Larkey Valley SSSI would be maintained. Indeed, in its letter of 16 October 2020 Natural England advised CCC that the changes introduced in the s. 73 application, and hence in the condition 8 application, were unlikely to have significantly impacts on the SSSI as compared with the original proposal.
85. The Masterplan Statement submitted with the application under condition 8 explained that the alignment of the approach to the western roundabout had been adjusted to relate

more closely to the site contours in that area (p.13). The Statement also illustrated and explained that the western parkland and open space along the southern boundary is retained. It will be enhanced by substantial new planting (pp.16-17, 25 and 33-38). Indeed, the area devoted to open space has been substantially increased. The Statement also referred to the re-profiling of land necessary for the section of the spine road which would lead to the western roundabout, something which is self-evident from the existing contours shown on the drawings (pp.18-19).

86. On 26 February 2021 the claimant’s planning consultants, Strutt and Parker, sent a letter of some 16 pages making representations on the application under condition 8 for approval of the masterplan (and also the phasing plan submitted for approval under condition 7). The letter made a large number of detailed criticisms, but at no point did it raise concerns or issues about the altered position of the roundabout on Milton Manor Road or the consequential change to the alignment of the spine road. Nor was it said that the environmental information on those aspects was insufficient. The claimant does not suggest that anyone else raised those concerns. Accordingly, the complaint now raised under ground 2 has all the hallmarks of an “after the event” challenge of the kind to which Coulson LJ drew attention in (*R Gathercole*) v *Suffolk County Council* [2021] PTSR 359 at [1].
87. The officer’s report should be read in accordance with the principles set out in *R (Mansell) v Tonbridge and Malling Borough Council* [2019] PTSR 1452 at [41] – [42] and in *R (Hayes) v Wychavon District Council* [2019] PTSR 1163 at [26]-[27]. Furthermore, a planning authority is under no obligation to give reasons for its decisions on the adequacy of the environmental information submitted to it (see e.g. *Finch* [2022] EWCA Crim 189 at [84]). There is no suggestion in this case that the reasoning in the officer’s report took into account any irrelevant consideration.
88. When the officer’s delegated report on the application under condition 8 is read as a whole, fairly, and properly in context, it is clear that the claimant’s legal challenge is untenable.
89. The officer’s report noted that there were no objections from consultees. It went on to summarise views expressed in the single representation which CCC did receive, namely that from Strutt and Parker. The report explained that in the author’s judgment the masterplan submitted under condition 8 broadly accorded with the approved parameter plans, including the plan dealing with vehicular access and movement. Specifically in relation to landscape corridors and the open space network, the report stated that the details on the submitted masterplan were substantially in accordance with the principles of the OPP and the indicative masterplan. The report addressed concerns raised by Strutt and Parker that there were insufficient details on green infrastructure and the achievement of “Garden City principles”. The officer explained that detailed proposals would have to be submitted in the reserved matters for each phase and, for green infrastructure, would also have to be submitted under conditions dealing with open space, landscaping and ecological enhancement (pp. 2 and 3). It is plainly implicit that the officer considered that the material in the Masterplan Statement on those aspects was sufficient for the purposes of an approval under condition 8. Mr. Kolinsky did not suggest otherwise.
90. Ultimately, the claimant’s submissions on this part of the legal challenge came down to the application of regulation 9(2) and 9(3) of the EIA Regulations and the concluding

paragraph of the officer's report. She stated that "sufficient information has been provided in respect of condition 08". The claimant submits that that should be read as simply summarising the officer's view on Garden City principles and green infrastructure. Consequently, it is said, the officer failed to consider the overall adequacy of the environmental information before CCC for the purposes of regulations 9(2) and (3).

91. That is the kind of excessively legalistic argument which both the Court of Appeal and this Court have deprecated for some years (see e.g. *Mansell*). The words criticised mean what they say. The officer had regard to all aspects relevant to the approval under condition 8. There is no basis for seeking to read down the broad language she used so that it is simply treated as repeating her earlier reasoning dealing with the specific points raised by Strutt and Parker. In the same vein the officer went on to state that the masterplan proposals were acceptable for the site. There is no justification for reading down that broad statement so that it only covers matters expressly addressed earlier on in the report. The document must not be read as if it were a decision letter or a document fulfilling a legal duty to give reasons.
92. There remains the allegation that CCC failed to carry out a HRA in relation to its determination of the application for approval of a masterplan under condition 8. This concerns Natural England's change of stance in relation to potential impacts on the European site at Stodmarsh so as to require new development in the Stour Valley catchment to be "nutrient neutral".
93. First, it should be noted that although Natural England raised this matter in its consultation response dated 16 October 2020 on the s.73 application (CA/20/01777), it only went so far as to say that further information was required on the significance of nutrient impact from the development and the scope for mitigation. Natural England added that without that information it might object to the proposal. Second, Natural England did not in fact raise any objection to the application for approval of the masterplan under condition 8. Third, it is apparent from the sequence of correspondence from Natural England that it regards the issue as capable of being resolved by the mitigation measures indicated for RHL's site. For example, in a letter dated 6 April 2021 on the application for approval of reserved matters in relation to phases 1 and 2, Natural England envisaged that the "appropriate assessment stage" (i.e. a stage in the future) would address SUDS wetland creation as nutrient mitigation based upon detailed design work (see also Natural England's letter of 29 April 2021). The court has not been shown any statement by Natural England raising an objection in principle which cannot be resolved by mitigation, or that the issue (and HRA) should be addressed prior to determining the condition 8 application. Natural England has been content for this subject to be dealt with under applications for approval of reserved matters. Both CCC and RHL say that a second HRA is being undertaken which will address the nutrient neutrality issue.
94. In *R (Wingfield) v Canterbury City Council* [2019] EWHC 1974 (Admin) it was held at [72] – [77] that for the purposes of the Habitats Regulations, there is no decision authorising the implementation of the project in the case of a multi-stage consent until reserved matters are approved. Reserved matters approval is the "implementing decision". Unlike the EIA Regulations, there is no legislative objective requiring HRA to be carried out at the earliest possible stage. Accordingly, HRA may lawfully be completed at the reserved matters stage, even if not carried out prior to the grant of

outline permission. The various attempts by the claimant in *Wingfield* to challenge the decision by Lang J were rejected by the Court of Appeal (as recorded in [2021] 1 WLR 2863).

95. CCC and RHL are entirely correct to submit that *Wingfield* and the decision upon which it is based, *Adastral New Town Limited v Suffolk Coastal District Council* [2015] Env. L.R. 28, provide a complete answer to this second limb of ground 2. The claimant's argument is hopeless.
96. For these reasons, ground 2 must be rejected.

#### **Ground 4**

97. Mr. Kolinsky submitted that there are conflicts between the SUDS proposals in the masterplan and the routes shown for an existing public right of way and other proposed footpaths within the development site. He says that condition 8 requires the masterplan to show "key infrastructure (including SUDS...)" and therefore it follows that such issues cannot be left to, for example, the submission of details under condition 21. The claimant insists that "the purpose of condition 8 was to require the interested party to *finalise* the drainage details contained within the "indicative" or "illustrative" masterplan.
98. This complaint is also hopeless. As Ms. Thomas points out, the document to be approved under condition 8 is a "masterplan" which, in accordance with common practice, is not drawn at a detailed scale. It is a drawing of a strategic nature setting out "principles" to be applied when details are submitted under other conditions (e.g. conditions 9, 10 and 11). In this respect, the function of the masterplan is no different for sustainable drainage as compared with its depiction of land use areas, movement corridors (including footpaths), landscape corridors and open space. Mr. Kolinsky delved into some detailed aspects of the documents before the authority (including correspondence from Strutt and Parker and from KCC) to show the alleged points of conflict. These were few in number. Mr. Tabachnik QC (who appeared for RHL with Ms. Jackson), together with Ms. Thomas, delved into other parts of the detailed material to show that, either the alleged conflicts did not exist, or they would be resolved by subsequent detailed design. It was pointed out for example, that the attenuation basins had been designed for a 1 in 140-year event and the detention basin could be provided below ground level. It is unnecessary for the Court to go any further into the evidence. It related to matters of judgment, which were for the decision-maker.
99. In her delegated report the officer referred to the claimant's concerns raised in correspondence and was satisfied that sufficient detail had been provided by RHL. I conclude that her satisfaction with this aspect of the masterplan is not open to challenge in this Court, applying the *Wednesbury* standard of review.
100. For these reasons ground 4 must be rejected.

#### **JR2**

#### **Ground 1**

101. The NMA under s.96A of TCPA 1990 approved on 8 April 2021 altered the requirement to obtain approvals under conditions 11, 15, 18, 21, 25, 26, 33 and 34 before the commencement of *any* development, so as to allow “initial earthworks” approved under condition 10 to be carried out before those approvals are obtained. Mr. Kolinsky submits that the term “initial earthworks” is not defined anywhere in the NMA, or in any material incorporated in that decision or otherwise admissible as an aid to construction. He says that that term is legally uncertain and consequently the amendments would render the conditions so amended void for uncertainty. Such an alteration is ultra vires s.96A.
102. It is well-established that the test which the claimant has to satisfy involves a high hurdle. As Lord Denning said in *Fawcett Properties Limited v Buckingham County Council* [1961] AC 636 at 678:
- “Reverting now to the examples given by Mr. Megarry, all of these were, it seemed to me, examples of ambiguity or absurdity and not of uncertainty, or at any rate, not of such uncertainty as makes a condition void. For I am of opinion that a planning condition is only void for uncertainty if it can be given no meaning or no sensible or ascertainable meaning, and not merely because it is ambiguous or leads to absurd results. It is the daily task of the courts to resolve ambiguities of language and to choose between them; and to construe words so as to avoid absurdities or to put up with them. And this applies to conditions in planning permissions as well as to other documents. If you should take any of Mr. Megarry's examples the courts, I am sure, could say whether the case came within the condition or not. They would not have to give up the task in despair.”
103. In *Trump* the Supreme Court reaffirmed the correctness of the principle in *Fawcett* (see [2016] 1 WLR 85 at [27]). The principle applies more widely in public law, for example, to the validity of bye laws and both to uncertainty of language and uncertainty of application (*Percy v Hall* [1997] QB 924).
104. Mr. Kolinsky said that if the conditions had been amended so as to refer to “earthworks” approved under condition 10, rather than “initial earthworks” approved under that condition, then the uncertainty argument would not have arisen. He submits that the mechanism supplied by condition 10 for the approval of reserved matters cannot overcome the uncertainty he criticises, because the language of condition 10 does not require the developer to specify works which are “initial earthworks” or to obtain approval for “initial earthworks” as such.
105. I am in no doubt that the claimant’s argument must be rejected. There is no uncertainty of language or of application in the alteration to conditions made by the NMA. The initial earthworks are to be identified by obtaining an approval to those works under condition 10, just as if an approval had been obtained under that condition for all earthworks to be carried out. Conceptually, the position is no different from the conditions for defining phases and then the detailed works in each phase. Definition is achieved through the controls exercisable by the planning authority under the condition. If those controls are wide enough to embrace the subject in question, then it does not matter whether that subject is expressly referred to in the language creating those

controls. In any event, condition 10 explicitly states that the details of layout for which approval is required include earth modelling, mounding, regrading and changes in level.

106. Equally, it does not matter that the relevant works are identified by an approval under a condition given subsequent to the NMA. The legal certainty of the NMA does not depend on the initial earthworks having been defined at the stage of granting the NMA (see also *Trump* at [28]-[30]).
107. For these reasons, the argument that the NMA rendered the conditions altered void for uncertainty is untenable. Accordingly, ground 1 must be rejected. For completeness, I record that an application was made for approval under condition 10 of initial earthworks, which was granted on 8 October 2021.

### **Grounds 2 and 3**

108. These grounds are relied upon by the claimant if ground 1 should fail, so that the amendment of conditions 11, 15, 18, 21, 25, 26, 33 and 34 is not void for uncertainty. First, it is submitted that CCC was not entitled to conclude, as it did, that the amendments would not prejudice the delivery or satisfaction of those conditions without obtaining further information. Essentially, the claimant's argument is that the authority could not lawfully reach the conclusion that those conditions would not be prejudiced without knowing about the nature and extent of the works to be treated as "initial earthworks". Therefore, CCC was obliged under the *Tameside* principle to require that information to be presented to them before they determined the application for the NMA.
109. The NMA was determined by a planning officer acting under delegated powers. The officer concluded in her report that the carrying out of initial earthworks in the absence of details submitted and approved under the relevant conditions would not prejudice their delivery. She gave specific reasons in relation to conditions 18, 21, 25 and 26.
110. The claimant complains that no explanation was given in the report as to why the amendment would not prejudice the delivery of an open space strategy under condition 11. It is submitted that "initial earthworks" might include the creation of mounds and the digging of ditches which could impinge upon the nature and location of open spaces, as well as landscaping. Details of landscaping as a reserved matter under condition 10 are to accord with the open space strategy approved under condition 11.
111. The officer's delegated report should be read in accordance with the principles referred to above ([87]). There was no obligation for the officer to give reasons. The case is not remotely analogous to, for example, *R (CPRE Kent) v Dover District Council* [2018] 1 WLR 108. Mr. Kolinsky did not suggest otherwise. Furthermore, the officer should be accorded an appropriate margin of respect for her professional expertise and judgment.
112. In relation to condition 21 dealing with the approval of details of SUDS for each phase, the claimant submits that "initial earthworks" approved under condition 10 could include work for the creation of drainage systems, or might prejudice their delivery by affecting site levels and ground conditions.

113. Conditions 25 and 26 require details of surface water infiltration into the ground and the disposal of foul water to be approved for any phase before any development in that phase may be begun. The claimant says that “initial earthworks” approved under condition 10, once again, could affect site levels and ground conditions and therefore prejudice the proper operation of conditions 25 and 26.
114. Not surprisingly, the claimant does not allege in relation to any of the conditions amended by the NMA, that the carrying out of “initial earthworks” to be defined and approved under condition 10, would necessarily prejudice the delivery of any of those conditions. The claimant only goes so far as to say that those works *might* do so.
115. There are two points, either of which is sufficient to dispose of these complaints. First, the officer’s conclusion that the NMA would not prejudice the operation of the conditions amended was a matter of planning judgment on a relatively technical set of topics. That judgment may only be challenged on the grounds of irrationality. The hurdle for establishing that ground is very high, particularly on technical issues (*R (Newsmith Stainless Limited) v Secretary of State for the Environment, Transport and the Regions* [2017] PTSR 1126 and *R (Mott) v Environment Agency* [2016] 1 WLR 4338). The claimant has not begun to show how the court could possibly intervene on the ground of irrationality.
116. Second, at the stage when “initial earthworks” are proposed under condition 10, it will be possible for CCC to consider whether those works could prejudice matters still to be approved under the conditions amended by the NMA. The authority would still retain adequate control in relation to the approval of those earthworks and would still be able to consider whether such approval could prejudice the operation of those conditions.
117. Furthermore, the alleged failure on the part of the authority to obtain information on the nature and extent of the “initial earthworks” before approving the NMA could not succeed unless the claimant is able to demonstrate that it was irrational for the approval to be granted without that material (*R (Khatun) v Newham London Borough Council* [2005] QB 37 at [35]; *R (Balajigari) v Secretary of State for the Home Department* [2019] 1 WLR 4647 at [70]). Subject to that test, it is for the decision-maker, not the court, to decide upon the manner and intensity of any inquiry into any relevant factor, including whether to make any such inquiry (*Flintshire County Council v Jayes* [2018] EWCA Civ 1089 at [14]). In my judgment there is no basis for treating CCC’s approach as irrational. In any event, the authority retains control under condition 10 over the approval of any initial earthworks and their relationship to the conditions amended by the NMA.
118. For completeness, I should make it clear that there is no basis for the claimant to suggest that CCC failed to have regard to any material consideration when approving the NMA, applying the tests in *Oxton Farms v Harrogate Borough Council* [2020] EWCA Civ 805 and *R (Friends of the Earth Limited) v Secretary of State for Transport* [2021] PTSR 190 at [116] to [121].
119. For these reasons, grounds 2 and 3 must be rejected.

## Ground 4

120. Mr. Kolinsky also seeks to challenge that part of the NMA which amended condition 9 of the OPP. Originally condition 9 prevented the submission of an application for approval of reserved matters for any phase until the design code parameters for that phase had been approved. Now the reserved matters in relation to a particular phase may be submitted before the approval of the relevant design code parameters. However, those reserved matters cannot be approved before the relevant design code parameters are approved. The amendment simply allows some overlap between the two application procedures. Plainly, the authority's assessment of whether to approve reserved matters for a phase uses the design code parameters which must already have been approved under condition 9 for that phase. That also appears from the "reason" stated for the imposition of condition 9.
121. Mr. Kolinsky submits that condition 9 forms part of a raft of conditions, particularly conditions 7 to 11, which were designed to ensure that the phased development of the site as a whole takes place in a co-ordinated way. But in my judgment, the amendment of condition 9 is not inimical to that objective. First, it does not alter the operation of conditions 7 and 8. Second, a reserved matter application must accord with the Open Space Strategy already approved under condition 11. I also agree with the submission of Mr. Tabachnik that the amendment to condition 9 may assist CCC by enabling them to assess proposed design code parameters alongside proposed reserved matters for that phase. Of course, the authority may refuse to approve the design code parameters proposed, or require them to be amended, in which case the application for approval of reserved matters may have to be withdrawn or amended. That is a risk which the developer takes if it decides to submit a reserved matters application before the design code parameters for that phase are approved.
122. The claimant is wholly wrong to suggest that the effect of the amendment of condition 9 is that applications for approval of reserved matters cannot meaningfully be based upon approved design code parameters or that the amendment gives rise to a risk of *ad hoc* or piecemeal development.
123. In any event, the question of whether the amendment of condition 9 amounted to a non-material amendment of the OPP was a matter of planning judgment for CCC. There is no arguable basis for contending that that judgment was irrational or otherwise open to challenge applying *Wednesbury* principles.
124. I entirely agree with Swift J that permission should not be granted for ground 4.

## JRs 3, 4, 5, 6 and 7

125. CCC and RHL submit that if certain grounds of challenge in JR1 or JR2 succeed then relief should be refused under section 31(2A) of the Senior Courts Act 1981. In part, they rely upon later decisions which are the subject of subsequent applications by the claimant for judicial review, where the question of permission has not yet been determined. That is because the claimant made an application for JR4 to be stayed pending the court's determination of JR1 and JR2. The defendant and interested party opposed that application unsuccessfully. That argument having been lost, the remaining applications for judicial review were stayed by consent.

126. During the hearing it was a matter of some concern for the Court to be told by the parties that if it should reach the stage of having to apply s.31(2A) in relation to a ground affected by a subsequent judicial review, then JR1 and/or JR2 should be adjourned to a second hearing so that submissions could be made on whichever subsequent application for judicial review was relevant.
127. Paragraph 8 of the claimant’s submissions dated 7 January 2022 stated that the subsequent judicial reviews are largely parasitic upon JR1 and JR2 but “not entirely so”. One instance was given where there would remain a freestanding challenge to a subsequent decision, namely the “Earthworks approval”. However, unhelpfully, the claimant did not identify all such points.
128. These circumstances only serve to show that the applications to stay the subsequent claims for judicial review were inappropriate. If the other claims had been entirely parasitic then it is difficult to see why they should not have been resolved, one way or another, at the same time as JR1 and JR2. The bundles for the present hearing contain material relating to those other decisions and it is unlikely that it would have been necessary to augment those bundles substantially. Alternatively, if there were to be freestanding issues needing to be resolved, then it would have been better for them to be dealt with by the same judge in the same hearing, rather than require that judge to be redeployed to a second hearing, with the consequential delay involved. That would involve an inefficient and disproportionate use of the court’s resources (which include the deployment of Queen’s Bench judges across a wide range of jurisdictions). It would also disadvantage other parties waiting for their cases to be heard. All this is contrary to the overriding objective in CPR 1.1 and the ethos of the Planning Court. It is difficult to see why both sides to this dispute could not have seen this situation arising before the beginning of January this year and sought directions from the Court for the lifting of the stay.
129. Given the way in which the grounds of challenge have been determined, it is unnecessary for the Court to apply s.31(2A) in either JR1 or JR2. But plainly the claimant must now identify without delay any free-standing issues in the five other applications for judicial review which she contends still need to be determined. Any such issues should be resolved by the Court as expeditiously as possible. The claimant must also identify all grounds which are parasitic upon the outcome of this claim.

## **Conclusions**

130. Ground 1 in JR1 raised an objective question of law for the Court to determine, the interpretation of the OPP. The Court had the benefit of full and helpful argument from all parties and that issue has now been resolved. The other grounds of challenge mainly involved excessively legalistic criticisms of the decision-making by CCC. The words of Sir Geoffrey Vos C (as he then was) in *Mansell* at [62]-[63] need to be re-emphasised. They apply *mutatis mutandis* to reports written for officers exercising delegated functions (see e.g. *Hayes*) as well as for planning committees:
- “62. planning decisions are to be made by the members of the planning committee advised by planning officers. In making their decisions, they must exercise their own planning judgment and *the courts must give them space to undertake that process.*
63. Appeals should not, in future, be mounted on the basis of a legalistic analysis of the different formulations adopted in a

planning officer's report. An appeal will only succeed, as Lindblom LJ has said, if there is some distinct and material defect in the report. Such reports are not, and should not be, written for lawyers, but for councillors who are well-versed in local affairs and local factors. Planning committees approach such reports utilising that local knowledge and much common sense. They should be allowed *to make their judgments freely and fairly without undue interference by courts or judges* who have picked apart the planning officer's advice on which they relied." (emphasis added)

131. The renewed application for permission to apply for judicial review in respect of ground 4 in JR2 is refused. The other grounds of challenge have been rejected and so the claims for judicial review in JR1 and JR2 are dismissed.

## Annex

5 The development hereby approved shall comprise:

- a maximum of 400 dwellings
- no less than 200 sqm of community /leisure floorspace
- no less than 3,716 sqm of employment floorspace (Use Class B1)

**REASON:** In the interests of certainty as to what is permitted.

6 The development hereby permitted shall be carried out in accordance with the following approved plans, in respect of those matters not reserved for later approval:

- Land Use Parameter Plan: 2780-01 OD
- Open Space Parameter Plan: 2780-01 5C
- Vehicular Access and Movement Parameter Plan: 2780-012F
- Pedestrian and Cycle Access Parameter Plan: 2780-011D
- Density Parameter Plan: 2780-013C
- Building Heights Parameter Plan: 2780-014C

**REASON:** In the interests of sustainable development and to ensure that the development is carried out in accordance with the development as approved and the assumptions underpinning the Environmental Impact Assessment

7 No development shall take place until a Phasing Plan which shall be broadly in accordance with the Indicative Phasing Plan at Figure 5.3 within the Environmental Statement (Revision 2, November 2017) and shall include justification for the proposed Phases, demonstrate the timescale for the delivery of the development broadly in accordance with the most up to date Housing Trajectory as set out in the Local Plan or draft Local Plan, and include the order of the delivery of the proposed phases, has been submitted to and approved in writing by the local planning authority. The phasing of the development shall not be carried out otherwise than in accordance with the approved plan.

All reserved matters submissions shall accord with the Phasing Plan as approved by the Local Planning Authority. Any references to a Phase of the development within this permission shall be taken to be a reference to phases as identified on the approved Phasing Plan submitted under this condition.

**REASON:** In the interests of the proper development of the area and to achieve sustainable development.

8 No development shall take place until a Masterplan for the entire application site, which shall substantially be in accordance with the Indicative Masterplan within the Environmental Statement (drawing no.2780-002 Rev K), has been submitted to and approved in writing by the Local Planning Authority. This shall include the following:

- Principles of the proposed layout design that demonstrate how the surrounding urban and rural context have been taken into account
- Principles of land form topography as existing and proposed
- Details of how the development will achieve Garden City principles
- Land use plan showing the location of the residential development, employment floorspace, open space, community hub, including densities of development
- Movement corridors within the site (including principal roads, public transport corridors, footpaths, cycleways and green corridors) and demonstrating how these relate to existing movement networks in the wider area
- Key infrastructure (including SUDs, significant utility provision)
- Landscape corridors and open space network
- Public open space

**REASON:** To ensure high quality design and coordinated development against which to assess reserved matters applications and to ensure a satisfactory appearance to the development.

9 Prior to the submission of any application for the approval of any reserved matters for any phase approved under Condition 7, design code parameters for that phase shall be submitted to and approved in writing by the Local Planning Authority.

The design code parameters shall be in accordance with the principles and parameters established by the Design and Access Statement, the approved parameter plans set out in Condition 6, the Masterplan approved under Condition 8, Open Space Strategy approved under Condition 11 and shall include, but not be limited to:

- A masterplan showing the relationship of built development and open space, including
  - Principles of the proposed layout design that demonstrate how the surrounding urban and rural context have been taken into account
  - Principles of landform topography as existing and proposed  
Details of how the development will achieve Garden City principles

- Land use plan showing the location of the residential development, employment floorspace, open space, community provision, including densities of development
- Movement corridors within the site (including public transport corridors, footpaths, cycleways and green corridors) and demonstrating how these relate to existing movement networks in the wider area
- Key infrastructure (including SUDs, significant utility provision,)
- Landscape corridors and open space network
- Public open space

- The character, mix of uses and heights, as established through the approved parameter plans.
- The street hierarchy, including the principles and extent of the proposed adoptable highway, along with traffic calming measures.
- How the design of the streets takes into account the mobility and accessibility of users and promotes active travel.
- Typical street cross-sections which will include details of tree planting, tree species, and on street parking.
- Block principles to establish density and building typologies. In addition, design principles including primary frontages, pedestrian access points, fronts and backs and threshold definition shall be provided;
- Building typologies should include information about height, scale, form, level of enclosure, building materials and design features;
- Details of the approach to vehicular parking across the entire site including levels of provision, the location and layout of parking for people with disabilities and for each building type;
- Measures to demonstrate how the design can maximise resource efficiency and climate change adaptation through external, passive means, such as landscaping, orientation, massing, and external building features;
- Details of measures to minimise opportunities for crime;
- Measures to show how design and orientation will address/minimise the impact of traffic noise etc. on future residents.
- Measures to show how design, orientation and the use of materials will mitigate the landscape and visual impact of the development.

**REASON:** To ensure a high-quality design and coordinated development against which to assess reserved matters applications and to ensure a satisfactory appearance to the development.

10 Each Reserved Matters application shall be accompanied, as appropriate, by the following documents and/or information:

- A Design Statement that demonstrates how the proposals accord with the approved parameter plans and design code parameters and in the case of

any variation explain the reason for that change and the explain the nature of the change.

- In relation to the matter of access: details (including specifications) of the access to the sub-phase and within the sub-phase for vehicles, cycles and pedestrians (including Access for All standards).
- In relation to the matter of layout a Reserved Matters application shall include:
  - details of the siting and orientation of the proposed buildings and any relevant roads, as well as the location of any landscaped or open space areas;
  - details of any necessary temporary layout associated with boundary treatment and condition between the sub-phases
  - details of parking areas, servicing areas, and plant areas
  - details of cycle parking
  - details of any public rights of way affected by the proposal
  - details and specification (including cross sections if necessary) of proposed earth modelling, mounding, re-grading or changes of level to be carried out including spot levels where relevant, details of storing commercial refuse, including recyclable material and point of collection.
- In relation to scale and appearance a Reserved Matters application shall include:
  - details of building heights and massing
  - details of housing mix including the mix and location of affordable housing, which shall meet the local housing needs, as set out in the Council's Housing Strategy
  - details of the internal layout of buildings with space standards indicated
  - details of the external treatment and design of the buildings
  - details of finished floor levels
- In relation to the matter of landscaping a Reserved Matters application shall include:
  - plans, drawings, sections, and specifications to explain full details of the hard and soft landscaping treatment and works including; materials (size, type and colour), proposed drainage arrangements, children's play equipment, street furniture, lighting columns/brackets, private and communal areas, opens spaces, edges, boundary

treatments, public rights of way and roads in accordance with the overarching Open Space Strategy approved under Condition 11

☞ tree planting details and specification of all planting in hard and soft landscaped areas

☞ details of the programme for implementing and completing the planting

In relation to the matter of access a Reserved Matters application shall include:

- The highway details to be provided shall comprise:
  - a) the width and configuration of proposed carriage way layouts including any footways and verges;
  - b) the width and configuration of any footpaths and cycleways;
  - b) the details of any PROW closure or diversion, including route and time period
  - c) the layout and configuration of junctions and roundabouts within the site;
  - d) the layout of street lighting;
  - e) the layout and configuration of surface water sewers, drains and outfalls serving the highway;
  - f) the layout and configuration of retaining walls and highway supporting structures;
  - g) the layout of service routes and corridors within highways;
  - h) identification of any vehicle overhang margins, embankments, visibility splays, property accesses, carriageway gradients, driveway gradients, car parking and street furniture.
- The gradient of vehicular accesses shall be no steeper than 1 in 10 for the first 1.5 metres from the highway boundary and no steeper than 1 in 8 thereafter.
- Before their first use the surface of vehicular accesses shall be a bound surface for the first five (5.0) metres of the access from the edge of the highway and this surface shall be permanently maintained thereafter.
- Measures that demonstrate how the Phase or sub-phase will meet Garden City principles
- Measures that demonstrate how the Phase or sub-phase will accord with the Open Space Strategy approved under Condition 11
- ☞ Measures that demonstrate how the Phase or sub-phase will positively contribute to the objectives of the Energy Strategy

**REASON:** In order that the Reserved Matters Applications can be properly considered and assessed against the approved Parameter Plans and Design Code and in the interests of proper planning.

11 No development shall take place unless and until an overarching Open Space Strategy has been submitted to and approved in writing by the local planning authority. The Open Space Strategy shall be in accordance with the Masterplan approved under condition 8 and the 'Open Space' parameter plan (drawing no.2780-015 Rev C) and shall:

- Demonstrate that the structural planting to the west of proposed built development shall take place within the first Phase of the development
- Demonstrate the quantum of open space to be provided on site in accordance with the approved Open Space Parameter Plan: 2780-015C and the 'Open Space, Sports Pitch Provision and Community Benefits' statement dated September 2017
- Demonstrate that that the public open space will be planted, established and accessible prior to the first occupation of the proposed development
- Identify the approximate location of the main areas of formal and informal open space to be provided within the development and set out a proposed programme for its delivery linked to the development phases;
- Outline the local play space and the distribution of play areas within the development and set out a proposed sequence for their delivery linked to the development phases;
- Set out (i) a proposed programme for delivery of the area of proposed allotments linked to the development phases, and (ii) proposals for future management of the allotment area.

Development and delivery of open spaces shall be carried out in accordance with the approved Open Space Strategy.

**REASON:** In the interests of nature conservation in relation to Larkey Woods SSSI, in the interests of the visual amenities of the area and the Area of High Landscape Value and to adequately integrate the development into the environment in accordance with policies DBE3 and LB10 of the Canterbury District Local Plan 2017

12 Prior to the commencement of development an Ecological Mitigation Strategy for the entire application site shall be submitted to and agreed in writing with the Local Planning Authority. The content of the Strategy shall be in accordance with the mitigation principles within the details submitted in respect of the planning application hereby approved and the Environmental Statement, including provision of 4.3ha of compensatory woodland habitat and off-site skylark habitat as set out within the Environmental Statement (Version 2, November 2017) within the first phase of development, and shall include:

- A statement of purpose and objectives;

- Measures, informed by ecological survey work, to achieve the stated objectives;
- Details of the extent and location of proposed mitigation works (including biodiversity protection areas) shown on plans of an appropriate scale;
- Details of the nature and extent of habitat creation for all habitat types to include the specification of native seed mixes and species for tree/shrub planting;
- Habitat enhancement measures for species, to include the specification and location of features such as bat and bird boxes/bricks and reptile hibernacula;
- Ecological design considerations for the proposed sustainable drainage system;
- Habitat management practices to promote biodiversity within the retained areas of woodland, scrub and grassland habitat and within new areas of habitat creation;
- Means of implementation of the plan, including persons responsible and provision for specialist ecologist(s) to be present on site to oversee works;
- Programme of and arrangements for monitoring against stated and measurable objectives;
- Procedure for the identification, agreement and implementation of contingencies and/or remedial actions where the monitoring results show objectives are not being met;
- A management plan and maintenance plan for the lifetime of the development and details of the body/organisation(s) responsible for implementation of the plan.
- Details of the educational material to be provided to occupiers of the proposed development in relation to the Larkey Woods SSSI
- Details of the measures to prevent direct access to Larkey Wood SSSI other than the existing access including additional signage

The overarching Ecological Mitigation Strategy shall be implemented in accordance with the approved details, unless varied by a European protected species mitigation licence subsequently issued by Natural England.

**REASON:** In the interests of nature conservation in relation to Larkey Wood SSSI, in the interests of preserving protected species and their habitats having regards to paragraph 118 of the National Planning Policy Framework and in accordance with policy LB9 of the Canterbury District Local Plan 2017.

13 Prior to the commencement of development a Landscape and Ecological Management Plan (LEMP) for the entire application site, in accordance with the principles contained in the submitted Environmental Statement and green infrastructure parameter plan, shall be submitted to and approved in writing by the

local planning authority. The LEMP shall provide the overarching approach to landscape and ecological management and shall include the following:

- Description and evaluation of features to be managed;
- Aims and measurable objectives of management;
- Identification of ecological enhancement measures set out in the Environmental Statement
- Appropriate management prescriptions for achieving aims and objectives;
- Preparation of a work schedule (including an annual work plan capable of being rolled forward over the duration of the Plan);
- Ongoing habitat and species monitoring provision against measurable objectives;
- Procedure for the identification, agreement and implementation of contingencies and/or remedial actions where the monitoring results show that the objectives are not being met;
- Details of the body/ies or organisation/s responsible for implementation of the plan.

The approved plan shall be implemented in accordance with the approved details.

**REASON:** In the interests of preserving protected species and their habitats having regards to paragraph 118 of the National Planning Policy Framework.