Case No: C1/2003/0212

Neutral Citation No: [2003] EWCA Civ 1408
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM QUEEN'S BENCH DIVISION
(Mr Justice Richards)

Royal Courts of Justice
Strand,
London, WC2A 2LL

Thursday 16th October 2003

Before :

LORD JUSTICE LAWS
LORD JUSTICE DYSON
and
LORD JUSTICE CARNWATH

- -

Between :

THE QUEEN on the APPLICATION OF JONES	Appellant
- and -	
MANSFIELD DISTRICT COUNCIL and Another	Respondent

- -

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

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Mr David Wolfe of Counsel (instructed by Public Interest Lawyers) for the Appellant
Mr John Steel QC and Ms Sarah Jane Davies of Counsel (instructed by Messrs Brown Jacobson) for the Respondent

- -

Judgment
As Approved by the Court

Lord Justice Dyson :

Introduction

1. Dawn Jones lives adjacent to a 28.4 hectare site which at the present time is open countryside. On 5 November 2001, Mansfield District Council, the local planning authority ("the council"), determined to grant outline planning permission for the use of the site as an industrial estate. By a claim form dated 17 December 2001, Ms Jones challenged the legality of this decision on the basis that it had been reached without proper consideration of whether an Environmental Impact Assessment ("EIA") was required before permission could be granted. The council agreed to reconsider the question of whether an EIA was needed. On 25 February 2002, its planning committee considered two reports from the Head of Planning and Building Controls. These were (a) a report again recommending that an EIA was not required ("the first report"); and (b) a report recommending that outline planning permission be granted for the industrial estate ("the second report"). At its meeting of 25 February 2002, the planning committee determined that an EIA was not required and that planning permission should be granted. By these proceedings, Ms Jones challenges both decisions, contending that the second was unlawful by reason of the flaw in the first. In a judgment delivered on 20 January 2003, Richards J dismissed her application for judicial review. He concluded that the council's decision not to require an EIA was reasonable and lawful, so that the challenge to the grant of planning permission also failed. Ms Jones appeals with the permission of Laws LJ.

Legal framework

2. The application for planning permission was made on 15 October 1998. Accordingly, the relevant regulations are the Town and Country Planning (Assessment of Environmental Effects) Regulations 1988 ("the Regulations"). The Regulations implement Council Directive 85/337/EEC of 17 June 1995 on the assessment of the effects of certain public and private projects on the environment ("the Directive").

3. The summary of the legal framework that follows is substantially based on that given by the judge. Regulation 4(2) of the Regulations provides:

> "The local planning authority or the Secretary of State or an inspector shall not grant planning permission pursuant to an application to which this regulation applies unless they have first taken the environmental information into consideration and state in their decision that they have done so."

4. The question in this case is whether the application was one to which regulation 4 applied. Regulation 4(1) provides that regulation 4 applies inter alia to any "Schedule 2 application", which is defined by regulation 2(1) in these terms:

> "Schedule 2 application means … an application for planning permission … for the carrying out of development of any description mentioned in Schedule 2, which is not exempt development and

> which would be likely to have significant effects on the environment by virtue of factors such as its nature, size or location."

5. It is common ground that the development in this case is of a description mentioned in Schedule 2, namely "an industrial estate development project" (Schedule 2, paragraph 10(a)), and that it is not exempt development. Regulation 4 therefore applies to it if, but only if, it "would be likely to have significant effects on the environment by virtue of factors such as its nature, size or location".

6. Regulation 2(2) provides:

> "Where the Secretary of State gives a direction which includes a statement that in his opinion proposed development would be likely, or would not be likely, to have significant effects on the environment by virtue of factors such as its nature, size or location, or includes such a statement in a notification under regulation 10(1), that statement shall determine whether an application for planning permission for that development is, or is not, a Schedule 2 application by reason of the effects the development would be likely to have; and references in these Regulations to a Schedule 2 application shall be interpreted accordingly."

7. Where it is decided that an application for planning permission is a Schedule 2 application so that regulation 4 applies to it, the obligation in regulation 4(2) is, as indicated, to take the "environmental information" into consideration. "Environmental information" is defined in regulation 2(1) as "the environmental statement prepared by the applicant or appellant …, any representations made by any body required by these Regulations to be invited to make representations or to be consulted and any representations duly made by any other person about the likely environmental effects of the proposed development".

8. An "environmental statement" is defined as such a statement as is described in Schedule 3, which provides so far as material:

> "1. An environmental statement comprises a document or series of documents providing, for the purpose of assessing the likely impact upon the environment of the development proposed to be carried out, the information specified in paragraph 2 (referred to in this Schedule as "the specified information").
>
> 2. The specified information is –
>
> (a) a description of the development proposed, comprising information about the site and the design and size or scale of the development;
>
> (b) the data necessary to identify and assess the main effects which that development is likely to have on the environment;

> (c) a description of the likely significant effects, direct and indirect, on the environment of the development, explained by reference to its possible impact on: human beings; flora; fauna; soil; water; air; climate; the landscape; the interaction between any of the foregoing; material assets; the cultural heritage;
>
> (d) where significant adverse affects are identified with respect to any of the foregoing, a description of the measures envisaged in order to avoid, reduce or remedy those effects;
>
> (e) a summary in non-technical language of the information specified above."

9. Although they were not directly invoked in this case, it is relevant to note the provisions of regulation 5 concerning the giving of "screening" opinions in advance of an application for planning permission. By regulation 5(1), a person who is minded to apply for planning permission may ask the local planning authority to state in writing whether in their opinion the proposed development would be within a description mentioned in Schedule 1 or Schedule 2 and, if so, (a) within which such description and (b) if it falls within a description in Schedule 2, whether its likely effects would be such that regulation 4 would apply. By regulation 5(2), such a request must be accompanied by inter alia (a) a plan sufficient to identify the land and (b) a brief description of the nature and purpose of the proposed development and of its possible effects on the environment. By regulation 5(3) the authority shall, if they consider that they have not been provided with sufficient information to give an opinion on the questions raised, notify the person making the request of the particular points on which they require further information. Regulation 5(4) provides that the authority shall respond to a request within three weeks or such longer period as may be agreed in writing with the person making the request. Regulation 6 contains corresponding provisions as to the giving of pre-application directions by the Secretary of State.

10. So far as material, the Directive provides as follows. By its recitals:

> "Whereas the 1973(4) and 1977(5) action programmes of the European Communities on the environment…..stress that the best environmental policy consists in preventing the creation of pollution or nuisances at source, rather than subsequently trying to counteract their effects;
>
> Whereas they affirm the need to take effects on the environment into account at the earliest possible stage in all the technical planning and decision-making processes; whereas to that end, they provide for the implementation of procedures to evaluate such effects;
>
> …..
>
> Whereas general principles for the assessment of environmental effects should be introduced with a view to supplementing and coordinating development consent procedures governing public and private projects likely to have a major effect on the environment;

> Whereas development consent for public and private projects which are likely to have significant effects on the environment should be granted only after prior assessment of the likely significant environmental effects of these projects has been carried out…"

11. Article 2 provides:

> "1. Member States shall adopt all measures necessary to ensure that, before consent is given, projects likely to have significant effects on the environment by virtue inter alia, of their nature, size or location are made subject to an assessment with regard to their effects. These projects are defined in Article 4."

12. Article 4 provides:

> "2. Projects of the classes listed in Annex II shall be made subject to an assessment, in accordance with Article 5 to 10, where Member States consider that their characteristics so require. To this end Member States may inter alia specify certain types of projects as being subject to an assessment or may establish the criteria and/or thresholds necessary to determine which of the projects of the classes listed in Annex II are to be subject to an assessment in accordance with Articles 5 to 10."

The facts

13. In view of the comprehensive statement of the relevant facts given by the judge at paragraphs 16-29 of his judgment, I do not propose to venture a summary of my own. It is sufficient that I append his summary of the facts as an appendix to this judgment.

The role of the court

14. The judge said (para 7) that the question whether the development "would be likely to have significant effects on the environment by virtue of factors such as its nature, size or location" was a matter for decision by the local planning authority, subject to review on *Wednesbury* grounds. The correctness of this proposition does not seem to have been in issue before the judge, and it was not challenged in the grounds of appeal. During the course of oral argument, Carnwath LJ raised the point with counsel, and suggested that the question might be one for the court to decide as a question of primary fact. In the course of his reply, Mr Wolfe embraced this suggestion, and submitted, but very briefly and without developing the point, that the decision of the council was not subject to a *Wednesbury* review, but to a full appeal on the facts and the law. It is unfortunate that the point was the subject of only the most exiguous argument. In these circumstances, I do not propose to deal with it at any great length.

15. In my judgment, the judge was right. The decision of the highest authority that he cited in support of his view was *Berkeley v Secretary of State for the Environment* [2001] 2 AC 603,

at 610G-H and 614G-615A. It is true that neither of these passages provides explicit support for the judge's conclusion. In the first, Lord Hoffmann said that, in the absence of a direction by the Secretary of State pursuant to regulation 2(2), the question whether an application is or is not a Schedule 2 application "is left to be determined in the first instance by the opinion of the local planning authority". In the second passage, he said in relation to a direction under regulation 2(2): "if no reasonable Secretary of State could have considered that the club's application was a Schedule 2 application, the judge would of course have been entitled to rule that no EIA could have been required". As I have already stated, regulation 2(2) provides that "Where the Secretary of State gives a direction which includes a statement that in his opinion proposed development would be likely….", that statement is determinative. There is no corresponding express reference to the role of the local planning authority. But as Lord Hoffmann said, in the absence of a direction by the Secretary of State under regulation 2(2), it is for the local planning authority to determine whether an application is a Schedule 2 application.

16. It is right to say that Lord Hoffmann did not deal specifically with the role of the court in any challenge to a decision by a local planning authority. But it would be very surprising if the nature of the court's reviewing function were to differ according to whether the decision as to whether the application is a Schedule 2 application is made by the local planning authority or the Secretary of State. The question that is left to be determined in the first instance by the local planning authority is the same as the question that is determined by the Secretary of State pursuant to regulation 2(2). I do not consider that the use of the word "opinion" in regulation 2(2) indicates that there is any difference. The fact that the decision of the local planning authority may be overridden by a formal direction of the Secretary of State does not justify or require a different role for the court in the two cases. Accordingly, I would hold that what Lord Hoffmann said in relation to challenges to decisions by the Secretary of State applies equally to challenges to decisions by local planning authorities.

17. Whether a proposed development is <u>likely</u> to have <u>significant</u> effects on the environment involves an exercise of judgment or opinion. It is not a question of hard fact to which there can only be one possible correct answer in any given case. The use of the word "opinion" in regulation 2(2) is, therefore, entirely apt. In my view, that is in itself a sufficient reason for concluding that the role of the court should be limited to one of review on *Wednesbury* grounds.

18. I note that in *Aannemersbedriijf P K Kraaijeveld v Gedeputeerde Staten Van Zuid-Holland* [1997] 3 CMLR 1, the ECJ said:

> "[59] The fact that in this case the Member States have a discretion under Articles 2(1) and 4(2) of the directive does not preclude judicial review of the question whether the national authorities exceeded their discretion (see, in particular, VERBOND VAN NEDERLANDSE ONDERNEMINGEN).
>
> [60] Consequently where, pursuant to national law, a court must or may raise of its own motion pleas in law based on a binding national rule which were not put forward by the parties, it must, for matters within its jurisdiction, examine of its own motion whether the legislative or administrative authorities of the Member State remained

> within the limits of their discretion under Article 2(1) and 4(2) of the directive…"

It seems to me that this passage (particularly the reference to administrative authorities having a "discretion") supports the view that I have just expressed. I take the word "discretion" to mean an exercise of judgment, rather than discretion in the strict sense.

What is the correct approach to the question whether the development would be likely to have a significant effect on the environment?

19. On the face of it, the language of Schedule 2 to the Regulations is clear. The words "and which would be likely to have significant effects on the environment" reappear in regulation 2(2), and they reflect precisely the language of Article 2(1) of the Directive. There is, therefore, no apparent conflict between the Regulations and the Directive which requires resolution in favour of the Directive: see *Marleasing* [1990] ECR 1 – 4135.

20. The judge summarised his interpretation of the relevant words in the following way:

> "51. In my view it is important not to over-complicate the analysis of this issue, as Mr Wolfe seemed to me on occasion to do by, for example, his references to a "bounding principle" and to "bounded uncertainty" and "unbounded uncertainty". In any event I reject the contention that an authority is subject to a "bounding principle" whereby it must require an EIA unless confident or positively satisfied that the proposed development will not have significant effects on the environment, and that any uncertainty must be resolved in favour of requiring an EIA. I also reject the contention that there is a low gateway or threshold for the application of the EIA regime. Of course it is important, in view of the objectives of the Directive, that a lawful decision is made as to whether an EIA is required; but I do not think that any gloss is required on the provisions of the 1988 Regulations.
>
> 52. The straightforward position is that under the regulations an EIA is required if a non-exempt development of a Schedule 2 description "would be likely to have significant effects on the environment by virtue of factors such as its nature, size or location". It is only <u>significant</u> effects that bring a development within the scope of the EIA regime; minor environmental effects do not do so, though all such effects may fall to be taken into account in the normal way as material considerations (cf. the observations of Sullivan J in <u>Milne</u> e.g. at para 113, in relation to the details to be included in an environmental statement where an EIA is required). It is for the authority to judge whether a development would be likely to have significant effects. The authority must make an informed judgment, on the basis of the information available to it and having regard to any gaps in that information and to any uncertainties that may exist, as to the likelihood of significant environmental effects. The gaps and uncertainties may or may not make it impossible reasonably to

> conclude that there is no likelihood of significant environmental effects. Everything depends on the circumstances of the individual case."

21. Mr Wolfe submits that the Directive and the Regulations should be construed so as to give effect to the broad scope and purpose of the Directive stated in the recitals, including, in particular, the objective of taking into account environmental information at the earliest possible stage, ie before planning permission is granted. Accordingly, he submits that Schedule 2 projects which may have significant environmental effects must be the subject of an EIA; a conclusion that a development would be unlikely to have significant effects can be properly reached only after a comprehensive assessment; and a comprehensive assessment must leave no uncertainties unresolved or impacts to be assessed after the grant of planning permission. In short, where there is any uncertainty about the environmental effects of a development, it cannot be said that it would be unlikely to have significant effects on the environment, and an EIA will be required.

22. Mr Wolfe relies on a number of authorities. In *R v Cornwall County Council ex p Hardy* [2001] 2001 Env LR 473, the council granted planning permission although its planning committee had decided that further surveys should be carried out to ensure that bats would not be adversely affected by the proposed development. This was a case governed by the 1999 Regulations, but there is no material difference between them and the 1988 Regulations. The case was concerned with the adequacy of information provided pursuant to Schedule 3 (where an EIA had been required), rather than the initial decision whether an EIA was required at all. But it is common ground that the issue raised in *Hardy* was substantially the same as that which arises here.

23. As Richards J pointed out (para 62), the key point in that case was that the planning committee had decided that further surveys should be carried out to ensure that bats would not be adversely affected by the development. Harrison J held that, since those surveys might reveal significant adverse effects on bats, it was not open to the committee to conclude that there were no significant nature conservation issues until they had the results of the surveys. The surveys might have revealed significant adverse effects on the bats or their resting places. Without the results of the surveys, they were not in a position to know whether they had the full environmental information required by Regulation 3 before granting planning permission. It was not permissible to defer to the reserved matters stage consideration of the environmental impacts and mitigation measures.

24. Since Richards J gave judgment in the present case, there have been two decisions of the Court of Appeal to which our attention has been drawn. The first is *Smith v Secretary of State for the Environment, Transport and Regions* [2003] EWCA Civ 262. This is another Schedule 3 case. At paragraphs 24-28, Waller LJ distilled four principles which he derived from earlier authorities. He said that it is at the outline consent stage that the planning authority must have sufficient details of any impact on the environment and of any mitigation to enable it to comply with its regulation 4(2) obligation; and there will be a failure to comply with regulation 4(2) if questions relating to the significance of the impact on the environment and the effectiveness of any mitigation are left over. But it is consistent with these principles to leave final details of, for example, a landscaping scheme, to be clarified in the context of a reserved matter or by virtue of a condition.

25. In *Bellway Urban Renewal Southern v Gillespie* [2003] EWCA Civ 400, the question was whether an EIA should be required for a development which fell within Schedule 2 of the Regulations. The site was heavily contaminated. Planning permission was given by the Secretary of State for redevelopment of the site. It was accepted by all parties that a substantial amount of work would be required to deal with the contamination. The Secretary of State decided that the development was unlikely to cause significant effects to environment because satisfactory remediation work could be required by the imposition of suitable conditions. The question in that case was to what extent (if at all) the Secretary of State was entitled, when deciding whether an EIA was required, to take into account the remediation measures that could be imposed as a condition of the planning permission. This court held that, remedial measures could be taken into account, but only to a limited extent: see paras 39,46 and 49 of the judgments of Pill, Laws and Arden LJJ respectively. The court held that the Secretary of State had erred. Pill LJ said that the error lay in "the assumption that the investigations and works contemplated in Condition VI could be treated, at the time of the screening decision, as having had a successful outcome" (para 41). Laws LJ said: "In the result, in my judgment the Secretary of State has deployed Condition VI effectively as a surrogate for the EIA process. That is illegitimate." (para 48). Arden LJ agreed that the Secretary of State had proceeded on the wrong basis for the reasons given by Pill and Laws LJJ (para 49).

26. I can find nothing in any of these three decisions which undermines or is inconsistent with the judge's analysis.

27. I should now refer to two decisions of the European Court of Justice on which Mr Wolfe relies. The first is *Kraaijeveld*. There were a number of issues before the court. The first was the interpretation of the phrase "canalisation and flood-relief works" in paragraph 10(e) of Annex II to the Directive, and whether it included dykes along waterways. The ECJ held that it did. At para 21 of his Opinion, Mr Advocate General Elmer referred to the purpose of the Directive as being to ensure that there is a prior assessment of the likely environmental effects of projects, and said that this purpose means that "in the interpretation of Annex II significant importance must in cases of doubt be attached to the actual effects on the environment which may be regarded as bound up with various categories of projects". Applying such an approach to the question of interpretation, he decided that question in the way that I have described.

28. The next issue was whether the duty to undertake an EIA applied not only to the construction of new dykes, but also to the modification of existing ones. The court held that it applied to both. In the course of his discussion of this issue, the Advocate General made "one or two comments on the question of how the modification to Annex II projects should be carried out for the project in question" (para 39). What followed included the following:

> "39….Thus as far as modifications to both Annex I and Annex II projects are concerned specific consideration *must* be given to whether the modifications *may* have a significant effect on the environment, so that where necessary an environmental impact assessment must be undertaken in pursuance of Article 5-10 of the directive.

> 40. The purpose of the directive, according to which projects *may* have significant effects on the environment *must* be subject to a prior environmental impact assessment militates decisively in favour of that interpretation….." (emphasis added).

29. In my judgment, the observations of the Advocate General in para 21 of his Opinion do not cast light on the correct approach to determining whether a project would be likely to have significant effects on the environment. They are directed to the proper interpretation of classes of development in the Directive. The Advocate General was not considering the question that arises on this appeal.

30. Mr Wolfe also relies on the passage at paras 39 and 40, and in particular the use of the word "may". At one stage of his argument, Mr Wolfe submitted that the relevant test as to whether a project is *likely* to have significant environmental effects is whether it *may* have such effects. But he later disavowed the suggestion that "likely" means "may". At all events, the Advocate General was plainly not addressing the question of what is required before an authority can be satisfied that a project "would be likely to have significant environmental effects". He did not purport to interpret that phrase. It is to be noted that he repeated the phrase "likely to have significant environmental effects" (without elaboration) at paras 46, 47, 51 and 52. I do not consider that the comments of the Advocate General support the proposition that, if there is any doubt as to whether the development is likely to have significant effects on the environment, an EIA must be required.

31. The second decision of the ECJ is *World Wildlife Fund (WWF) v Autonome Provinz Bozen* [2000] 1 CMLR 149. This case concerned the project for converting Bolzano airport in Italy from military to civilian use. The national law did not require the project to be subject to an EIA. The question was whether the national law conformed to the Directive. The questions for the court included whether Article 4(2) of the Directive could be interpreted as meaning that certain classes of the projects listed in Annex II may from the outset, in the absolute discretion of the Member States, be excluded in their entirety from the obligation to carry out an EIA, or whether the margin of discretion enjoyed by Member States is limited by the obligation in Article 2(1) to subject those projects likely in any event to have significant effects on the environment to an EIA.

32. The court held that, in relation to entire classes of projects, the discretion conferred by Article 4(2) is subject to "the obligation set out in Article 2(1) that projects likely, by virtue inter alia of their nature, size or location, to have significant effects on the environment are to be subject to an impact assessment" (para 36). At para 38, the court said:

> "[38] The Court also held in paragraph [53] of its judgment in KRAAIJEVELD, cited above, that a Member State which established criteria or thresholds at a level such that, in practice, an entire class of projects would be exempted in advance from the requirement of an

> impact assessment would exceed the limits of its discretion under Articles 2(1) and 4(2) of the Directive unless all projects excluded could, when viewed as a whole, be regarded as not being likely to have significant effects on the environment."

33. The second issue raised by the national court was whether, "taking into account the fact that an airport is the only airport in the region in which it is located that can be restructured, Articles 4(2) and 2(1) of the Directive nevertheless confer on the Member State the power to exclude from the assessment procedure established by the Directive a specific project…as not being likely to have significant effects on the environment either under national legislation…or on the basis of an individual examination of the project" (para 41). The court said:

> "[43] Consequently, the Directive confers a measure of discretion on the Member States and does not therefore prevent them from using other methods to specify the projects requiring an environmental impact assessment under the Directive. So the Directive in no way excludes the method consisting in the designation, on the basis of an individual examination of each project concerned or pursuant to national legislation, of a particular project falling within Annex II to the Directive as not being subject to the procedure for assessing its environmental effects.
>
> [44] However, the fact that the Member State has the discretion referred to in the previous paragraph is not in itself sufficient to exclude a given project from the assessment procedure under the Directive. If that were not the case, the discretion accorded to the Member States by Article 4(2) of the Directive could be used by them to take a particular project outside the assessment obligation when, by virtue of its nature, size or location, it could have significant environmental effects.
>
> [45] Consequently, whatever the method adopted by a Member State to determine whether or not a specific project needs to be assessed, be it by legislative designation or following an individual examination of the project, the method adopted must not undermine the objective of the Directive, which is that no project likely to have significant effects on the environment, within the meaning of the Directive, should be exempt from assessment, unless the specific project excluded could, on the basis of a comprehensive assessment, be regarded as not being likely to have such effects.
>
> [46] It should be added, with regard to the exclusion of the project at issue in the main proceedings from the assessment procedure under Law 27/92, that, even if that project concerns the only airport in the province which can be restructured and it has actually been specified

> by the legislature, the latter cannot in any event exempt the project from the assessment obligation unless, on the date when Law 27/92 was adopted, it was able to assess precisely the overall environmental impact which all the works entailed by the project were likely to have.
>
> [47] As for the exclusion of the project on the basis of an individual examination carried out by the national authorities, the file shows that the contested measures were preceded by an environmental impact study carried out by a team of experts, that information was communicated to the municipalities concerned and that the public was informed by press notices. In addition, the environmental agency and the Amsterdirektorenkonferenz were consulted.
>
> [48] It is for the national court to review whether, on the basis of the individual examination carried out by the competent authorities which resulted in the exclusion of the specific project at issue in the main proceedings from the assessment procedure established by the Directive, those authorities correctly assessed, in accordance with the Directive, the significance of the effects of that project on the environment.
>
> [49] In view of the foregoing considerations, the answer to the first and second questions must be that Articles 4(2) and 2(1) of the Directive are to be interpreted as not conferring on a Member State the power either to exclude, from the outset and in their entirety, from the environmental impact assessment procedure established by the Directive certain classes of projects falling within Annex II to the Directive, including modifications to those projects, or to exempt from such a procedure a specific project, such as the project of restructuring an airport with a runway shorter than 2,100 metres, either under national legislation or on the basis of an individual examination of that project, unless those classes of projects in their entirety or the specific project could be regarded, on the basis of a comprehensive assessment, as not being likely to have significant effects on the environment. It is for the national court to review whether, on the basis of the individual examination carried out by the national authorities which resulted in the exclusion of the specific project at issue from the assessment procedure established by the Directive, those authorities correctly assessed, in accordance with the Directive, the significance of the effects of that project on the environment."

34. Mr Wolfe relies on this passage, and, in particular on para 45, and submits that it shows that an EIA is required in relation to an individual project pursuant to the Directive unless it can be shown "on the basis of a comprehensive assessment" that the project would not be likely to have significant effects on the environment.

35. I have not found this passage, and in particular para 45, altogether easy to interpret. It is important to emphasise, however, that the court is dealing with the question of interpretation of the second sentence of Article 4(2) of the Directive, read with Article 2(1). Article 4(2) gives Member States a discretion to specify certain types of projects which will be subject to an assessment or to establish the criteria and/or thresholds to determine which of the Annex II classes of projects are to be subject to an assessment. I have already referred to what the court said at para 38 in relation to entire classes of projects. Paras 36-40 identify the limitations on the ability of a Member State to exclude Annex II classes of projects from the EIA process altogether. There is nothing in these paragraphs which indicates what test should be applied, or what approach should be adopted in determining whether a particular project is one which is likely to have significant effects on the environment within the meaning of Article 2(1).

36. Paras 41-48 deal with the question whether, and if so in what circumstances, a Member State can exclude a specific project from the EIA procedure. In my view, the court is not here seeking to define the steps that have to be taken before the authority of a Member State can be said to have discharged the Article 2(1) obligation to ensure that all projects likely to have significant effects on the environment are made subject to an EIA. It is dealing with the rather unusual situation of a Member State seeking to exclude a specified individual project from the assessment process altogether. The court held that, just as in the case of entire classes of projects, so too in the case of a specified individual project, a Member State cannot exclude the project from the assessment process unless it is satisfied that the project could be regarded as not being likely to have significant effects on the environment.

37. It follows that I do not consider that the *Bozen* case casts light on whether the council adopted the correct approach to the question whether the development in the present case would be likely to have a significant effect on the environment.

38. Following this review of the authorities relied on by Mr Wolfe, I can now say why I would respectfully adopt paras 51 and 52 of Richards J's judgment (see para 20 above) as a clear and adequate statement of what is required. It is clear that a planning authority cannot rely on conditions and undertakings as a surrogate for the EIA process. It cannot conclude that a development is unlikely to have significant effects on the environment simply <u>because</u> all such effects are likely to be eliminated by measures that will be carried out by the developer pursuant to conditions and/or undertakings. But the question whether a project is likely to have significant effect on the environment is one of degree which calls for the exercise of judgment. Thus, remedial measures contemplated by conditions and/or undertakings can be taken into account to a certain extent (see *Gillespie*). The effect on the environment must be "significant". Significance in this context is not a hard-edged concept: as I have said, the assessment of what is significant involves the exercise of judgment.

39. I accept that the authority must have sufficient information about the impact of the project to be able to make an informed judgment as to whether it is likely to have a significant effect

on the environment. But this does not mean that all uncertainties have to be resolved or that a decision that an EIA is not required can only be made after a detailed and comprehensive assessment has been made of every aspect of the matter. As the judge said, the uncertainties may or may not make it impossible reasonably to conclude that there is no likelihood of significant environmental effect. It is possible in principle to have sufficient information to enable a decision reasonably to be made as to the likelihood of significant environmental effects even if certain details are not known and further surveys are to be undertaken. Everything depends on the circumstances of the individual case.

The judge's conclusions

40. The judge started by recording that it was common ground before him that the central question that the planning committee had to decide was whether the proposed development was likely to have significant effects on the environment, a decision that called for an exercise of judgment on the part of the members of the committee. He then addressed what he characterised as the logically prior question of whether the committee had sufficient information to enable it to form a sensible judgment as to the likelihood of significant environmental effects. He concluded that the committee was reasonably entitled to regard the information available to it as sufficient to enable it to form such a judgment.

41. Next, he turned to the central question whether the committee's judgment that the proposed development was not likely to have significant effects on the environment was impeachable.

42. In relation to golden plovers, he referred to the third report of the developer's consultants dated February 2001, which was prepared on this specific issue in response to the concerns that had been expressed, and which found that there was no reason to presume that the overwintering golden plover population would suffer significant harm as a result of the development. The judge also referred to the comments by English Nature quoted at para 21 of his judgment that it was "far from clear whether the proposed development would have a measurable impact upon the current Golden Plover numbers within the wider area available to this species in Nottinghamshire". Mr Wolfe relied strongly on this passage in the report by English Nature in support of his submission that the committee could not reasonably have concluded that the development was not likely to cause significant impact on the golden plover population. The judge said that if the comments of English Nature were read as a whole, it was "perfectly reasonable for the committee to conclude that the development was unlikely to have significant effects as regard golden plovers" (para 54). He said that the writer of the first report:

> "..was right about the underlying point that, despite the one uncertainty referred to, English Nature was effectively accepting that the development was not likely to have a significant impact on golden plovers. It was no part of English Nature's representations that further investigations might reveal the likelihood of a significant impact" (para 55).

43. That the development was likely to have some impact on golden plovers was not in dispute. It was the likelihood of a significant impact that was not accepted. Thus there was no inconsistency in the planning officer referring in the second report to the loss of the land as a roosting/feeding site for golden plovers, which was still a material consideration. Nor was the acceptance of the developer's unilateral undertaking to carry out further survey work inconsistent with the Council's approach to the question whether an EIA was needed. As the planning officer's second report recorded, the purpose of the further survey in relation to golden plovers was "in order to gain a better understanding of the Golden Plovers movements in the locality, which could then be used generally to assess the impact of this and other developments in the area". The judge said (para 57):

> "Although it was no doubt appropriate for the council to accept that unilateral undertaking and to impose conditions concerning further survey work with a view to gaining a better understanding and possibly minimising any adverse effect, such further work was plainly not considered necessary for the purposes of an informed decision on an EIA; and in the absence of the results of that work the committee could nonetheless reasonably proceed to a decision on an EIA and could reasonably decide that the development was unlikely to have significant effects in relation to Golden Plovers".

44. As to bats, the judge noted that there was a considerable amount of material before the committee. The first report from the developer's consultants, dated November 1998, reported no signs of any protected species, including bats, on the site. The second report, dated July 2000, reported that all mature trees and buildings had been checked for potential roost sites for bats. Potential sites had been identified, but no absolute evidence of the presence of bats had been found. As the judge pointed out, there was no evidence from any source that bats were present on the site. Accordingly, he held that on the basis of the material before them, it was reasonable for the committee to conclude that the development was unlikely to have significant effects in relation to bats (para 58).

45. As for the unilateral undertaking and conditions in respect of additional survey work in relation to bats, the judge saw no inconsistency between them and the committee's approach to an EIA. Having regard to the information already available, it was reasonable to conclude that the development was unlikely to have significant effects in relation to bats; but it was still appropriate to adopt further measures to ensure that , if there were any bats on the site, account was taken of them in the timing of the work carried out and by way of other mitigation (para 59).

46. Having dealt with the issue of an EIA in relation to golden plovers and bats, the judge said that there was nothing in relation to any other environmental issues raised in the course of representations that made it unreasonable for the committee to proceed to decision on an EIA or to conclude that there was no likelihood of significant environmental effects. He concluded, therefore, that the Council's decision not to require an EIA was reasonable and lawful.

The appellant's case on the facts

47. The case advanced on behalf of Ms Jones on appeal is essentially the same as that which was advanced before the judge and rejected by him. Mr Wolfe submits that there was considerable controversy and uncertainty about the potential impact of the proposed development on birds (in particular golden plovers) and bats. Consultees, such as the Nottinghamshire County Council Rural Development Environment Group, RSPB, Nottinghamshire Wildlife Trust and North Notts Bat Group were calling for further surveys before an assessment was made as to the impact of the development. The Council could not lawfully decide that the impact of the scheme would not be likely to be significant until an assessment was made in order to resolve the uncertainties identified in the reports.

48. Mr Wolfe draws attention to the fact that (a) the second report recorded that the developer had offered a unilateral undertaking to carry out further studies in order to gain a better understanding of the golden plover movements; (b) the same report also referred to a criticism of the ecological survey that it did not give a full annual assessment of the site (see para 8 of the appendix to this judgment); (c) the notes to the conditions subject to which planning permission was granted included a note advising that any survey must include all species of birds and bats; and (d) the unilateral undertaking promised a full ecological survey "to establish all ecological interests on the site" including "all fauna and flora elements". These features amount, in effect, to an admission that there were serious shortcomings in the information available to the Council to enable it to decide whether the project would be likely to have a significant effect on the environment.

49. Mr Wolfe also makes a number of detailed points about the adequacy of the information that was available to the Council at the time it made its decision. I do not think it necessary to deal with these individually. In short, he submits that the Council did not have sufficient material to enable it to reach an informed decision on the question whether the project would be likely to have a significant effect on the environment.

50. He contends that it was not legitimate for the council to permit the developer to resolve these uncertainties by granting planning permission and to rely on the developer's unilateral undertaking to carry out a full ecological survey and submit details of "appropriate mitigation measures and aftercare measures". In deciding that an EIA was not required and in granting planning permission without an EIA, the Council fell into the same error of approach as did the Secretary of State in *Gillespie*. Specifically, the Council relied on assessments that were to be undertaken pursuant to a condition or undertaking after the grant of planning permission as a substitute for the assessment that needed to be undertaken as part of an EIA. In this way, the Council was subverting the statutory scheme. The Council deployed the condition as a surrogate for the EIA process. That was illegitimate: see per Laws LJ in *Gillespie* (para 48).

51. Mr Wolfe submits that the Council resolved the uncertainty about impacts on the environment by concluding, impermissibly in the face of manifest uncertainty, that there were not likely to be significant impacts. Rather, it should have required it to be positively and comprehensively shown that there would not be significant impacts before dispensing with the need for an EIA. It acted unlawfully in that (a) it failed to ask itself whether there might be significant impacts, which would necessitate an EIA, but instead (b) left the resolution of uncertainties until after approval had been given, rather than requiring a comprehensive assessment before giving approval.

My overall conclusion

52. I have earlier (paras 14-18 above) given my reasons for holding that the judge explained the approach correctly, and that the role of the court is to conduct a *Wednesbury* review of the decision of the council. In my judgment, the judge also reached the correct conclusion in his review of the decision. Since I have set out his reasoning in some detail, I can state my own reasons shortly.

53. This was plainly not a *Gillespie* case. The committee had a great deal of information about the likely effects of the development on the environment. It had representations from various consultees. It also had a number of ecological reports from the developer's consultants which described the various surveys that had been undertaken; and it had two comprehensive reports by the Head of Planning and Building Controls. The committee did not rely on the conditions and undertaking in order to arrive at its conclusion that the development was unlikely to have an environmental effect in relation to bats, golden plovers or birds generally. The judge was right to say that the imposition of conditions with regard to surveys, and the acceptance of the undertaking, did not preclude the council from being satisfied that it was unlikely that the project would have a significant effect on the environment. Having regard to the information already available, it was reasonable for the committee to decide that the development would be unlikely to have significant effects in relation to birds and bats. I would respectfully adopt what the judge said at paras 57 and 59 of his judgment (see paras 43 and 45 above).

54. The judge was also right to say that the comments by English Nature (referred to at para 6 of the Appendix to this judgment) were important. The Officer was right to say, as he did in the first report, that these comments enabled him to advise the committee that the development would not have a significant environmental impact on the golden plover habitat. As the judge pointed out, English Nature did not suggest, still less request, that further investigations be carried out which might reveal the likelihood of a significant impact.

55. The members of the committee had to make a judgment on the material that was before them as to whether the proposed development would be likely to have a significant effect on the environment. For the reasons that I have given, which are substantially the same as those expressed by the judge, I am satisfied that they were entitled to conclude as they did. I would dismiss this appeal.

Lord Justice Carnwath :

56. I agree. I would add two comments. First, the protracted procedural history of this planning application gives cause for some concern. The site of the proposed development is large (28 ha), but not unusual. It consists of ordinary but attractive arable land, with some trees and hedgerows. The principle of its use for industry, to meet a need identified in the 1996 structure plan, was established by its allocation in the local plan adopted in November 1998 (presumably following public consultation). An application for outline planning permission was made in October 1998 (proposing that 40% should be used for strategic landscaping). Since then, the authority has had the benefit of advice from a variety of expert consultees, as well as ecological studies commissioned by the applicants. Only two points of particular note have emerged: first, that the site is a small part of a much wider area of importance for wintering Golden Plover; and, secondly, that there are some potential roost sites for bats, although there is no evidence of their presence.

57. The appellant (who is publicly funded) lives near the site, and shares with other local residents a genuine concern to protect her surroundings. However, as far as we have been told, she has no special interest in, or knowledge of, golden plovers or bats. With hindsight it might have saved time if there had been an EIA from the outset. However, five years on, it is difficult to see what practical benefit, other than that of delaying the development, will result to her or to anyone else from putting the application through this further procedural hoop.

58. It needs to be borne in mind that the EIA process is intended to be an aid to efficient and inclusive decision-making in special cases, not an obstacle-race. Furthermore, it does not detract from the authority's ordinary duty, in the case of any planning application, to inform itself of all relevant matters, and take them properly into account in deciding the case.

59. We have not been asked to dismiss the appeal on discretionary grounds; nor has the developer been represented. We have accordingly heard no argument on that issue, in the light of the apparently narrow view taken by the House of Lords in *Berkeley v Secretary of State* [2001] 2 AC 603. I note, however, the publication (since the hearing) of a comprehensive and expert study of the law relating to EIA (Tromans and Fuller: *Environmental Impact Assessment – Law and Practice*). The authors comment that "the fundamental principle" established in Berkeley has been "modified in subsequent cases where the circumstances are less clearcut" (para 8.44). This echoes what I said, with the agreement of the other members of the Court, in *Bown –v- Secretary of State* [2003] EWCA Civ 170, para 47 (a challenge to orders authorising a new bypass for Barnstaple, alleged to be in conflict with the European Wild Birds Directive):

> "The speeches (in *Berkeley*) need to be read in context. Lord Bingham emphasised the very narrow basis on which the case was argued in the House. The developer was not represented in the House and there was no reference to any evidence of actual prejudice to his or any other interest. Care is needed in applying the principles there decided to other circumstances such as cases where as here there is clear evidence of a pressing public need for the scheme which is under attack."

The principles for the exercise of the court's discretion are well-established (see the discussion in Wade, Administrative Law, 8th Ed p 688ff, a passage cited with approval by

Lord Steyn in *R(Burkett) v Hammersmith and Fulham LBC* [2002] 1 WLR 1593; examples are collected in Fordham *Judicial Review Handbook,*3rd Ed. Para.24.3).

60. Secondly, as explained by the European Court in *Bozen* (see Dyson LJ para 31ff) responsibility for the "discretion" given by the Directive to "Member States" is shared by the legislative, administrative and judicial authorities. Having myself raised a doubt on the point, I agree with Dyson LJ that, within the statutory framework set by the legislature, determination of "significance" (for Annex II projects) is a matter for the administrative authorities, subject only to judicial review on conventional "*Wednesbury*" grounds.

61. Quite apart from the legal analysis, that view clearly makes practical sense. It enables an authoritative decision as to the procedure to be made at the outset, without risk of subsequent challenge except on legal grounds. Furthermore, the word "significant" does not lay down a precise legal test. It requires the exercise of judgment, on technical or other planning grounds, and consistency in the exercise of that judgment in different cases. That is a function for which the courts are ill-equipped, but which is well-suited to the familiar role of local planning authorities, under the guidance of the Secretary of State.

Lord Justice Laws:

62. I agree with both judgments.

Order: Appeal Dismissed. Order as per draft order.

(Order does not form part of the approved judgment)

APPENDIX

The facts

1. The Planning Committee on 25 February 2002 had before it two reports prepared by the Council's Head of Planning Control, one dealing with environmental assessment and the other with the grant of planning permission if the committee decided that environmental assessment was not required.

2. The first report advised that an environmental assessment was not required, but sought a decision from the committee on that question. It reminded members of the background and then explained the two basic steps involved in determining whether an assessment was required: first, to determine whether the proposed development fell within a description of a development in Schedule 1 or Schedule 2 (which, as the committee was told, it did); secondly, to determine whether the development was likely to have significant effects on the environment.

3. On the question of significant effects, the report referred to relevant parts of Circular 15/88 which I have mentioned above. As regards the indicative advice in paragraph 13 of Appendix A to the circular, it stated that "[a]s this site is 28.4 hectares in area and there a number of houses in proximity to the site, guidance would in the first instance seem to suggest that Environmental Assessment is required". It went on, however, to point out that the number of dwellings within 200 metres of the site was significantly less than the figure of 1,000 dwellings referred to in the circular, and to cite the further advice in paragraph 31 of the circular that thresholds are only indicative and that the fundamental test to be applied in each case is the likelihood of significant environmental effects.

4. The evidence that had led the planning officer to conclude initially that environmental assessment was not required was stated to be as follows:

> "1. The concept behind the Abbot Road scheme is for a low density development of employment buildings with significant areas of strategic planting. Indeed the Local Plan Inspector recommended about 40% of the site should be landscaped. Accordingly the developed area of the site is likely to be significantly below the 20 hectare threshold referred to in the Circular.
>
> 2. The Local Plan Inspector drew comparison with another proposal and referred to the '*far less significant intrusion into open countryside*' of the proposal as it would be bounded by the Western Bypass.

3. Finally in his report the Local Plan Inspector found that Abbot Road could accommodate the traffic generated without causing significant environmental harm.

4. I am of the opinion that the project is a local project and not of wider significance.

5. I am of the opinion that the location is not a particularly sensitive or vulnerable location.

6. I am of the opinion that the project is not unusually complex.

These points are relevant for the Council to bear in mind in its determination of whether EA is required against the criteria of the 1988 Regulations."

5. After referring to the provisions of the 1999 Regulations, on which nothing turns for present purposes, the report proceeded to inform the committee of the substance of representations by third parties. I shall quote a few passages from the several pages of the report that set out those representations:

"Nottinghamshire County Council Rural Environment Group

….

It is acknowledged that the site is intensively farmed arable land with little conservation value, but there are other areas of concerns raised and these are summarised as follows:

(a) although there are no designated statutory or non-statutory wildlife areas on the site, there may be some species or habitats that could be of conservation concern;

(b) the proposal may lead to the loss of hedgerows which are valuable habitats and wildlife corridors;

(c) the ecological value of the site has not been adequately assessed, not being comprehensive due to when the surveys were carried out;

…

(g) no details of what would happen to the trees identified on the site, which can provide important wildlife habitats;

(h) insufficient information to determine the application;

(i) the site is considered important as a roosting site for Golden Plovers and it is felt that not enough information has been provided on alternative sites available in the area, if this site is developed ….

RSPB

Object to the proposal the reasons being summarised as follows:

(a) the loss of the site for use by Golden Plovers should be a material consideration;

…

(d) further studies should be carried out over a wider area to establish the likely impact of the development on the Plover population;

(e) the argument that birds will move to other areas is not sustainable;

(f) landscaping of the site would not be suitable for the Golden Plovers

…

Nottinghamshire Wildlife Trust

Several comments have been made by this organization at different periods during the processing of this application raising various concerns and objections and these can be summarised as follows:

…

(g) It is believed that there are bats in the vicinity and as they are protected under the Wildlife and Countryside Act, a comprehensive bat survey should be undertaken of the area including trees, farm buildings and outhouses to ascertain their status and distribution, to assess the potential effects from the development and put forward measures for their protection;

(h) several birds of high conservation concern have been seen at the site, therefore a full bird breeding survey should be carried out at the appropriate time of year to evaluate the status and distribution of protected and common birds on the site, potential impact, and measures for their protection and enhancement. The surveys and studies undertaken by the applicants fail to offer adequate assessments or appropriate mitigation measures, specifically in respect of the Golden Plovers for which this is a regionally important winter migration site ….

North Notts Bat Group

Although there are no records of the farm itself, there are records of bats within a few miles of the site. The ecological survey identified that the site and the farm buildings may be important for bats. A full

survey of the building should be carried out before any works are commenced and if it is established that there are bats using the buildings for a roost, the appropriate licence from the Department of the Environment, Transport and Regions must be applied for."

6. The report informed members that all the representations were available for inspection. The view was expressed that in general terms most of the objections raised were matters of planning judgment and did not raise issues of fact which would alter the officer's assessment of the need for an environmental assessment. The report went on to deal specifically, however, with the concerns expressed in relation to Golden Plovers:

"The Golden Plovers

One issue to emerge as a consequence of public consultation has been the significance of the development upon the habitat of Golden Plovers. Evidence concerning this was not before me at the time that I made my determination in 1998 that Environmental Assessment was not required.

Nevertheless a request was made to the applicant to undertake an ecological study to assess the potential impact of the development on the site and the surrounding area was made and the applicant has provided a report of the ecological study and additional information specifically relating to Golden Plovers.

Once the relevant information was received English Nature were consulted and they have the following observations.

'Golden Plover in the context of this development proposal is protected only in so far as intentional killing and injuring under Part I of the Wildlife and Countryside Act 1981 (as amended). However it is unlikely that operations associated with the development will cause offences under this legislation. Consequently, paragraph 47 of PPG9 may therefore not apply to Golden Plover in this case.

Golden Plover is, however, listed on Annex 1 of the European Birds Directive 79/409/EC and the number of birds wintering around Penniment Farm, Mansfield are at least of local importance in a Nottinghamshire context. Even so, it is far from clear whether the proposed development would have a measurable impact upon the current Golden Plover numbers within the wider area available to this species in Nottinghamshire. The amount of Golden Plover wintering habitat that would be lost is also relatively small in terms of the amount available to the species within Nottinghamshire. In addition, it is likely that farming practices have far greater influence on wintering Golden Plovers than the loss of land to development. It is on this basis that English Nature considers that there are no substantiated grounds of a statutory nature on which we could object to this application.'

I consider that the highlighted comment of English Nature about the lack of clarity of any measurable impact enables me to advise that the

> development will not have a significant environmental impact upon the Golden Plover habitat" (original emphasis).

7. Finally, the committee was advised that it must consider all the information in the report and go through the requisite steps to reach a determination on whether an environmental statement was required.

8. In the second report, prepared for the purposes of the committee's consideration of the application for planning permission in the event that environmental assessment was not required, there was a lengthy section dealing with ecological issues. Again it is necessary to quote parts of it:

> "There are certain conditions on the site that are important, in particular those which encourage its use by Golden Plovers and to a lesser extent by Lapwings. Information received from the applicant and various consultees, suggests that the site is an important roosting/feeding site for Golden Plover. It is important to the Plovers due to the character of the site, with its large open arable fields and few hedgerows or other features that could conceal potential predators. As with many rural habitat situations, this environment has been created by farming practices, over which the Local Planning Authority has little control and which could easily change without notice, negating any value the site currently has for the Golden Plovers. It is clear from the information received, and comments made, the full impact on the Golden Plovers by the development of the site cannot be accurately assessed, as it is considered as being only a small part of a much wider area used by them. It is also difficult to address the loss of this site to development ….
>
> > It is clear in this instance that there would be unavoidable loss of the fields used by the Golden Plovers and that it would not be possible to recreate the particular character of the site to compensate the loss. The applicant has offered in the form of a unilateral undertaking, to carry out further studies in and around the area of the proposed development site, in order to gain a better understanding of the Golden Plovers movements in the locality, which could then be used generally to assess the impact of this and other developments in the area. They have also suggested other initiatives to protect and enhance the Golden Plover habitats, but these would involve third parties playing an active role. The nature conservation bodies are of the opinion that this is not an appropriate approach ….
> >
> > Other ecological issues raised include the loss of hedgerows, bat roosts and habitats/feeding sites for various other species of birds and animals of conservation concern ….
> >
> > Although there is no clear evidence that bats use either the farm buildings or trees in the area, there is every possibility that they could. Even if this is the case there is no reason why the site cannot be developed subject to activities affecting possible bat habitats and roosts being carried out at the

> appropriate time of year. Further to this, various measures can be carried out to encourage their establishment in the locality.
>
> A criticism of the ecological survey submitted, is that it does not give a full annual assessment of the site and there may be species of flora and fauna that may be present which have not been recorded. Since the application was first considered, the applicants have commenced some additional survey works, so that all species and habitats including the river catchment area, can be considered, in the preparation of appropriate mitigation measures that will be required. A commitment to the additional ecological survey work is also given in the unilateral undertaking.
>
> …
>
> Although it is acknowledged that the Golden Plovers may be affected by this proposal, I am of the opinion that there will be some benefits for wider nature conservation and that there are other overriding material factors, which support the proposal to develop this site."

9. The report recommended the grant of outline planning permission subject to conditions and completion of section 106 agreements.

10. Owing to the brevity of references to them in the planning officer's report, I should also note that the material before the council included three reports on ecological surveys carried out by consultants on behalf of the developer. The first, dated November 1998, related to a full ecological survey and reported that the value of the land to wildlife was relatively low and that there was no evidence of any protected species on site. Recommendations for further work were subsequently received from Nottinghamshire Wildlife Trust and others. This led to the commissioning of a second report, dated July 2000, which dealt inter alia with birds and bats (identifying potential bat roosts but no absolute evidence of the presence of bats). Following the expression of further concerns about golden plovers, a third report, dated February 2001, provided an assessment of the significance of the site with regard to over-wintering golden plovers. The report concluded that there was no reason to presume that the over-wintering golden plover population would suffer significant harm through development of the site. Although the site was one of a number of favoured roost/rest sites, it was not a significant food resource.

11. At the meeting on 25 February the committee first resolved, in line with the officer's first report, that the proposed development was not a development likely to have significant effects on the environment and therefore did not require an environmental statement, and then resolved to grant planning permission in accordance with the recommendation in the officer's second report.

12. The conditions on which planning permission was granted included the following:

> "(12) No development shall take place until there has been submitted to and approved in writing by the Local Planning Authority a scheme of landscaping…

(13) A landscape management plan … shall be submitted to and approved in writing by the Local Planning Authority prior to the occupation of any development on site or any phase of the development, whichever is the sooner ….

(14) Site clearance shall not take place during the bird breeding season March-July unless otherwise agreed in writing by the Local Planning Authority.

(15) Demolition of buildings on site shall only be undertaken in the months of September-October unless otherwise agreed in writing by the Local Planning Authority.

(16) Any trees to be removed from the site shall be felled in sections and lowered to the ground by ropes. These works shall only take place in the months of September and October in accordance with details which shall be submitted to and approved in writing by the Local Planning Authority."

13. Conditions 12 and 13 were expressed to be in the interests of visual amenity, Conditions 14 to 16 in the interests of nature conservation. In addition to the conditions there were a number of Notes, including the following:

"(9) The applicant is advised that the landscaping of the site must be undertaken in a manner which will encourage nature conservation and bio-diversity in the locality ….

(11) The applicant is advised that any survey must include all species of birds and bats that may be using the existing buildings, trees and hedges on the site. The mitigation measures must also include a programme of management for existing trees and hedges on the site ….

(14) … English Nature must be notified if the proposal is likely to destroy or disturb bat roosts."

14. A unilateral undertaking entered into by the developer provided in the third schedule that:

"Prior to the Commencement of Development of the Land (including tree felling, demolition works or rubbish clearance), a full ecological survey shall be undertaken to establish all ecological interests on the site and must include all fauna and flora elements. Any such survey shall cover a period of one calendar year and include details of all the trees and hedges, including type, position and condition, a bat survey to establish

the level of occupancy and use, following which, the results of that survey and any details of appropriate mitigation measures and aftercare measures (including details of implementation phasing of new plant and animal habitat creation) to protect and/or replace/relocate/enhance habitats, ecosystems or any other elements important for nature conservation shall be submitted to and approved in writing by the Council. Thereafter the scheme shall be implemented as approved."