

Case No: CO/8634/2012

Neutral Citation Number: [2013] EWHC 12 (Admin)

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT IN BIRMINGHAM

Birmingham Civil Justice Centre
33 Bull Street, Birmingham, B4 6DS

Date: 11/01/2013

Before :

THE HONOURABLE MR JUSTICE BEATSON

Between :

Shadwell Estates Ltd	<u>Claimant</u>
- and -	
Breckland District Council	<u>Defendant</u>
- and -	
Pigeon (Thetford) Ltd	<u>Interested Party</u>

Timothy Straker QC and Timothy Leader (instructed by **Greenwoods Solicitors**) for the
Claimant

John Hobson QC and Ned Helme (instructed by **Breckland District Council Legal
Department**) for the **Defendant**

James Maurici (instructed by **Berwin Leighton Paisner LLP**) for the **Interested Party**

Hearing dates: 26 and 27 November 2012

Judgment

Mr Justice Beatson :

I. Introduction

1. The claimant, Shadwell Estate Company Ltd (“Shadwell”), owns a large agricultural and equine estate to the south-east of Thetford. In these proceedings, brought under section 113 of the Planning and Compulsory Purchase Act 2004 (“the 2004 Act”), it challenges the decision of the defendant, Breckland District Council (“the Council”) to adopt the Thetford Area Action Plan (“the TAAP”) on 5 July 2012.
2. The TAAP confirmed the designation in the Council’s Core Strategy of an area to the north-east of Thetford as a strategic urban extension for the town on which 5,000 houses are to be built. The area so designated does not include the Shadwell estate but does include the Kilverstone Estate (“Kilverstone”). A planning application on land which includes Kilverstone is being promoted by Pigeon (Thetford) Ltd, a property company. Pigeon is an interested party in these proceedings. On its face, Shadwell’s challenge does not concern the treatment of its own land. Its case is that there are public law deficiencies in the treatment of evidence relating to stone-curlews on the Kilverstone estate by the Council and by Mr Broyd, the Inspector at the examination in public of the TAAP on 6 and 7 March 2012.
3. Stone-curlews are a protected species under Council Directive 79/409/EEC (“the Birds Directive”), as updated by Council Directive 2009/147/EC. The Conservation of Habitats and Species Regulations 2010 SI 2010 No 490 (“the Habitats Regulations 2010”), now amended by the Habitats Regulation 2012 SI 2012 No 1927, have transposed the Birds Directive and Council Directive 92/43/EEC (“the Habitats Directive”) into United Kingdom law. Stone-curlews and their habitats must be protected from the effects of development. One of the areas designated under Article 4.1 of the Birds Directive which is therefore a “European Site” because of the presence on it of stone-curlews, is the Breckland Special Protection Area (“the SPA”), an area to the south-east of Thetford. The Habitats Regulations 2010 provide, *inter alia*, for the assessment of the implications of plans or projects for European Sites. Part of Shadwell’s estate is within the SPA and the remainder of the estate is no more than a few hundred metres from its boundary. The Kilverstone estate is situated to the north-east of Thetford and is not within any area designated as SPA due to stone-curlews. None of the allocation areas are within 1,500 metres of the boundary of the SPA designated due to stone-curlews, but some are within 2,500 metres of that boundary.
4. The TAAP is in what can be termed the third tier of development plan provided for by the 2004 Act. As such it is required that it be prepared in conformity with the first and second tiers, the Regional and Core Strategies, in order to provide local policy detail in relation to the strategic choices made in those development documents. The relevant Regional Strategy is the 2008 East of England Plan. The Council’s Core Strategy was adopted on 17 December 2009.

5. The East of England Plan designated Thetford as a key area for development, envisaging an additional 6,000 dwellings in and on the edge of the town. In its Core Strategy the Council defined an area to the north-east of Thetford as a strategic urban extension for the town. The Council's strategy is to protect species in the Breckland SPA and in a 1,500 metre buffer-zone from the edge of those parts of the SPA that support, or are capable of supporting, stone-curlews, from development that will adversely affect the SPA. In the SPA and the buffer-zone additional tests for planning permission apply in order to seek to protect the SPA. Because of the presence of the stone-curlews in the area to the south-east of the town, including on Shadwell's land, that area was not within the area designated by the Core Strategy for the strategic urban extension. Shadwell did not challenge the Core Strategy.
6. The TAAP was preceded by two documents; in 2008, "Issues and Options" and, in March 2009, "Preferred Options", and extensive consultation. At the TAAP's examination in public, the Inspectors *inter alia* tested whether the Core Strategy provided a sufficiently robust foundation for the preparation of action plans. They concluded that it did and rejected criticisms of the evidential base for the approach in the Core Strategy.
7. Shadwell contends that the TAAP was legally defective on the ground that the underlying sustainability appraisal was flawed in that it did not include an assessment of the environmental characteristics at Kilverstone because information about stone-curlews on that estate was incomplete. During earlier stages of the planning process, Shadwell's position had been very different. It had not sought the removal of Kilverstone as a suitable location for housing development, but opposed having an urban extension entirely to the north-east of Thetford on the basis that it would be unbalanced, and opposed the 1,500 metre buffer zone as having no sound basis. Its case now is that the Council was told of the presence of stone-curlews on part of the Kilverstone estate but did not put that material before the Inspector who conducted the examination of the TAAP either in detail or (since the Council's position was that that information was provided in confidence in relation to another matter) in general terms. It maintains that, for this reason, the picture before the Inspector was not complete.
8. In these proceedings, Shadwell's case as to the flaws in the TAAP has been crystallised into three grounds. The first two relate to the underlying sustainability appraisal and the consequences for the TAAP. The third relates to the Habitats Regulations 2010. They are:
 - (1) The Council failed to carry out an adequate sustainability appraisal and strategic environmental assessment in compliance with section 19(5)(b) of the 2004 Act, and various provisions of the Environmental Assessment of Plans and Programmes Regulations 2004 SI 2004/1633 ("the EAPPR 2004").
 - (2) The Inspector who conducted the examination of the TAAP erred in finding that the TAAP satisfied the requirements of section 19 of the 2004 Act and that it was "sound". Accordingly, the requirements of section 20(5) of the 2004 Act were not met.

- (3) The data in the Council’s Habitats Regulations assessment did not take account of the finding that built development could adversely affect the nesting density of stone-curlews up to a distance of 2,500 metres, and was incomplete in excluding the Kilverstone estate after 2000 and only including data for other land around Thetford between 1988 and 2006. The result was that the assessment breached Regulation 61 of the Habitats Regulations 2010.

Shadwell also contended (see, for example, skeleton argument, paragraphs 5 and 61) that it was deprived of a proper opportunity to test the TAAP at the examination in public and to advance alternative proposals because its objections to the soundness of the TAAP were dismissed as based on anecdotal evidence.

9. The evidence on behalf of Shadwell consists of two statements of Christopher Kennard, its Finance Director, dated 28 August and 20 November 2012, and a statement of Darryl Broom dated 17 September 2012. Mr Broom was a gamekeeper at Kilverstone until 2008. The evidence on behalf of the Council consists of the statement, dated 3 October 2012, of David Spencer, the Council’s Deputy Planning Manager. The evidence on behalf of the interested party consists of the statement of Daniel Brown, dated 15 November 2012. Mr Brown is a freelance ecologist and a director of Daniel Brown Ecology, which conducted stone-curlew surveys of Kilverstone from 2007 for the estate and for the interested party.
10. The legislative framework is summarised in section II of this judgment. The factual and regulatory background and Shadwell’s criticism of the sustainability appraisal is summarised in section III in some detail. The detail is necessary because Shadwell’s challenge involves consideration of the fine detail of the evidence before the TAAP Inspector and the evidence that was before the Core Strategy Inspectors in 2009. Section IV contains my discussion of the submissions, my conclusion that Shadwell’s application must be dismissed, and my reasons for that conclusion. The written and oral submissions on behalf of the Council and the Interested Party made much of the fact that the position taken by Shadwell in these proceedings was radically different to the position it had taken at earlier stages of the development plan process. Although not stated expressly, it was implicit that they consider this challenge is one of those (alluded to by Carnwath LJ in *R (Jones) v Mansfield DC* [2003] EWCA Civ. 1408 at [57] ff) made where the environmental grounds pursued are in fact a tactical means of pursuing a different objective. The point remained implicit and it has played no part in my decision.

II. The Legislative framework

(i) The preparation of development plan documents

11. Section 15 of the 2004 Act requires local planning authorities to maintain a “local development scheme”. The local development scheme consists of development plan documents which, together with any Regional Strategy, (here the East of England Plan) comprise the “development plan” for the area: see section 38(3) of the 2004 Act. The Core Strategy and the TAAP are also development plan documents.
12. Planning decisions must generally be made in accordance with the development plan unless other material considerations indicate otherwise. In view of the potential effect

of development plans, Parliament has required that when they are prepared certain steps should be taken to ensure that they are “sound” and “capable of being carried into effect”. Section 19(5) of the 2004 Act requires the local planning authority to carry out “an appraisal of the sustainability of the proposals in each development plan document”; i.e. a “sustainability appraisal” of the environment affected by a plan. It also involves (see section 20(1)) a consultation process which enables the representations to be made about the effects of the plan, including the adequacy of the “sustainability appraisal”, and an independent examination in public.

13. Section 20(5) of the 2004 Act provides that the purpose of independent examination is to determine in respect of a development plan document:

“(a) whether it satisfies the requirements of sections 19 and 24(1) [the regional strategy], regulations under section 17(7) [in relation to the form and content of local development documents] and any regulations under section 36 relating to the preparation of development plan documents;

(b) whether it is sound; and

(c) whether the local planning authority complied with any duty [to co-operate in relation to planning of sustainable development] imposed on the authority by section 33A in relation to its preparation.”

14. The preparation of development plan documents is governed by regulations made under section 36 of the 2004 Act. The TAAP was largely prepared under the Town and Country Planning (Local Development) (England) Regulations 2004 SI 2004 No 2204 (“the 2004 Regulations”), which were in force until 6 April 2012. Regulation 7 of the 2004 Regulations provided that core strategies and area action plans must be in the form of development plan documents. Regulation 30(1)(a) prescribed the sustainability appraisal report as one of the documents to be sent to the Secretary of State under s.20(3) of the 2004 Act before an examination in public of a development plan document.

15. The Town and Country Planning (Local Planning) (England) Regulations 2012 SI 2012 No 767 (“the 2012 Regulations”) came into force on 6 April 2012. The 2004 Regulations were, subject to a saving provision which gave effect to anything done under them as if it were done under the corresponding provisions of the 2012 Regulations, revoked: see Regulations 37-38.

16. By Regulation 25 of the 2012 Regulations, a local planning authority is required to publish the recommendations of the person who conducted the independent examination of a development plan document. If the development plan document is found to be sound, the local planning authority may adopt it as part of the development plan.

(ii) Environmental assessment

17. The Environmental Assessment of Plans and Programmes Regulations 2004 SI 2004 No 1633 (“the EAPPR 2004”) govern the strategic environmental assessment of plans and programmes. The effect of Regulations 5 and 8 is that an environmental assessment of certain plans and programmes must be carried out in accordance with Part 3 of the Regulations before its adoption.

18. Regulation 12, in Part 3 of the EAPPR 2004, provides:

“12. — Preparation of environmental report

(1) Where an environmental assessment is required by any provision of Part 2 of these Regulations, the responsible authority shall prepare, or secure the preparation of, an environmental report in accordance with paragraphs (2) and (3) of this regulation.

(2) The report shall identify, describe and evaluate the likely significant effects on the environment of—

(a) implementing the plan or programme; and

(b) reasonable alternatives taking into account the objectives and the geographical scope of the plan or programme.

(3) The report shall include such of the information referred to in Schedule 2 to these Regulations as may reasonably be required, taking account of—

(a) current knowledge and methods of assessment;

(b) the contents and level of detail in the plan or programme;

(c) the stage of the plan or programme in the decision-making process; and

(d) the extent to which certain matters are more appropriately assessed at different levels in that process in order to avoid duplication of the assessment.

(4) Information referred to in Schedule 2 may be provided by reference to relevant information obtained at other levels of decision-making or through other [EU] legislation.

(5) When deciding on the scope and level of detail of the information that must be included in the report, the responsible authority shall consult the consultation bodies.

(6) Where a consultation body wishes to respond to a consultation under paragraph (5), it shall do so within the period of 5 weeks beginning with the date on which it receives the responsible authority's invitation to engage in the consultation.”

19. The information listed in Schedule 2 which Regulation 12(3) requires to be in the report is:

“1 An outline of the contents and main objectives of the plan or programme, and of its relationship (if any) with other relevant plans and programmes.

2 The relevant aspects of the current state of the environment and the likely evolution thereof without implementation of the plan or programme.

3 The environmental characteristics of areas likely to be significantly affected.

4 Any existing environmental problems which are relevant to the plan or programme including, in particular, those relating to any areas of a particular environmental importance, such as areas designated pursuant to Council Directive 79/409/EEC on the conservation of wild birds and the Habitats Directive.

5 The environmental protection objectives, established at international, Community or Member State level, which are relevant to the plan or programme and the way those objectives and any environmental considerations have been taken into account during its preparation.

6 The likely significant effects on the environment, including short, medium and long-term effects, permanent and temporary effects, positive and negative effects, and secondary, cumulative and synergistic effects, on issues including—

(a) biodiversity;

(b) population;

...

(d) fauna;

(e) flora;

(f) soil;

...

(l) landscape; and

(m) the inter-relationship between the issues referred to in sub-paragraphs (a) to (l).

7 The measures envisaged to prevent, reduce and as fully as possible offset any significant adverse effects on the environment of implementing the plan or programme.

8 An outline of the reasons for selecting the alternatives dealt with, and a description of how the assessment was undertaken including any difficulties encountered in compiling the required information.

9 A description of the measures envisaged concerning monitoring in accordance with regulation 17.

10 A non-technical summary of the information provided under paragraphs 1 to 9.”

(iii) The Habitats Regulations 2010

20. Article 6 of the Habitats Directive and Article 6 of the Birds Directive have been transposed into United Kingdom law by regulation 61 of the Habitats Regulations 2010. This *inter alia* provides:

“(1) A competent authority [here the Council], before deciding to undertake, or give any consent, permission or other authorisation for, a plan or project which—

(a) is likely to have a significant effect on a European site ... (either alone or in combination with other plans or projects), and

(b) is not directly connected with or necessary to the management of that site,

must make an appropriate assessment of the implications for that site in view of that site's conservation objectives.

(2) A person applying for any such consent, permission or other authorisation must provide such information as the competent authority may reasonably require for the purposes of the assessment or to enable them to determine whether an appropriate assessment is required.

(3) The competent authority must for the purposes of the assessment consult the appropriate nature conservation body and have regard to any representations made by that body within such reasonable time as the authority specify.

(4) They must also, if they consider it appropriate, take the opinion of the general public, and if they do so, they must take such steps for that purpose as they consider appropriate.

(5) In the light of the conclusions of the assessment, and subject to regulation 62 (considerations of overriding public interest), the competent authority may agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the European site or the European offshore marine site (as the case may be).

(6) In considering whether a plan or project will adversely affect the integrity of the site, the authority must have regard to the manner in which it is proposed to be carried out or to any conditions or restrictions subject to which they propose that the consent, permission or other authorisation should be given.”

Regulation 5 of the Habitats Regulations 2010 defines the appropriate nature conservation body which must be consulted under regulation 61(3). In this case, it is Natural England.

21. Development plan documents such as the Core Strategy and the TAAP may be agreed notwithstanding a negative assessment of the implications for a European Site if the plan or project must be carried out for reasons of overriding public interest: see regulations 62, 102 and 103.

(iv) Challenges to development plan documents

22. Section 113 of the 2004 Act enables a person aggrieved by, *inter alia*, a development plan document such as the Core Strategy or the TAAP, to apply to this court within six weeks of its adoption to quash or remit the document to the body responsible for its adoption. The grounds are the conventional ones for statutory judicial review, that the document is to any extent outside the “appropriate power” or that the interests of the applicant have been substantially prejudiced by a failure to comply with a “procedural requirement”.
23. Section 113 of the 2004 Act was amended by section 185 of the Planning Act 2008. As amended, section 113(7A) and (7C) provide for a power to give directions in relation to the whole or part of a development plan document which has been remitted. By section 113(7B):

“Directions under subsection (7A) may in particular—

- (a) require the relevant document to be treated (generally or for specified purposes) as not having been approved or adopted;

(b) require specified steps in the process that has resulted in the approval or adoption of the relevant document to be treated (generally or for specified purposes) as having been taken or as not having been taken;

(c) require action to be taken by a person or body with a function relating to the preparation, publication, adoption or approval of the document (whether or not the person or body to which the document is remitted);

(d) require action to be taken by one person or body to depend on what action has been taken by another person or body.”

III. The factual and regulatory background

(i) 2007 – 2008

24. One of the aims of designating Thetford as a key centre for development and change in the 2008 East of England Plan is to increase the number of dwellings in and on the edge of the town by 6,000. Policy TH1 of the Plan stated that this would be done “through maximising sensitive development within the urban area which respects its historic settings and features and through sustainable urban extensions which avoid harm to the Breckland Special Protection Area and/or Breckland’s Special Areas of Conservation”.

25. In the year before the adoption of the East of England Plan, the Council undertook a scoping report, its Core Strategy Preferred Options document and, as required by section 19(5) of the 2004 Act, a sustainability appraisal. It is also relevant to mention that Dan Brown Ecology undertook a preliminary stone-curlew survey of Kilverstone for the Landscape Partnership, which was completed in December 2007. I shall summarise the findings of this and other surveys later in this judgment.

26. During 2008, the Council produced the Thetford Area Action Plan “Issues and Options” document. Comments were invited on twelve areas identified for potential development. The document recognised the sensitivity that was the consequence of the presence of the SPA to the south-east of the town but at that stage land in and near that area was included in the areas identified for potential development. Two of the twelve areas were promoted by Shadwell.

(ii) The Habitats Regulations Assessment

27. During 2008, Footprint Ecology undertook an assessment under the Habitats Regulations for the Council. It produced two reports dated 10 November 2008. *Habitat Regulations Assessment: Breckland Council’s Submission, Core Strategy and Development Control Policy Document*, (“the Habitat Regulations assessment”) *inter alia* considered the effect of the proposed development in the Thetford area on relevant species. It concluded that there was evidence that stone-curlews avoided housing, and that the evidence was clear for at least a 1,000 metre distance. It also stated that, although it was difficult to give a definitive distance beyond which no effect occurred, there would potentially be an effect at distances of between 1,000 and 2,500 metres: Report, paragraph 9.4.7.

28. The Habitat Regulations assessment concluded that “the point at which the effects are no longer adverse (i.e. at a distance somewhere between 1,000m and 2,500m) now requires further consideration” and that “based upon the evidence and taking a precautionary approach a distance must be set that prevents built development occurring within a zone whereby it is considered that adverse effects would occur”: paragraph 9.4.10. It also stated that the evidence in the report should enable “Natural England and possibly other key stakeholders to set the most appropriate distance on a precautionary basis”. The other report, *The Effect of Housing Development and Roads on the Distribution of Stone-Curlews in Brecks* (“Footprint Ecology’s Evidence report”), contained the supporting evidence for the Habitats Regulations assessment.
29. The two Footprint Ecology reports used comprehensive bird data acquired under licence from the Royal Society for the Protection of Birds (“RSPB”). The data covered the period 1988 to 2006, excluding 2001, when the occurrence of foot-and-mouth disease resulted in an incomplete data set. The data gave the specific location of stone-curlew nests to the nearest 50 metres.
30. The areas surveyed by the RSPB in this area included Shadwell Estate, Elveden Estate and the Crown Estate. Mr Spencer’s statement (paragraph 26) stated that the coverage did not include Kilverstone Estate because the RSPB had not been given access, but that that was not unusual, and indeed the Shadwell Estate had not given access to the RSPB since 2009.
31. Mr Spencer stated that one quarter of the land area of the urban extension is in the Crown Estate, which had been surveyed by the RSPB. His evidence is that the Crown Estate land is of key relevance to consideration of the Kilverstone Estate since it comprises an area of similar condition to the Kilverstone Estate, which is also bounded by the A11 and the urban edge of Thetford. He stated that “importantly, no stone-curlews have been recorded by the RSPB on Crown Estate land”. In a response dated 7 November 2012 to a request for further information and disclosure by the claimant, Mr Spencer stated that, since drafting his statement, he had been informed by the RSPB that the Kilverstone Estate was surveyed by it in the period 1992 – 2001 “on a limited *ad hoc* basis”, and that the RSPB did not hold records of the precise areas surveyed or the dates of the surveys, but had verified to him that no stone-curlews were found in that period.

(iii) The evidence considered for the Core Strategy

32. On 31 March 2009 the Council’s Core Strategy was submitted for examination, and the TAAP “Preferred Options” document was published. The “Preferred Options” document reflected the proposed Core Strategy submission, and the Habitats Regulations assessment which had been informed by the evidence in Footprint Ecology’s Evidence report. It stated (paragraph 8.2) that the work undertaken on the possible impact on protected habitats and species, especially stone-curlews, “has resulted in a bigger area than originally anticipated needing protection from development”. It also stated that “the main impact of this work has been to rule out significant development to the south-east of Thetford, but not to the north of Thetford”.

33. Mr Spencer's evidence (paragraph 51) is that the environmental work "raised a question as to whether a single urban extension to the north of the town, avoiding the 1,500 metre buffer for the SPA, could deliver the [East of England Plan] housing requirements" and "work by Roger Evans Associates demonstrated that it could". Mr Spencer also stated (statement, paragraph 28) that, in preparing the Core Strategy, the Council had considered a number of alternatives, including a "two strategic directions of growth" option, one to the north-east and one to the south-east of Thetford, but had to discount the latter on environmental grounds.
34. The evidence provided in support of the Core Strategy included a Sustainability Appraisal Report (comprising the Scoping Report, and the Preferred Options' and Submission Sustainability Appraisal Reports), and Footprint Ecology's Habitats Regulations assessment, and Evidence report.
35. Natural England and the RSPB were consulted throughout the preparation of the Core Strategy. Although there was evidence of a positive relationship between nest densities and distance from settlement up to 2,500 metres, they strongly supported the Council's general approach and the use of the buffer zones.
36. Natural England stated that it was satisfied with "the data set of bird distribution in Breckland which had been analysed" and "the quality of the interpretation of this data set by Footprint Ecology". It supported "the analysis which recognises a 1,500m zone of impact around the SPA for stone-curlews", and welcomed the Council's "very strong response to the Footprint Ecology report, which [it] consider[ed] will effectively protect stone-curlews...from the adverse effects of development".
37. The RSPB described the approach of the Council to assessing potential effects and the steps taken to protect the SPA as "exemplary". It commended the Council on "the thorough manner in which the [Habitat Regulations assessment] has been undertaken, and the subsequent changes made to the Core Strategy and development control policies" reflecting the recommendations of that assessment. The RSPB also stated it considered that implementation of the changes "will avoid an adverse effect on the Breckland SPA as well as the other internationally important wildlife considered within the [Habitat Regulations assessment]", and that the Core Strategy proposed submission document "is sound" although several points of clarification were suggested.

(iv) The adopted Core Strategy

38. The examination of the Core Strategy Development Plan took place between 30 June and 17 July 2009, the Inspectors' report was published on 13 October, and the Core Strategy was adopted by the Council on 17 December 2009. I have stated (see [7]) that, at that stage, Shadwell accepted the north eastern area as an appropriate choice for an urban extension and did not seek the removal of Kilverstone as a suitable location for housing development. It considered that it was not the only appropriate location and, *inter alia* opposed the buffer zones as having no sound basis. Shadwell's general stance was that the Council was being over-precautionary in its desire to protect stone-curlews.

39. The three policies in the Core Strategy which are of particular relevance to the present proceedings are SS1, spatial strategy; CP1, housing; and CP10, natural environment. SS1 confirmed that Thetford is to be a location for major change and sets out the specific housing requirements for Thetford, which are to be delivered by way of a greenfield strategic urban extension allocation to the north-east of the town.

40. Policy CP1 set out how the strategic housing requirements will be met. Paragraph 3.8 of the Core Strategy document stated:

“At Thetford, mechanisms will be set out in an area action plan [this is the TAAP] for monitoring and managing the release of land to 2021 to meet RSS requirements, including phasing and any sequential release of land. The [TAAP] will also address the circumstances under which reserve land to 2026 would be released at Thetford. The broad location for the sustainable extension at Thetford will be land to the north-east of the town, within the boundary of the A11. Beyond 2021, new housing growth in Thetford will take place on identified sites within the town that may include deliverable brownfield land. The precise land areas and mix of uses will be set out in the [TAAP], utilising evidence base work undertaken in respect of the town’s Growth Point Status. The town is also constrained to the east, and north of the A11, due to protected European habitats and species. The Council will require demonstration, through subsequent Habitats Regulations assessments, that proposed development to the north-east of Thetford will not result in harm to European habitats or species.”

41. Policy CP10 concerned the protection of species in the Council’s area. Among other things, it sought to protect the SPA from development that will adversely affect it. To this end, it prescribed two buffer zones, an “orange” zone and a “blue” zone, to protect those parts of the SPA that support, or are capable of supporting stone-curlews. The policy provided:

“The Council will require that an appropriate assessment is undertaken of all proposals for development that are likely to have a significant effect on the Breckland Special Protection Area (SPA) and will only permit development that will not adversely affect the integrity of the SPA. In applying this policy, the Council has defined a buffer zone indicated in orange...that extends 1,500m from the edge of those parts of the SPA that support or are capable of supporting stone-curlews, within which:-

...

b. permission may be granted for development provided it is demonstrated by an appropriate assessment the development will not affect the integrity of the SPA.

In other locations, indicated in blue..., the Council will apply the policy set out above to afford protection to other land supporting the qualifying features of the SPA...”

42. Paragraph 3.72 of the Core Strategy document stated that, “in order to ensure that there are no significant effects on European habitats and species, new development will only be permitted within 1,500m of SPAs that are suitable for stone-curlews if it can be demonstrated, through an appropriate assessment under the Habitats Regulations, that there will be no adverse impact on the qualifying features”. This is the area described as the orange zone. This paragraph also stated that, outside the

orange zone, in an area described as the blue zone, development restrictions would also operate on land suitable for stone-curlews or where they are present. It stated this to be an area within 1,500 metres of a place “where there have been five nesting attempts or more since 1995 or where other conditions are suitable, such as soil type”, but “in these areas development may also be acceptable providing alternative land outside the SPA can be secured to mitigate any potential effects”.

43. The “orange” and “blue” buffer zones are thus areas in which additional tests for planning permission will be applied in order to protect the SPA. They are stated in Mr Spencer’s statement (paragraph 24) to represent a precautionary approach for the protection of stone-curlews in which housing allocations are not made, and in which additional tests are applied to planning applications.
44. The Inspectors who considered the Core Strategy recommended a number of changes. None of these was seen as materially altering the substance of the original plan or undermining the sustainability appraisal and participatory processes already undertaken: see paragraph 1.4. The Inspectors’ report concluded that, subject to those changes, the Core Strategy Development Plan document was “sound”. The three tests of soundness are set out in PPS 12. They are that the development plan is “justified”, “effective” and “consistent with national policy”. The Inspectors were satisfied that the document met the requirements of the 2004 Act and Regulations, and that the three tests of soundness had been met.
45. Under the heading “Environment”, the Inspectors considered whether the Core Strategy and related development control policies made adequate provision for the protection of the natural environment and other environmental assets. The material headings in this section are “background”, “plans and guidance”, and “evidence base”. The area’s support of internationally important bird species, including stone-curlews, is mentioned at paragraph 3.207. The Inspectors referred to the views of some respondents that changes to policy CP10 would be beneficial because they would provide more scope for development where the impact on protected species could be shown to be minimal, or if suitable mitigation measures could be undertaken (paragraph 3.213). It was stated that, subject to the qualifications, the Inspectors “are satisfied that the broad thrust of the policy is consistent with relevant legislation and national guidance, and is supported by a robust evidence base based upon the current state of knowledge”: paragraph 3.214.
46. In the section on “evidence base”, it is stated that the work commissioned by the Council showed that the most significant effect on stone-curlews extended to 1,500 metres: paragraph 3.216. It is also stated that some commentators regarded that as excessive, but that Natural England and the RSPB endorsed the studies and their use by the Council (paragraph 3.217), although both bodies acknowledged “the relatively poor understanding of the bird’s behaviour and admit[ted] that this hinders possible mitigation measures which might permit a less restrictive approach to development” (paragraph 3.217).
47. Paragraph 3.218 referred to advice from the European Commission that measures based on the precautionary principle should be proportionate to the chosen level of protection and only maintained as long as the scientific data is inadequate, imprecise or inconclusive. In the following paragraphs, the Inspectors expressed concern that

the policy was based on information about bird populations that is not freely available and therefore not subject to scrutiny. It is stated that the buffer zones lack subtlety because it seemed likely that parts of the SPA would contain habitats unsuitable for ground nesting birds, and because anecdotal evidence from experts and landowners suggested that stone-curlews may be less susceptible to human activity than either Natural England or the RSPB believed. However, despite these misgivings, the Inspectors concluded (paragraph 3.222) that “in the absence of evidence to show that development in ‘buffer zones’ will not adversely affect stone-curlew populations, the precautionary principle must be followed” and that “the evidence is sufficiently robust to support the protective measures in this respect”.

48. The way the Inspectors suggested their concerns might be addressed for the future was (see paragraph 3.223) by addressing the absence of evidence. This would enable the Council to seek a better balance between the future development needs of the area and maintaining the fullest possible protection for identified endangered species on the fringes of the SPAs when “carrying forward delivery of the [Core Strategy] growth agenda by way of the [TAAP] and the site allocations DPD.” The Inspectors “therefore” considered that:

“urgent work, including careful monitoring, is essential to provide a better understanding of the interactions between Stone-Curlews and human settlement, and to develop practical and effective mitigation methods to complement the modifications to the policy suggested by the Council. Without such steps we accept, as Natural England makes clear, that it will remain extremely difficult to overcome the presumption against development”: paragraph 3.224.

49. After the receipt of the Inspectors’ report and before the Council adopted the Core Strategy, it corresponded with Shadwell. In an email dated 14 November 2009, Shadwell’s finance director, Mr Kennard, stated that its concern was that Thetford’s expansion to the north-east would lead to the disintegration of the town. He also suggested that there had been more than five breeding attempts by stone-curlews on Kilverstone since 1995. In his first statement, he stated that he first told the Council of this in August 2009. In his November email, he stated that there had been more than five breeding attempts by stone-curlews on Kilverstone since 1995. He stated that he cited the Kilverstone evidence “not to preclude development there, but demonstrate quite how absurd the 1,500m requirement is, if the birds can co-exist within 400m of a 24-hour supermarket”.
50. Mr Kennard stated that, although the Council would probably claim the evidence is only “anecdotal”, it was more than that and had been corroborated. He was referring to information, in particular from Malcolm Kemp, a tenant farmer on the Kilverstone estate, and Darryl Broom, who, between 2000 and 2008, had been employed as a gamekeeper on Kilverstone estate. Their accounts are now contained in statutory declarations respectively dated 20 and 29 February 2012. Mr Broom stated that he was aware of stone-curlew nesting sites on areas identified on a map, and witnessed fledgling chicks in multiple locations close to Maiden’s Walk, confirming that there must have been more than one nest site in the area in each of the years. Mr Kemp, who has worked on the estate for 35 years, stated that, in the years prior to 2000, he was aware of regular nesting in the locations referred to by Mr Broom, but was unable to be specific as to exact areas or incidence.

51. Mr Kennard's evidence (first statement, paragraph 19) is that, at a meeting with the Council about this evidence on 21 January 2010, Council officials declined to consider it. His evidence also refers to stone-curlews being identified on the Kilverstone estate in the summer of 2011, and that, in 2011, the Leader of the Council told him that Lady Fisher of the Kilverstone estate had told him that she had seen stone-curlews on her land, and that on one occasion Lady Fisher had confirmed this to him (Mr Kennard).

(v) The recommended "urgent" work

52. I have referred to the fact that the amended Core Strategy, as adopted on 17 December 2009, has not been challenged. In the light of what the Inspectors had said about addressing the absence of evidence, the Council, with the support of Natural England and the RSPB, is in the process of undertaking the further work recommended. Mr Spencer's evidence is (statement, paragraph 39) that the Core Strategy Inspectors' reference to "urgent work" is to the commissioning of that work, because it would take several years to plan, commission and undertake studies of the quality and robustness required to serve as an appropriate evidence base, and to avoid the difficulty identified by the Inspectors in paragraph 3.224 of their report (as to which see [47] – [48]). Mr Spencer's evidence is that it was for that reason that the Council did not consider it appropriate to delay the preparation of the TAAP. The work now being undertaken is due to be completed in the early part of 2013, with a report due in March. Mr Spencer's evidence is that the Council's approach has the support of Natural England and the RSPB.

53. Jumping forward in the chronology, the Council's approach was criticised by Shadwell at the TAAP examination in March 2012, but successfully defended. It had previously been endorsed in the 13 December 2011 report of the Inspector who considered the site-specific development plan document. The Inspector, who had conducted that examination the previous summer, stated (paragraph 58 of his report) that he interpreted the reference to "urgent work" as meaning that "the work should start as soon as possible, not that the work should necessarily be completed quickly, as it is clear that such work may take several years".

(vi) The TAAP

54. I have referred to the fact that the purpose of the TAAP was to manage the growth and regeneration around Thetford within the Core Strategy in a more detailed way. The final draft of the TAAP was published in August 2011. It was accompanied by a Sustainability Appraisal as required by section 19(5) of the 2004 Act, and a Habitats Regulations assessment under the Habitats Regulations 2010. The Sustainability Appraisal is a document of some 200 pages. It identifies various sustainability appraisal objectives, including objective 6, the need to "protect, conserve, enhance and expand biodiversity, and promote and conserve geodiversity". One of the objectives identified is to ensure that new development does not impact upon the integrity of European sites. The Habitats Regulations assessment (dated July 2011) substantially adopted the assessment used for the Core Strategy.

55. Section 4 of the submission suitability appraisal report for the TAAP contains the sustainability appraisal framework. It poses a series of questions examining whether

sustainability objectives will be met if particular sites are allocated for development, and whether an allocation will “conserve and enhance species, diversity and avoid harm to protected species”. Shadwell criticised this section (skeleton argument, paragraph 15(v)) because the site specific appraisal questions listed did not include whether the land to be allocated is a suitable habitat for protected species, whether protected species have been (i) surveyed and (ii) recorded on the land, and, if they have been recorded, details as to the species, the location, and the numbers.

56. Section 5 is concerned with developing and appraising the options. The option of developing the south-east of Thetford on the claimant’s land is dismissed on the ground that:

“... no new empirical evidence presented. Infrastructure requirements not yet fully understood for south-east option. Preliminary work indicates higher costs and environmental impacts.”

57. Section 6 is concerned with predicting the effects of the TAAP in order to consider the potential changes to identified baseline conditions with or without actions, and the direct and indirect effects of the policies against the baseline. The process included predicting the scale, probability and impact of such effects and of any alternative options that have been identified.

58. One of the effects predicted was the deterioration of local biodiversity habitats as a result of development. The significance of the effect is designated as high, and its evaluation is as follows:

“There are a high number of important European designated wildlife sites around Thetford. The [TAAP] affords a high degree of protection to areas of special environmental importance. Therefore, this effect is highly significant to the DPD.

...

Because biodiversity is an important issue to Thetford and its surroundings, these are highly significant effects. Separate to the requirements of the SA/SEA an appropriate assessment of the DPD under the Habitats Regulations has been undertaken at all the statutory stages of document production. The outcomes of the submission HRA document are presented in the literature review and confirm that the plan in itself will not have a likely significant effect on protected European habitats and qualifying features.”

59. Shadwell has criticised the sustainability appraisal as focused on European sites but not specifying what the impact might be in “any meaningful sense”, and as not looking in the direction of protected birds and their habitats outside the SPA and the buffer: skeleton argument, paragraph 15(xi). A specific example is the observation (skeleton argument, paragraph 15(xii)) that the section of the sustainability appraisal dealing with the mitigation of the adverse effects of the plan did not canvass the possibility that those effects might need to be mitigated outside the SPA and the buffer zones.

60. The baseline data is set out between pages 36 and 53 of the submission sustainability appraisal report for the TAAP. As to the number of stone-curlew breeding pairs, the tables give figures for the years 2007 – 2009, which are respectively 208, 222, and

230. Section 9 contains a number of targets which had been specified to determine whether the TAAP has a positive or negative effect. They include maintaining the breeding population in Breckland at no fewer than 172 pairs, and increasing the breeding population in Norfolk and Suffolk as a whole. Another aspect of Shadwell's criticisms (see skeleton argument, paragraphs 15(xv) and 57-58) is that, although, Kilverstone "has a considerable area of suitable habitat capable of supporting stone-curlews", the sustainability appraisal did not apply those targets to Kilverstone, and that the Habitats Regulations assessment used made no reference to the fact that Footprint Ecology had no data about stone-curlews nesting in Kilverstone. In these proceedings Mr Straker submitted that the latter point was significant because Kilverstone lay within 2,500 metres of the SPA and that the consequence was that the Habitats Regulations assessment of the TAAP did not enable the Council to conclude that the plan will not adversely affect the SPA.

61. Shadwell and others commissioned a report from the Landscape Science Consultancy ("LSC"). This was circulated in draft in the spring of 2011 and subsequently submitted as part of Shadwell's representations on the TAAP at the examination by the Inspector. The LSC report was criticised by Natural England, the RSPB and the Council. Mr Spencer's evidence (paragraph 69) is that the principal problem was that the LSC report did not focus on the issue of disturbance to stone-curlews caused by development, and it did not add to the understanding of what would constitute effective mitigation from development.
62. Shadwell's submissions on the final draft of the TAAP were that the 1,500 metre buffer was excessively precautionary, and that the further work recommended by the Core Strategy Inspectors had not been completed in the two years since the adoption of the Core Strategy. The result was that planning "continue[d] to be based on a lack of evidence". It maintained that the evidence of stone-curlews to the north-east of Thetford that it had provided had been ignored. During the hearing Mr Kennard produced an email dated 1 February 2010 to Tim Cowan of the RSPB and the statutory declarations referred to at [50].
63. The RSPB responded by exhibiting an email sent to the claimant on 2 February 2010 in response to an earlier email from the claimant which stated that the land at Kilverstone allocated for the housing extension lay outside both buffers and there were no reasons under the Habitats Regulations why it could not be allocated for housing. The email stated that any developments outside the buffer zones were likely to require environmental impact assessments and also project-level Habitats Regulations assessments, which would include assessing whether stone-curlews are present and are likely to be affected at the planning application stage. The RSPB's view was that the evidence relied on by the claimant was "anecdotal survey information" which did not jeopardise or contradict the approach taken by the Council or Footprint Ecology. It stated it "fully supports the approach taken in the [Habitats Regulations assessment]". In response to a request by the Inspector, the Council later stated that it had not previously had sight of the material submitted by Shadwell, but noted that four of the nest locations were within 1,500 metres of the SPA and only two were indicated on land outside the buffer zone.
64. At the examination of the final TAAP, the Council and the RSPB provided Dr Durwyn Liley of Footprint Ecology to answer any lines of enquiry on the veracity of

Footprint Ecology's report and the Habitats Regulations assessment. The RSPB provided Professor Rhys Green, who was stated to be "widely accepted as the leading UK scientific authority on stone-curlews".

65. The Inspector issued his report on the TAAP on 30 May 2012. The report specifically addressed the evidence base and the sustainability appraisal. He accepted the RSPB's characterisation of the evidence about stone-curlews on Kilverstone as "anecdotal". His report made the following points:
- (1) The LSC Report's conclusions were not "sufficiently well founded, particularly in relation to the likely impact of development on breeding protected species, to justify overriding the protection afforded by the 1,500m buffer" (paragraph 27);
 - (2) The LSC Report's conclusions were not sufficiently robust to set aside the "comprehensive [Footprint Ecology Study] that has been found to be sound through examination of both the [Core Strategy] and the Site Specific DPDs" (paragraph 28);
 - (3) Natural England continued to support the initiatives pursued by the Council to protect the integrity of the SPA and the precautionary approach of the Council to locate development beyond the 1,500m buffer remained justified (paragraph 28);
 - (4) The single direction of growth to the north of Thetford remained justified (paragraph 29);
 - (5) Contrary to SECL's case, different approaches had not been taken towards stone-curlew nesting evidence on sites to the north as compared with sites to the south (paragraph 30);
 - (6) Notwithstanding Shadwell's criticisms, the Inspector stated: "I am satisfied that the SA was carried out in accordance with the Strategic Environmental Directive and the reasons for not pursuing development to the south-east of the town are explained in the SA. The SA is sound and the evidence base as a whole is proportionate and meets the requirements of the NPPF" (paragraph 30).
66. Shadwell's criticism of the sustainability appraisal is usefully summarised in paragraph 16 of its skeleton argument. Mr Straker QC submitted on its behalf that the sustainability appraisal did not: (a) set out baseline evidence on the presence or absence of stone-curlews or their habitat outside the SPA and the buffer zone; (b) predict or evaluate the effects of the plan on stone-curlews in those places; or (c) consider how those effects could be mitigated. The criticism is that the sustainability appraisal approached the matter on the basis that there would be no impact on stone-curlews in the proposed urban extension because it lies beyond the 1,500 metre buffer. The criticism is thus that there was no assessment of individual instances of the stone-curlew on the Kilverstone land.

67. Mr Spencer's evidence is that at no point in the Habitats Regulations assessment process for the TAAP or the Core Strategy, or through other representations, has Natural England ever asked the Council to assess individual instances of the stone-curlew on the Kilverstone land. Nor did the RSPB, although the email dated 2 February 2010 referred to at [63] recognized that such work may be required in the more specific context of a planning application for the urban extension.
68. Such a planning application is currently under consideration by the Council. Mr Spencer's evidence (paragraph 66) is that, in connection with that application, Pigeon, the interested party, submitted a study by Dan Brown Ecology Ltd containing surveys of Kilverstone for the years 2007 – 2011 using a methodology which has been endorsed by the RSPB. Pigeon supplied this information to the Council in April 2012, a month after the conclusion of the examination on the TAAP, but some seven weeks before the Inspector reported.
69. Shadwell relied on the fact that the Council had not attempted to obtain any of this material earlier and, after it received it, did not inform the Inspector or Shadwell: see skeleton argument, paragraph 40. It also relied (skeleton argument, paragraph 37) on what it described as a concession by Dan Brown Ecology that its survey methodology may have under-recorded stone curlew activity because the surveys were carried out at the wrong time of the year. What Shadwell described as a "concession", however, related only to the material for 2007 when Dan Brown Ecology undertook a "preliminary scoping exercise" not a full survey. The RSPB has raised no caveat about the method Dan Brown Ecology used.
70. As to what the surveys revealed, the 2008 survey was carried out between March and October. The report stated that in fourteen visits no stone-curlew were seen within the area of the TAAP but that one territorial pair had been seen outside its area. No territorial pairs were located in 2009 or 2010, although in 2010 on two occasions stone-curlews were recorded foraging. In 2011 one territorial pair was found, but again this was outside the area of the TAAP. In summary, the surveys by Dan Brown Ecology indicated some limited stone-curlew presence on Kilverstone, but did not reveal a scale of nesting attempts by stone-curlews at a sufficient level (i.e a minimum of five) to indicate that it should be within the blue buffer for the purpose of Core Strategy policy CP10.

IV. Discussion

(i) The process and the role of the Court

71. Before turning to the three grounds upon which the TAAP is challenged, I make two observations about the process and one about the role of the court. The procedure at an independent examination in public is less formal than at a traditional planning inquiry. It generally proceeds on the basis of written documents being presented, and discussion between the parties and the Inspector based upon those documents: *Persimmon Homes (North East) Ltd v Blyth Valley BC* [2008] EWHC 1258 (Admin) at [49] Collins J. While formal evidence can be given where the Inspector decides that is essential, this would be so only rarely.

72. Secondly, a decision-maker should give the views of statutory consultees, in this context the “appropriate nature conservation bodies”, “great” or “considerable” weight. A departure from those views requires “cogent and compelling reasons”: see *R (Hart DC) v Secretary of State for Communities and Local Government* [2008] EWHC 1204 (Admin) at [49] *per* Sullivan J, and *R (Akester) v Department for the Environment, Food and Rural Affairs* [2010] EWHC 232 (Admin) at [112] *per* Owen J. See also *R (Jones) v Mansfield DC* [2003] EWCA Civ. 1408 *per* Dyson LJ at [54].
73. As to the role of the Court, review of the adequacy of environmental appraisals, assessments, and impact statements, is on conventional *Wednesbury* grounds: see *R v Rochdale NBC, ex p Milne* [2001] Env. L.R. 22 at [106] *per* Sullivan J (Environmental Assessment); *R (Bedford & Clare) v Islington LBC* [2002] EWHC 2044 (Admin) at [199] and [203] *per* Ouseley J (Environmental Statement); *R (Jones) v Mansfield DC* [2003] EWCA Civ. 1408 at [14] – [18] (Environmental Impact Assessment), and *Bowen-West v Secretary of State for Communities and Local Government* [2012] EWCA Civ 321, at [39] *per* Laws LJ (Environmental Impact Assessment and Environmental Statement).
74. What does review of environmental documents on conventional *Wednesbury* grounds mean in practice? The judgments of Ouseley J in the *Bedford & Clare* case, of Sullivan J (as he then was) in *R (Blewett) v. Derbyshire CC* [2003] EWHC 2775 (Admin) and of Weatherup J in the Northern Irish case *Seaport of Investments Ltd, Re Application for Judicial Review* [2007] NIQB 62 illustrate the general approach of the court.
75. Ouseley J (at [203]) distinguished deficiencies resulting from the omission of a topic or because it has been inadequately dealt with which may have force on the planning merits and deficiencies which show that there has been an error of law or mean that the document cannot reasonably be regarded as (in that case) an Environmental Statement. Only the latter can found a statutory application to quash.
76. In the *Blewett* case Sullivan J stated that:
- “41.... In an imperfect world it is an unrealistic counsel of perfection to expect that an applicant's environmental statement will always contain the ‘full information’ about the environmental impact of a project. The Regulations are not based upon such an unrealistic expectation. They recognise that an environmental statement may well be deficient, and make provision through the publicity and consultation processes for any deficiencies to be identified so that the resulting ‘environmental information’ provides the local planning authority with as full a picture as possible. There will be cases where the document purporting to be an environmental statement is so deficient that it could not reasonably be described as an environmental statement as defined by the Regulations ... but they are likely to be few and far between.”
77. He also (see [68]) deprecated the tendency of “claimants opposed to the grant of planning permission to focus upon deficiencies in environmental statements, as revealed by the consultation process prescribed by the Regulations, and to contend that because the document did not contain all the information required by [the Regulations] it was therefore not an environmental statement and the local planning authority had no power to grant planning permission” He considered this to be misconceived unless, in language similar to that of Ouseley J, “the deficiencies are so serious that the document cannot be described as, in substance, an environmental statement for the purposes of the

Regulations”. Sullivan J’s approach was approved by Lord Hoffmann in *R (Edwards) v. Environment Agency* [2008] UKHL 22 at [38] and [61].

78. In *Seaport Investments Ltd, Re Application for Judicial Review* [2007] NIQB 62 Weatherup J stated (at [26]) that “the responsible authority must be accorded a substantial discretionary area of judgment in relation to compliance with the required information for environmental reports”. He also stated that the Court will not examine the fine detail of the contents of such a report but will seek to establish whether there has been substantial compliance with the information required. He went on to consider whether the specified matters have been addressed “rather than considering the quality of the address”.

(ii) *Ground 1: Did the Council’s sustainability appraisal and strategic environmental assessment comply with section 19(5)(b) of the 2004 Act and the 2004 Regulations?*

79. Shadwell’s case on this ground is essentially that the sustainability appraisal did not include an assessment of the environmental characteristics of Kilverstone because it approached the proposed urban extension on the basis that it will have no impact on stone-curlew because it lies beyond the 1,500 metre buffer. It was argued that it therefore did not contain all relevant information relating to the current state of the environment as required by regulation 12 and Schedule 2 of the EAPPR 2004.

80. My summary of the sustainability appraisal shows that there are numerous references in it to biodiversity issues, impacts on stone-curlews, and alternatives, including developing the area to the south east of Thetford. Shadwell’s criticisms of the appraisal (see [59], [60], and [69]) are of a highly detailed nature. Does the appraisal’s treatment of the position of Kilverstone and the area to the north east of Thetford mean that it cannot be described as, in substance, a sustainability appraisal for the purposes of the Regulations? The answer depends on whether it was required to provide a comprehensive assessment of the entire body of evidence about stone-curlew activity, notwithstanding the quality of the evidence. I have concluded that it was not.

81. First, the sustainability appraisal was required to assess the likely significant effects on the environment of implementing the TAAP and reasonable alternatives. The Regulations make it clear that the information required is that which may “reasonably be required” taking account *inter alia* of the need “to avoid duplication of the assessment”: EAPPR 2004, regulation 12(3)(d). The sustainability appraisal, strategic environmental assessment and Habitats Regulations assessment for the Core Strategy had not been challenged and were supported by Natural England and the RSPB. Those assessments led to the decision to adopt the orange and blue buffer zones in the designated areas. Shadwell’s current position appears to be that the buffer zones should be altered either by including Kilverstone in the orange zone or by including it or part of it in the blue zone. But since the TAAP is required to conform to the Core Strategy, it is difficult to see how it would be possible to alter the buffer zones.

82. Secondly, there has been no challenge to the “five nesting attempts” criterion for inclusion in the blue zone. The evidence provided by Shadwell (see [49] - [51]) was considered “anecdotal” by the RSPB which stated (see [63]) that it did not “jeopardise

or contradict” the approach taken by the Council and Footprint Ecology. The Dan Brown Ecology survey evidence concerning Kilverstone that has become available since the Core Strategy (see [69] - [70]) was adopted shows that it does not meet the “five nesting attempts” criterion. Shadwell’s contention that the Dan Brown Ecology surveys underestimated the presence of stone-curlew is both not sustained and, in the light of the guidance in the cases I have cited (see [75] – [78]), assumes an inappropriate standard of review to an environmental report in an application of this sort.

83. Thirdly, the Council’s approach has the strong support of Natural England, a statutory consultee whose views must (see [72]) be given “considerable weight”, and of the RSPB, an important and expert interest group. Shadwell’s case on this ground involves inviting the Court to say that it was *Wednesbury* unreasonable for the Inspector to have found the sustainability appraisal and the TAAP to be “sound” solely on the basis of the treatment of the evidence about Kilverstone and despite the support for those documents and the Council’s approach by Natural England and the RSPB. The evidence about Kilverstone, however, is nowhere near providing the “cogent and compelling” reasons that are needed in order to depart from the views of a statutory consultee.
84. Mr Straker also relied on the fact that the work which the Core Strategy Inspectors described as “urgent work” in October 2009 had not been completed. He argued (see e.g. skeleton argument, paragraph 13) that this meant that, although the buffer zones reflected in Policy CP10 possessed “utility as a tool”, the tool carried a health warning. The implication of this was that it was not possible to make progress with the TAAP until that work was completed. But, given the time needed to complete suitable ecological studies and assemble a robust body of evidence, this would have involved a considerable delay. Taking the March 2013 anticipated completion date of the work, the delay would be of some three and a half years.
85. The Core Strategy Inspectors who made the recommendation did not conclude that the plan including the buffers could not be found to be “sound” pending the completion of this work, and they found it was “sound”. The RSPB, in its email dated 2 February 2010 (see [63]) did not consider that further assessment work was needed before a decision could be made about the TAAP. Had the completion of the TAAP been deferred pending the completion of that work, planning applications would have had to be considered and determined with only the more general level of development plan control that is possible within the Core Strategy. For these reasons, it is, in my judgment, unarguable that the TAAP Inspector should have sought to delay progressing or completing the TAAP until the work was completed. I also note that the approach taken by the Council and the TAAP Inspector has (see [53]) also been endorsed by the Inspector who considered the site specific development plan document.

(iii) Ground 2: Did the Inspector breach section 20(5) of the 2004 Act in concluding that the TAAP satisfied the requirements of section 19 of the 2004 Act and was “sound”?

86. For the reasons I have given in relation to ground 1, on the material before the TAAP Inspector, his findings were open to him. He expressly referred in his report to the matters raised by Shadwell. The question is whether the non-disclosure by the Council of the Dan Brown Ecology survey work to the Inspector means there is a public law basis for challenging the Inspector's examination of the TAAP. It was (see [67]) not information which the statutory consultee and the RSPB considered was required before a decision could be made about the TAAP.
87. The Council relied on the confidential nature of the information supplied, which included site specific information about stone-curlews. It argued that it would not have been appropriate to disclose this to the Inspector at the independent examination because (skeleton argument, paragraph 69) that "would have given rise to a potential for birds and/or nests to be destroyed". It relied on regulation 12(5)(g) of the Environmental Information Regulations 2004 SI 2004 No. 3391 which entitles a public authority to refuse to disclose information to the extent that its disclosure would adversely affect ... the protection of the environment to which the information relates". It also submitted that it was not required to place fine detail work submitted in support of a particular planning application before an examination directed to a more general strategic document.
88. The Council is, of course, entitled to rely on regulation 12(5)(g). But, had the information from the Dan Brown Ecology surveys been crucial to the further consideration of the TAAP, it would have been possible for the Council to disclose it with suitable safeguards. It was not, for example suggested that there was a risk of either Shadwell or the Inspector treating the information inappropriately. Indeed, given the position Shadwell has now taken, it would be against its interests to do anything which would adversely affect any stone-curlews on the Kilverstone estate.
89. That brings me to the crucial point in this context. Even if the Council was not entitled to withhold the Dan Brown Ecology survey work, in assessing whether the failure to disclose it means that the TAAP should be wholly or partly quashed, it is important to consider what impact that work might have had on the Inspector's conclusions. The information contained in it does not (see [69] - [70]) reveal a scale of nesting attempts by stone-curlews which would have put Kilverstone within the blue buffer zone and does not support the position Shadwell has taken in these proceedings. I accept the submissions of Mr Hobson QC and Mr Maurici that the disclosure of Dan Brown Ecology's surveys could have had no impact on the Inspector's conclusions. In terms of Policy CP 10 and the buffer zones, it in fact undermines Shadwell's case because the survey results are consistent with the other material considered by the Inspector which provided no evidence of sufficient breeding attempts on Kilverstone land.

(iv) Ground 3: Did the Council's Habitats Regulations assessment breach Regulation 61 of the Habitats Regulations 2010?

90. In order to succeed on ground 3, Shadwell has to produce credible evidence of a real risk to the integrity of the SPA (see *R (Boggis) and another v Natural England* [2009])

EWCA Civ 1061 at [37]) as a result of the TAAP. Shadwell relied upon six matters in support of its contention that the Council breached the Habitats Regulations 2010. The first two relate to Footprint Ecology and the Council not taking account of the evidence in Footprint Ecology's reports that development could adversely affect the nesting density of stone-curlews up to a distance of 2,500 metres. Shadwell contended that, in the light of this, the assessment of Kilverstone's position could not be based on the fact that Kilverstone was more than 1,500 metres from the SPA and the land in the blue buffer zone.

91. The difficulty with this contention is that the 1,500 metre distance was not challenged when the Core Strategy was being considered. No one then argued that a more precautionary approach was necessary. Indeed Shadwell's position at that time was that a less precautionary approach would suffice. The 1,500 metre distance was endorsed by Natural England and the RSPB. It was adopted in the Core Strategy, and the Core Strategy is no longer challengeable. No new evidence has been produced which undermines the validity of the 1,500 metre distance.
92. Three of the other alleged breaches rely on the matters relied on in support of ground 1. It is argued that the data from which the two buffer zones were derived was incomplete because it excluded data concerning the Kilverstone Estate, and evidence that stone-curlews had nested there and that its land was suitable for them. The reasons for which I rejected these contentions in the context of the sustainability appraisal also apply in the context of regulation 61 and the Habitats Regulations assessment.
93. The last of the matters relied on concerns an indication given to Shadwell by Mr Cowan of the RSPB in January 2010 that land to the north-east of Thetford ought to be surveyed by an independent expert to determine whether its development would adversely affect stone-curlews. Schedule 3 to Shadwell's grounds describes the view expressed as "a personal view", and, since the position taken by the RSPB was consistently supportive of the Council's approach and did not recommend such survey work, Shadwell is not assisted by it.
94. For the above reasons, I also reject this limb of the challenge.