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Case No: CO/2346/2014

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

Manchester Civil Justice Centre
1 Bridge Street West, Manchester
M60 9DJ

Date: Tuesday 28th October 2014

Before :

MR JUSTICE LEWIS

- - - - - - - - - - - - - - - - - - - -

Between :

	CHESHIRE EAST COUNCIL	**Claimant**
	- and -	
(1)	**SECRETARY OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT**	**Defendants**
(2)	**ROWLAND HOMES LTD**	

(Transcript of the Handed Down Judgment of
WordWave International Limited
A Merrill Communications Company
165 Fleet Street, London EC4A 2DY
Tel No: 020 7404 1400, Fax No: 020 7831 8838
Official Shorthand Writers to the Court)

Mr Anthony Crean QC and Ms Alison Ogley (instructed by **Sharpe Pritchard LLP**) for the **Claimant**
Mr Stephen Whale (instructed by **Treasury Solicitor**) for the **1st Defendant**
Mr Roger Lancaster (instructed by **Chadwick Lawrence LLP**) for the **2nd Defendant**

Hearing date: 10th October 2014
Judgment
As Approved by the Court

Mr Justice Lewis :

INTRODUCTION

1. This is an application for an order pursuant to section 288 of the Town and Country Planning Act 1990 ("the 1990 Act") to quash a decision of 11 April 2014 of an inspector appointed by the Secretary of State for Communities and Local Government. By that decision, the inspector allowed an appeal by the 2nd Defendant, Rowland Homes Limited, against the refusal of planning permission by the claimant, Cheshire East Council, and granted planning permission for 94 dwellings at Elworth Hall Farm, Dean Close, Sandbach.

2. In brief, the claimant contends firstly that the inspector failed lawfully to assess whether the claimant had a five-year supply of land for housing. Secondly, the claimant contends that the inspector failed lawfully to apply the presumption in favour of sustainable development contained in paragraphs 7 and 14 of the National Planning Policy Framework ("the Framework").

3. Thirdly, the claimant, in its skeleton argument, seeks permission to amend the grounds to contend that the inspector failed to comply with the duty imposed by regulation 9(5) of the Conservation of Habitats and Species Regulations 2010 ("the Regulations") to have regard to the provisions of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora ("the Habitats Directive"). In particular, the claimant seeks to contend that the inspector failed to have to regard to the obligation imposed on the United Kingdom by Article 12 to establish a system of strict protection of certain species specified in the Annex to the Habitats Directive (referred to as European Protected Species) and to determine whether the conditions for a derogation specified in Article 16 of the Habitats Directive were satisfied.

THE PLANNING FRAMEWORK

4. Planning permission is required for development including the carrying on of building or other works or the making of a material change of use of land: see sections 55 and 57 of the 1990 Act. In considering an application for planning permission, the planning authority must have regard to the development plan and any other material considerations: see section 70 of the 1990 Act. Furthermore, planning applications must be determined in accordance with the development plan unless material considerations indicate otherwise: see section 38(6) of the Planning and Compulsory Purchase Act 2004 ("the 2004 Act"). Where a planning authority refuses planning permission, the applicant may appeal to the Secretary of State pursuant to section 78 of the 1990 Act. An inspector may be appointed to determine the appeal (or to report to the Secretary of State for him to determine the appeal).

5. The policies contained in the Framework are material planning considerations. The relevant provisions of the Framework, for the purposes of the present application, are as follows. First, paragraph 14 of the Framework provides that there is a presumption in favour of sustainable development. In the case of decisions on applications for planning permission, that will include:

- "where the development plan is absent, silent or relevant policies are out-of-date, granting permission unless:

  - Any adverse impacts of doing so would significantly and demonstrably outweigh the benefits, when assessed against the policies in this Framework taken as a whole; or

  - Specific policies in this Framework indicate development should be restricted."

6. Paragraph 17 of the Framework sets out 12 core planning principles including a principle that local planning authorities should:

> "Proactively drive and support sustainable economic development to deliver the homes, business and industrial units, infrastructure and thriving local places that the country needs. Every effort should be made objectively to identify and then meet the housing, business and other development needs of an area, and respond positively to wider opportunities for growth. Plans should take account of market signals, such as land prices and housing affordability, and set out a clear strategy for allocating sufficient land which is suitable for development in their area, taking account of the needs of the residential and business communities."

7. The Framework then deals with differing aspects of delivering sustainable development. One aspect of that is identified as delivering a wide choice of high quality homes. Paragraph 47 of the Framework provides, so far as material to this application, that:

> "To boost significantly the supply of housing, local planning authorities should:
>
> …..
>
> identify and update annually a supply of specific deliverable sites sufficient to provide five years worth of housing against their housing requirements with an additional buffer of 5% (moved forward from later in the plan period) to ensure choice and competition in the market for land. Where there has been a record of persistent under delivery of housing, local planning authorities should increase the buffer to 20% (moved forward from later in the plan period) to provide a realistic prospect of achieving the planned supply and to ensure choice and competition in the market for land;"

8. Paragraph 49 of the Framework provides that:

> "Housing applications should be considered in the context of the presumption in favour of sustainable development. Relevant policies for the supply of housing should not be considered up-to-date if the local planning authority cannot demonstrate a five-year supply of deliverable housing sites."

9. Finally, Annex 2 to the Framework provides a glossary of terms used. It gives as the meaning of economic development "Development, including those within the B Use Classes, public and community uses and main town centre uses (but excluding housing development)".

THE FACTUAL BACKGROUND

10. The second defendant applied for planning permission originally for 96 dwellings on 10 hectares of open space and recreation land at Elworth Hall Farm, Dean Close, Sandbach in Cheshire. The application was refined during the course of consideration by the claimant and again during the inquiry into the appeal and the number of dwellings for which planning permission was sought was ultimately reduced to 94. The second defendant provided, amongst other documents, an ecology report dated March 2011. It dealt with two European Protected Species. In relation to bats, the report noted that no formal survey had been undertaken but that a survey would be necessary if works were not commenced before May 2011. In relation to great crested newts, the report again noted that no survey had been undertaken and recommended that no survey was necessary.

11. The claimant consulted Natural England who responded by letter dated 6 August 2012 in the following terms:

> "Thank you for your consultation dated and received by Natural England on 17 July 2012.
>
> The application form for this proposal indicates in section 13 that "*there is reasonable likelihood of: protected and priority species being affected adversely or conserved and enhanced within the application site, or on land adjacent to or near the application site*".
>
> We are unable to access any survey information in support of this proposal. We would ask the authority to require the applicant to supply further information about the biodiversity and geological conservation issues and to then re-consult Natural England once that information is available."

12. An ecologist engaged by the second defendant expressed the view in a letter dated 18 December 2012 that the potential for great crested newts being present in a particular pond was not high. No further surveys of great crested newts or bats was undertaken. Natural England was not reconsulted on the proposed development.

13. A lengthy and detailed report was prepared by officers on the application for planning permission for the proposed development. The report did consider ecology, amongst other issues. The relevant part of the report summarises the requirements of Article 12

and 16 of the Habitats Directive and the obligation imposed by the Regulations on the local planning authority to have regard to the requirements of the Habitats Directive so far as they may be affected by the exercise of their functions. It noted that a European Protected Species had been recorded on site and was likely to be adversely affected by the development. It quoted from the letter of 18 December 2012 and noted the comments from the claimant's own ecologist that although only a cursory inspection had been carried out, the pond appeared to be a garden pond which was unlikely to offer a significant habitat for newts and, in the view of the Council's ecologist, a more detailed survey was not necessary. The report does not record the view of the planning officers on this matter. The report goes on to state that :

> "Evidence of significant activity by other protected species has been recorded on site. Whilst the core of activity including the habitat will be retained the implementation of the proposed development will require the relocation of some species under the terms of a Natural England license".

14. The officer did not recommend refusing planning permission because it was unlikely that any licence would be granted by Natural England. Rather, the officer recommended rejecting the application as it did not accord with the development plan and, as they considered that the authority could demonstrate that it had a five-year supply of housing land, the development plan was up to date and there was no material planning consideration which justified departing from the development plan.

15. The claimant refused the application for planning permission by notice dated 22 February 2013. It was common ground that the reasons for refusal did not include any concern that Natural England would be likely to advise that any licence required by virtue of the Regulations should be refused. The second defendant appealed against the refusal of planning permission under section 78 of the 1990 Act. The Secretary of State appointed an inspector to determine the appeal.

THE INSPECTOR'S DECISION

16. Against that background, the inspector's decision can be summarised as follows. At paragraphs 8 to 13 of the decision letter, the Inspector correctly identified the relevant development plan policies applicable to the application. He correctly noted that the proposed development did not accord with development plan policy H6 as the proposed development was outside existing settlement zone lines. The inspector correctly therefore had regard to material planning considerations, including the provisions of the Framework, to determine whether a departure from the development plan was justified so that the appeal should be allowed and the application for planning permission granted.

17. At paragraph 14 of the decision letter, the inspector identified the main issues as follows:

> "Draft issues were circulated before the Inquiry and were discussed and amended at its beginning. In the above context and from all that I have read, heard and seen I consider the main issues to be

(a) Whether Cheshire East now has a five year housing land supply.

(b) Whether the proposal is sustainable development within the meaning of paragraph 7 of the National Planning Policy Framework and if so

(c) Whether the benefits of the proposal are significantly and demonstrably outweighed by any harm to the character and appearance of the local countryside, highway safety within Elworth and any other harm attributable to the development such that the presumption in paragraph 14 of the Framework to favourably consider applications for sustainable development is outweighed."

18. On the first issue, the inspector noted the requirements of paragraph 47 of the Framework which contemplated that planning authorities would identify specific sites to provide a five year supply of housing to meet their housing requirements for the next five years together with an additional buffer of 5% or, if there were a record of persistent under delivery of housing, an additional buffer of 20%.

19. The inspector noted that the parties were agreed that the North West Regional Strategy housing requirement for Cheshire East of 1150 dwellings per annum was the only rigorously tested evidence base to establish need. On the question of whether a 5% or a 20% buffer should be added, the inspector concluded in paragraph 19 that:

> "The area that now comprises the administrative area of Cheshire East has not met its housing targets since 2008/9. That is almost six years, during which time there has been persistent under delivery that now amounts to over 3,000 dwellings. The former Congleton Borough, in whose area Sandbach is located, also failed to meet its housing target in 2006/7 and 2007/8. The fact that the former Borough of Crewe and Nantwich, which was promoting economic growth policies, had a housing surplus that in a Cheshire East analysis masked this under delivery is not a basis for arguing that there was not under delivery. In the context of this appeal site's location there has been persistent significant under delivery of housing for some time. The Framework is clear that where there has been a persistent record of under delivery then the buffer should be 20%."

20. In paragraph 20 of the decision letter, the inspector considered some of the reasons for the shortfall.

21. On the question of the available housing land, the claimant had considered at the time that it refused the application for planning permission that it had a five year supply of land. It subsequently decided that it did not and, until the second day of the inquiry, maintained that position. It then sought to argue that it could, in fact, demonstrate that it had a supply of housing land sufficient to meet its needs for the next five years (see paragraph 4 of decision letter).

22. As the claimant accepted, it could not demonstrate a sufficient supply of sites to deliver its housing requirement with a 20% buffer on the basis of the figures used for an assessment in 2012. The claimant, however, sought to change the assumptions used about build rates and lead times in order to demonstrate that it did have a five supply of housing land. It contended at the inquiry that, using those assumptions, it had sufficient housing land to establish a 5.13 years supply of land to meeting its housing requirements (with the additional 20% buffer). At paragraph 21 of the decision letter, the inspector noted this:

> "Using the Council's figures there is a 5.13 years supply of housing land or a surplus of about 86 dwellings. However, on the supply side the Council has changed its assumptions concerning build rates and lead in times from those used in its 2012 assessment. Lead in times have been reduced by a year and the annual rates of dwellings delivered on sites accommodating more than 500 dwellings increased. At my request the Council analysed the lead in times and build rates on large sites given planning permission since 2000. The experience at a number of sites does show that short lead-in times are possible. However, for the most part these sites had a history and in a number of instances the starting point of the analysis was a renewed or revised planning permission rather than the original grant of permission. Overall it is difficult to conclude from this information that average lead in time is not similar to that assumed in the 2012 analysis. If this were the case then there would not be a 5 years supply with a 20% buffer."

23. At paragraphs 22 to 27 of the decision letter, the inspector dealt with other aspects of the claimant's contention about likely build rates and lead in times. Ultimately, the inspector concluded that there was a "distinct lack of credible hard evidence to justify the projections" for some of the sites relied upon. The inspector also considered a suggestion by the claimant, that six residential institutions granted planning permission since 2012 would be able to accommodate 360 elderly persons. The implication was that this would reduce the number of dwellings needed by 360. The inspector considered, however, that given the likely overall shortfall in the number of houses required, that even if 360 beds were provided in residential care homes over five years, and even if that led to a similar reduction in the number of houses required, there would still not be a five year supply of housing land. In all the circumstances, therefore, that the claimant had not demonstrated that it had a five year supply of housing land. Consequently, paragraph 49 of the Framework provided that the housing policy should not be considered up to date and the application for planning permission had to be determined in accordance with the presumption in favour of sustainable development.

24. The inspector, accordingly, turned to the issue of sustainable development. He correctly noted that paragraph 7 of the Framework pointed out that there are three dimensions to sustainable development: economic, social and environmental. At paragraphs 29 and 30 of the decision letter, the inspector said this:

> "29. Development contributes to the building of a strong and competitive economy, creating local jobs in the construction industry as well as business for and jobs in the building supply industry. This is particularly important in times of economic austerity and is emphasised in paragraph 17 of the Framework, which supports sustainable economic development to deliver the homes, business and infrastructure that the country needs. Whilst such jobs and business could be generated by developments anywhere and in the context of Cheshire East there may well be locations that are more sustainable than the appeal site that is not the issue. At the present time this Borough is falling far short of its requirements in terms of housing construction and building land is in short supply. In such circumstances, the availability of any site that could contribute to house building and economic development, in the short term, should attract weight. Unless any adverse impacts of the development significantly and demonstrably outweigh the benefits then it should be given planning permission."

> "30. The appeal site is available. A well established building company with a track record of delivering a significant number of new dwellings in a short period of time has acquired the site. There is no evidential reason to doubt their stated intention to commence construction as soon as site preparation allows, assuming planning permission is obtained. The development does not require the provision of off-site infrastructure and although significant site remediation is required, there is no evidence to suggest that this would unduly delay the development. There is no insurmountable reason why this site could not be built out within five years, thereby making a significant contribution to housing supply in the short term. The appellant is content for the time limitation conditions to be adjusted to encourage this and this contribution to the economic dimension of sustainability attracts further weight."

25. Consideration was then given to specific matters such as access from the proposed development to shops and work and to the loss of agricultural land. At paragraph 45, the inspector concluded that:

> "45. As I discuss below the proposal need not have an adverse impact on the character and appearance of the countryside or the landscape and its impact upon nature conservation would be positive. Despite the likelihood of a high use of the private car for journeys outside of Sandbach and to its town centre, particularly for shopping and the consequent adverse impact on climate change, as well as the loss of Grade 3a agricultural land, in the round I consider overall that the site is a sustainable location for residential development in the context of the meaning within paragraph 7 of the Framework. The Council's 2013 Strategic Housing Land Availability Assessment, in

identifying this site as available, achievable and developable for housing, presumably came to a similar conclusion."

26. The inspector dealt with ecology at paragraphs 67 and 68 of the decision letter where he said this:

> "67. There is evidence of the presence of protected species on this site. However, most of the area that is of ecological significance is outside of the area, proposed for residential development. Badgers occupy a part of the site and there is evidence that they forage over much of the remainder. There have also been sitings [sic] of protected birds nesting on the site and great crested newts, water voles and bats are alleged to be present in the area. Article 12 (1) of the European Commission's Habitats Directive requires the establishment of strict protection regimes for certain animal species, prohibiting the deterioration or destruction of breeding sites and resting places. The Conservation of Habitats and Species Regulations 2010 set up a licensing regime to deal with the requirements for derogation and this is administered by Natural England. Badgers and their sets are protected under the Protection of Badgers Act 1992. Natural England is again involved in the implementation of this legislation.
>
> 68. The Regulations place a duty on decision makers to have regard to the requirements of the Habitats Directive. The implementation of the proposal will destroy some habitat and some species will require relocation. This would have to be sensitively undertaken under the terms of a Natural England license. Nevertheless, there is potential for significant habitat enhancement in the areas that are not to be built on, particularly around the pond and the stream. There is no reason why conditions could not ensure that there are overall ecological benefits resulting from this development as discussed in paragraph 44 above. Guidance in the Framework says that where necessary appropriate mitigation and enhancement should be secured by conditions. I agree with the Council and consider that on balance and subject to conditions, the successful implementation of this scheme would result in positive gains for the area's ecology and that the presence of protected species should not weigh against the proposal."

27. The inspector's conclusions are set out in paragraphs 70 to 72 in the following terms:

> "70. The proposal is contrary to saved CBLP Policies PS8 and H6. However, I have found that on balance the proposal is clearly sustainable development within the overall meaning as set out in paragraph 7 of the Framework. The council does not have a five year supply of housing land and in such circumstances paragraph 14 of the Framework makes a presumption in favour of granting planning permission unless

the adverse impacts of doing so would significantly and demonstrably outweigh the benefits.

71. Any potential harm to the character and appearance of the local countryside could be largely resolved by conditions requiring the improvement of the hedgerow and its trees along the northern edge of the site, recontouring and landscaping along other interfaces of the residential development with the open countryside and minor alterations to the housing layout. Consequently any harm to the countryside aspects of saved CBLP Policies PS8 and H6 would not be significant and is outweighed by the proposal's clear benefits. Any potential harm, to education and highways within Sandbach could be overcome by the contributions that would be delivered through the Section 106 Agreement.

72. I do not consider the disadvantages of the scheme, including its conflict with the Development Plan, carry sufficient weight to significantly and demonstrably outweigh the presumption in favour of sustainable development set out in the Framework, when considered alongside the benefits provided for the supply of affordable and market housing in East Cheshire at an early date and the other material considerations in favour of the proposal discussed above. I therefore find for the reasons discussed above and having taken account of all of the other matters raised, including the representations that local residents put to me both at the Inquiry and in writing beforehand that the appeal should be allowed subject to conditions."

THE ISSUES

28. Against that, background, the following issues arise:

(1) did the inspector properly assess the question of whether the claimant had a five-year supply of housing land and give adequate reasons for his conclusion, in particular,

(a) when deciding to add a 20% buffer to the claimant's housing requirements;

(b) by not identifying precisely the quantity of housing land available over the next five years; or

(c) when assessing the claimant's case that the build and lead times or that the provision of six residential care homes meant that there was a five-year supply of housing land?

(2) did the inspector err in failing to exclude housing development from his assessment of whether the proposed development represented sustainable development?

(3) should the claimant (a) be given permission to amend the claim form to argue that the inspector failed to discharge his obligation under regulation 9(5) of the Regulations to have regard to articles 12 and 16 of the Habitats Directive and (b) if permission to amend is granted, did the inspector fail to comply with that obligation?

29. Grounds 1 and 2 involve a challenge to the reasoning of the inspector on certain of the issues dealt with in his decision letter. The principles governing consideration of an application to quash the decision of an inspector are well established and can, for present purposes, be summarised as follows:

(1) the role of the court is to review the lawfulness of the decision of the inspector (or the Secretary of State if the decision is taken by him); the application is not an opportunity to re-argue the merits of the planning appeal;

(2) the courts will determine whether as a matter of law a particular consideration is a material planning consideration but the weight to be given to a material planning consideration is a matter for the judgment of the inspector or the Secretary of State so long as that decision is not *Wednesbury* unreasonable (*Tesco Stores v Secretary of State for the Environment* [1995] 1 W.L.R. 759 at p. 780F-G);

(3) the decision letter must be read fairly, as a whole and in a straight-forward manner without excessive legalism (*Clarke Homes Ltd. v Secretary of State for the Environment* (1993) 66 P. & C.R. 263 at pp. 271-272);

(4) the decision-maker must give reasons for the decision which are adequate and intelligible, enabling the reader to understand why the matter was decided as it was, and what conclusions were reached on the principal important controversial issues. The degree of particularity required will depend upon the nature of the issues falling for decision (*South Buckinghamshire County Council v Porter (No. 2)* [2004] 1 W.L.R. 1953 at paragraph 36).

GROUND 1 – THE HOUSING SUPPLY ISSUE

30. The claimant advanced a number of grounds in the claim form as to why the inspector's conclusion that the claimant could not demonstrate a five year supply of land to meet its housing needs was flawed. That exercise involved determining the claimant's housing needs for the next five years and then calculating whether the claimant had sufficient housing land available to meet those needs.

31. The first criticism related to the calculation of the claimant's housing requirement for the next five years and, in particular, the inspector's decision that there had been a

record of persistent under delivery of housing so that a buffer of 20% should be added to the claimant's requirement in accordance with paragraph 47 of the Framework. The claim form contended that the inspector had failed adequately to address the issue of whether or not there had, in fact, been a record of persistent under delivery.

32. At the hearing, Mr Crean QC, for the Claimant, abandoned this argument. In my judgment, he was right to do so. The inspector properly addressed the question of whether there had been a record of persistent under delivery of housing in paragraphs 19 and 20 of his decision, applying the approach to paragraph 47 of the Framework set out in paragraph 47 of the judgment in *Cotswold District Council v Secretary of State for Communities and Local Government and others* [2013] EWHC 3719 (Admin.). The conclusion that the claimant had a record of persistent under delivery of housing, not least because it had failed to meet its housing targets over almost 6 years since 2008/2009, was one that the inspector was entitled to reach on the evidence before him.

33. Secondly, the claim form advanced a number of grounds relating to the inspector's conclusion that the claimant had failed to establish that it had a supply of housing land sufficient to meets its housing requirement (with the 20% buffer) over the next five years. At the hearing, Mr Crean's principal submission on behalf of the claimant was that the inspector had failed to give adequate reasons for his conclusion. He submitted that it was not sufficient for the inspector to conclude that there was less than a five year supply of housing land; he had to identify the amount of housing land available. In the present case, he submitted, the claimant's figure for housing supply (assuming a 20% buffer) was that it had 5.12 years supply whereas the second defendant contended that a figure of 3.45 years more accurately reflected the housing supply available. The inspector was required, he submitted, to determine where on that range the housing land supply fell.

34. The adequacy of the reasons for a conclusion depend upon the issue being addressed by the decision-maker. The inspector was dealing with an appeal against the refusal of planning permission for residential housing. In the present case, the issue on this aspect of the appeal was whether, in accordance with paragraph 49 of the Framework, the claimant could demonstrate that it had a five-year supply of housing land. If it could not, then its development plan would be considered to be out of date and the presumption in favour of granting planning permission for sustainable development applied. Thus the issue was correctly identified in paragraph 14(a) of the decision letter as whether the claimant "now has a five year housing land supply". The inspector gave his reasons for concluding why the claimant could not demonstrate that it had such a five year supply and the adequacy of those reasons is considered below. The issue, therefore, was whether the amount of housing land available was sufficient to meet the housing needs of the claimant (with the 20% buffer) over the next five years. If it were not, then the presumption applied. The inspector was not required to identify precisely the amount of housing land available, only whether the amount was less than needed for the next five years.

35. In terms of the adequacy of the reasons for concluding that the claimant had failed to demonstrate a five year supply of housing land, the claim form and skeleton argument contended that the inspector had failed to grapple with the claimant's arguments on this issue and made specific criticisms of his reasoning in relation to build rates and

the extent to which the provision of six residential care homes for the elderly would provide the equivalent of 360 dwellings.

36. The inspector, in my judgment, did deal with the central argument put forward by the claimant. Its original predictions, based on figures used in an assessment carried out in 2012, did not show that there was a 5 year supply of housing land available to meet its housing requirements (with a 20% buffer added). The claimant had changed its assumptions in relation to build rates and the lead in times for delivering houses and, applying those assumptions, there would be a five year supply of housing land. The claimant sought to persuade the inspector that those changed assumptions were sound. For the reasons given by the inspector, he did not consider that those changed assumptions were reliable and the evidence did not justify substituting those assumptions for the ones used in the 2012 analysis, as appears from paragraph 21 of his decision. That was, essentially, a planning judgment for the inspector based on the material before him.

37. The inspector gave specific reasons in relation to the particular matters raised. By way of example, he considered that, in dealing with large sites given planning permission since 2000, the analysis showed that short lead-in times were possible but that, for the most part, those properties implemented a renewed or revised planning permission rather than involving building pursuant to an original grant of planning permission. Given that the new assumptions were not strictly comparable to situations where the sites only had original planning permission, the inspector considered that one could not conclude from that information that there was a basis for departing from the lead-times derived from the 2012 analysis. That is a matter of planning judgment for the inspector and is adequately and intelligibly reasoned.

38. Criticism is made in the claim form that the inspector indicates that "for the most part" the sites where planning permission has been granted since 2000 had a particular planning history but the inspector does not deal with the other sites. The inspector was considering, however, an analysis done in 2012 which did not demonstrate the existence of a five year supply of housing land and considering whether the assumptions in that analysis should be displaced. He considered that the new material was not sufficiently robust or comparable to justify departing from the 2012 analysis. The reasoning is clear and adequate. Similarly, the claim form criticises the inspector for stating that 40% of the houses assumed by the claimant to be delivered within 5 years did not have planning permission and there could be difficulties on some sites. The claimant criticises the conclusion that, because there would be difficulty on some sites, the proposed assumptions on build-rates and lead in times would not be met. The decision, however, needs to be read fairly and as a whole. The inspector had the figures in the 2012 analysis. In relation to the new assumption the finding was that there "was a distinct lack of credible hard evidence to justify the projections for some of these sites and that it would be unwise to place too much reliance on the potential for delivering a significant amount of housing from such sources". That is a clear statement that the difficulties with the proposed assumptions meant that it was not appropriate or sensible to rely on those assumptions rather than the figures in the 2012 analysis. That is a clear, adequately reasoned decision on a matter, essentially, of planning judgment.

39. Criticism is also made of the inspector's conclusion in relation to the proposed six residential care homes. The conclusion on this issue however, was that even if 360

beds were available, and reduced the need for houses by a similar amount, the shortfall in housing provision was such that there still would not be sufficient housing land to meet housing needs (with a 20% buffer) over the next five years. That is a clearly reasoned decision on a matter of planning judgment. None of the matters raised under the first ground of challenge is therefore established.

GROUND 2 – SUSTAINABLE DEVELOPMENT

40. The essence of the second ground of challenge is this. In assessing sustainable development, the glossary to the Framework defines "economic development" as excluding housing development. It is alleged that the inspector may have overlooked the fact that the housing development here was not "economic development" and assumed that the development had economic benefits favouring the grant of permission when it did not.

41. First, in my judgment, the inspector was aware of the difference between housing development and economic development (narrowly defined to exclude housing). He expressly refers to them separately, in paragraph 29 of his decision set out above. Secondly, as is clear from paragraph 7 of the Framework which is summarised at paragraph 28 of the decision letter, sustainable development (i.e. development generally, not simply one type of development) has three aspects which need to be considered, economic, social and environmental. Thirdly, paragraph 30 of the decision letter makes it clear that the proposed development would make a significant contribution to housing supply in the short term. It was that contribution to the economic dimension of sustainability (not any contribution from economic development) that the Inspector was considering. In other words, the inspector was well aware that this was a development which would contribute to housing supply and he was assessing whether that development was sustainable (as is clear from the remainder of the section of the decision letter dealing with sustainable development). The inspector was not failing to draw a distinction between economic development (narrowly defined) and housing development. He was dealing with housing development and considering whether the proposed development represented sustainable development. For those reasons, this ground of challenge is not sustainable.

THE PROPOSED THIRD GROUND – THE HABITATS DIRECTIVE

Permission to Amend

42. The claimant sought permission to amend the grounds of claim at the hearing to contend that the first defendant failed to have regard, contrary to regulation 9(5) of the Regulations, to the requirements of Articles 12 and 16 of the Habitats Directive in so far as they were affected by the exercise of his functions. The defendants resisted the application for permission. There was full argument on the substantive issues at the hearing and I indicated that I would deal with the question of permission to amend, and the substantive issues if permission were granted, in this judgment.

43. The claim form was filed within the six week period required by section 288 of the 1990 Act although the application to amend was made outside that period. In such circumstances, the court has a discretion to permit an amendment to the grounds under CPR 17.4: see *San Vicente v Secretary of State for Communities and Local*

Government [2014] 1 W.L.R. 966. In the present case, the question of whether the first defendant complied with the obligations imposed by regulation 9(5) of the Regulations does raise arguable issues. The defendants accept that there would be no prejudice here in allowing the amendment: all the necessary evidence was before the court and the parties could, and did, argue the substantive issue fully. The defendants indicate that the claimant is the local planning authority and neither it nor any one else at the inquiry suggested that planning permission should be refused on issues relating to ecology or the Habitats Directive and they considered that such issues could, on the facts of this case, be dealt with by way of conditions attached to the grant of planning permission. Further, if the first defendant had acted in breach of its obligations under the relevant regulation in considering the appeal against the refusal of planning permission, it was arguable that the claimant itself might also have done so when it considered the application for planning permission. The defendants submitted that it would not be in the public interest in those circumstances to grant permission to amend to allow the new ground to be raised.

44. Ultimately, in my judgment, the issue is whether or not the first defendant complied with its duties under the relevant regulation. The fact that others, including other public bodies, might be said to have contributed to any failure to do so (or might themselves have similarly failed) does not justify a refusal to allow the issue of the lawfulness of the first defendant's conduct to be scrutinised. Given that the issues are arguable, and that there is no prejudice to the parties, the public interest favours the grant of permission to amend to allow the issue to be resolved. Permission to amend in the terms indicated is therefore granted.

The Legal Framework

45. Article 12(1) of the Habitats Directive provides that:

> "1. Member States shall take the requisite measures to establish a system of strict protection for the animal species listed in Annex IV (a) in their natural range, prohibiting:
>
> (a) all forms of deliberate capture or killing of specimens of these species in the wild;
>
> (b) deliberate disturbance of these species, particularly during the period of breeding, rearing, hibernation and migration;
>
> (c) deliberate destruction or taking of eggs from the wild;
>
> (d) deterioration or destruction of breeding sites or resting places."

46. The European Protected Species listed in Annex IV include great crested newts and bats. Article 16 of the Habitats Directive provides that:

> "1. Provided that there is no satisfactory alternative and the derogation is not detrimental to the maintenance of the populations of the species concerned at a favourable

conservation status in their natural range, Member States may derogate from the provisions of Articles 12, 13, 14 and 15 (a) and (b):

(a) in the interest of protecting wild fauna and flora and conserving natural habitats;

(b) to prevent serious damage, in particular to crops, livestock, forests, fisheries and water and other types of property;

(c) in the interests of public health and public safety, or for other imperative reasons of overriding public interest, including those of a social or economic nature and beneficial consequences of primary importance for the environment;

(d) for the purpose of research and education, of repopulating and re-introducing these species and for the breeding operations necessary for these purposes, including the artificial propagation of plants;

(e) to allow, under strictly supervised conditions, on a selective basis and to a limited extent, the taking or keeping of certain specimens of the species listed in Annex IV in limited numbers specified by the competent national authorities."

47. The provisions of the Habitats Directive are implemented by the Regulations. Regulation 9(1), (2) and (5) of the Regulations provide:

"9. (1) The appropriate authority and the nature conservation bodies must exercise their functions under the enactments relating to nature conservation so as to secure compliance with the requirements of the Habitats Directive.

"(2) Paragraph (1) applies, in particular, to functions under the following enactments –

(a) Part 3 of the 1949 Act (nature conservation);

(b) section 15 of the Countryside Act 1968 (areas of special scientific interest);

(c) Part 1 (wildlife) and sections 28 to 28S and 31 to 35 of the WCA 1981 (which relate to sites of special scientific interest);

(d) sections 131, 132 and 134 of the Environmental Protection Act 1990 (which relate to nature conservation functions of the Countryside Council for Wales);

(e) the Natural Environment and Rural Communities Act 2006; and

(f) these Regulations.

…

(5) Without prejudice to the preceding provisions, a competent authority, in exercising any of their functions, must have regard to the requirements of the Habitats Directive so far as they may be affected by the exercise of those functions."

48. The inspector, acting on behalf of the Secretary of State, is a competent authority for these purposes: see regulation 7 of the Regulations. His function is to determine an appeal against the refusal of planning permission. The inspector is required by regulation 9(5) to have regard to the requirements of the Habitats Directive so far as they may be affected by the exercise of that function.

49. Furthermore, the deliberate capture, injury or killing of any wild animal of a European Protected Species is made a criminal offence by regulation 41 of the Regulations. Formerly, the grant of planning permission would have amounted to a defence to such an offence. That is no longer the case. Rather, a licence may be granted under Regulation 53 of the Regulations and acts done pursuant to such a licence do not constitute a criminal offence for the purposes of regulation 41 of the Regulations. Regulation 53 provides so far as material that:

"53. (1) Subject to the provisions of this regulation, the relevant licensing body may grant a licence for the purposes specified in paragraph (2)."

"(2) The purposes are –

(a) scientific or educational purposes;

(b) ringing or marking, or examining any ring or mark on, wild animals;

(c) conserving wild animals or wild plants or introducing them to particular areas;

(d) protecting any zoological or botanical collection;

(e) preserving public health or public safety or other imperative reasons of overriding public interest including those of a social or economic nature and beneficial consequences of primary importance for the environment;

(f) preventing the spread of disease; or

> (g) preventing serious damage to livestock, foodstuffs for livestock, crops, vegetables, fruit, growing timber or any other form of property or to fisheries."
>
> "(3) Regulations 41 (protection of certain wild animals: offences), 43 (prohibition of certain methods of capturing or killing wild animals) and 45 (protection of certain wild plants: offences) do not apply to anything done under and in accordance with the terms of a licence granted under paragraph (1)."

50. The relevant licensing body for the purposes of regulation 53(2)(a) to (d) is, in relation to England, the Marine Management or Natural England. The relevant licensing body for the purposes of regulation 53(2)(e) to (g) is the appropriate authority, that is, the Secretary of State in relation to England: see regulation 56 of the Regulations. However, section 78 of the Natural Environment and Rural Communities Act 2006 empowers the Secretary of State to enter into an agreement with Natural England authorising it to perform a function of the Secretary of State. It was common ground in the present case that if great crested newts or bats had to be removed from the site, a licence would be needed and the relevant provision authorising the grant of such a licence would be 53(2)(e) of the Regulations, namely "other imperative reasons of overriding public interest". It was further assumed that the relevant licensing body was Natural England. In fact, if the licence was to be granted under regulation 53(2)(e) of the Regulations, the relevant licensing body would be the Secretary of State (unless he entered into an agreement to enable Natural England to exercise that function). However, it is clear that the Secretary of State was not purporting, in the present case, to be exercising any licensing functions under regulation 53. Rather, he had appointed an inspector on his behalf simply to carry out the function of determining an appeal against a refusal of planning permission under section 78 of the 1990 Act. The relevant duty was that in regulation 9(5) to have regard to the requirements of the Habitats Directive when exercising his planning functions: see *Elliott v Secretary of State for Communities and Local Government* [2013] Env. L.R. 5 at para. 50.

The Scope of the Obligation

51. The scope of the obligation under the predecessor to regulation 9(5) of the Regulations, which was in materially identical terms, was considered by the Supreme Court in *R (Morge) v Hampshire County Council* [2014] 1 W.L.R. 268. As Lord Brown noted at paragraph 28, the Court of Appeal had held as follows:

> "The planning committee must grant or refuse planning permission in such a way that will 'establish a system of strict protection for the animal species listed in Annex IV (a) in their natural range …' If in this case the committee is satisfied that the development will not offend article 12(1)(b) or (d) it may grant permission. If satisfied that it will breach any part of article 12(1) it must then consider whether the appropriate authority, here Natural England, will permit a derogation and grant a licence under regulation 44. Natural England can only grant that licence under regulation 44. Natural England can

only grant that licence if it concludes that (i) despite the breach of regulation 39 (and therefore of article 12) there is no satisfactory alternative; (ii) the development will not be detrimental to the maintenance of the population of bats at favourable conservation status; and (iii) the development should be permitted for imperative reasons of overriding public importance. If the planning committee conclude that Natural England will not grant a licence it must refuse planning permission. If on the other hand it is likely that it will grant the licence then the planning committee may grant conditional planning permission. If it is uncertain whether or not a licence will be granted, then it must refuse planning permission."

52. Lord Brown did not agree. In paragraph 29 of his judgment, he said this:

> "29. In my judgment this goes too far and puts too great a responsibility on the planning committee whose only obligation under regulation 3(4) is, I repeat, to "have regard to the requirements of the Habitats Directive so far as [those requirements] may be affected by" their decision whether or not to grant a planning permission. Obviously, in the days when the implementation of such a permission provided a defence to the regulation 39 offence of acting contrary to article 12(1), the planning committee, before granting a permission, would have needed to be satisfied either that the development in question would not offend article 12(1) or that a derogation from that article would be permitted and a licence granted. Now, however, I cannot see why a planning permission (and, indeed, a full planning permission save only as to conditions necessary to secure any required mitigating measures) should not ordinarily be granted save only in cases where the planning committee conclude that the proposed development would both (a) be likely to offend article 12(1) and (b) be unlikely to be licensed pursuant to the derogation powers. After all, even if development permission is given, the criminal sanction against any offending (and unlicensed) activity remains available and it seems to me wrong in principle, when Natural England have the primary responsibility for ensuring compliance with the Directive, also to place a substantial burden on the planning authority in effect to police the fulfilment of Natural England's own duty."

53. Lord Brown also said, at paragraph 30 in his judgment, that:

> "30. Where, as here, Natural England express themselves satisfied that a proposed development will be compliant with article 12, the planning authority are to my mind entitled to presume that that is so. The planning committee here plainly had regard to the requirements of the Directive: they knew from the officers' decision report and addendum report (see para 8 above and the first paragraph of the addendum report as set out

> in para 72 of Lord Kerr of Tonaghmore JSC's judgment) not only that Natural England had withdrawn their objection to the scheme but also that necessary measures had been planned to compensate for the loss of foraging. For my part I am less troubled than Ward LJ appears to have been (see his para 73 set out at para 16 above) about the UBS's conclusions that "no significant impacts to bats are anticipated" – and, indeed, about the decision report's reference to "measures to ensure there is no significant adverse impact to [protected bats]". It is certainly not to be supposed that Natural England misunderstood the proper ambit of article 12(1)(b) nor does it seem to me that the planning committee were materially misled or left insufficiently informed about this matter. Having regard to the considerations outlined in para 29 above, I cannot agree with Lord Kerr JSC's view, implicit in paras 75 and 76 of his judgment, that regulation 3(4) required the committee members to consider and decide for themselves whether the development would or would not occasion such disturbance to bats as in fact and in law to constitute a violation of article 12(1)(b) of the Directive."

54. Baroness Hale held at paragraphs 44 and 45 that:

> "44. It is quite clear from all of this that separate consideration was being given both to the effect upon European protected species and to the effect upon the protected sites, that both were being considered under the Habitats Regulations, and that the applicable policy on protected species, which also refers to the Habitats Regulations 1994, was being applied, It is true that the report does not expressly mention either regulation 3(4) or article 12 of the Directive. In my view, it is quite unnecessary for a report such as this to spell out in detail every single one of the legal obligations which are involved in any decision. Councillors were being advised to consider whether the proposed development would have an adverse effect on species or habitats protected by the 1994 Regulations. That in my view is enough to demonstrate that they "had regard" to the requirements of the Habitats Directive for the purpose of regulation 3(4). That is all they have to do in this context, whereas regulation 48(1)(a) imposes a more specific obligation to make an "appropriate assessment" if a proposal is likely to have a significant effect upon a European site. It is not surprising, therefore, that the report deals more specifically with that obligation than it does with the more general obligation in regulation 3(4).
>
> 45. Furthermore, the United Kingdom has chosen to implement article 12 of the Directive by creating criminal offences. It is not the function of a planning authority to police those offences. Matters would, as Lord Brown JSC points out, have

> been different if the grant of planning permission were an automatic defence. But it is so no longer. And it is the function of Natural England to enforce the Directive by prosecuting for these criminal offences (or granting licenses to derogate from the requirements of the Directive). The planning authority were entitled to draw the conclusion that, having been initially concerned but having withdrawn their objection, Natural England were content that the requirements of the Regulations, and thus the Directive, were being complied with. Indeed, it seems to me that, if any complaint were to be made on this score, it should have been addressed to Natural England rather than to the planning authority. They were the people with the expertise to assess the meaning of the updated bat survey and whether it did indeed meet the requirements of the Directive. The planning authority could perhaps have reached a different conclusion from Natural England but they were not required to make their own independent assessment. ”

55. Lord Walker and Lord Mance agreed with Lord Brown and Baroness Hale. Lord Kerr dissented. The ratio of *Morge* is, in my judgment, correctly stated by Lindblom J. in *R (Prideaux) v Buckinghamshire County Council and FCC Environment UK Ltd.* [2013] EWHC 1054 (Admin) at paragraph 96 in the following terms:

> “As the final decision in *Morge* makes clear, regulation 9(5) does not require a planning authority to carry out the assessment that Natural England has to make when deciding whether there would be a breach of article 12 of the Habitats Directive or whether a derogation from that provision should be permitted and a licence granted. If a proposed development is found acceptable when judged on its planning merits, planning permission for it should normally be given unless in the planning authority’s view the proposed development would be likely to offend article 12(1) and unlikely to be licensed under the derogation powers (see paragraph 29 of Lord Brown’s judgment in *Morge*).”

The Present Case

56. Against that background, the claimant contended that the inspector in the present proceeded on the basis that there were European Protected Species on the site. Mr Crean submitted that the key factor enabling the Supreme Court to conclude in *Morge* that the duty in the predecessor to regulation 9(5) of the Regulations had been discharged was that Natural England had, in fact, been consulted and had not objected to the development. In the absence of such advice, the claimant submitted that the inspector was under a duty to consider the specific requirements of Article 12 and Article 16, and decide whether a licence would be likely to be granted. On the claimant’s submission, that involved the inspector deciding, in relation to Article 16, whether there were imperative reasons of overriding public interest justifying the development, whether there were no satisfactory alternatives to permitting the development and whether the derogation from Article 12 represented by the disturbance of the species was not detrimental to the maintenance of their populations.

57. Mr Whale for the 1st defendant invited me to find as a fact that, on the evidence, there were no European Protected Species on the site and that the issue did not arise. Alternatively, he submitted that the inspector's judgment should be read as indicating that the protected species on the site were badgers (which are not a European Protected Species to which the relevant provisions of the Habitats Directive applied). Mr Whale further submitted that the inspector had proceeded on the basis that only the removal of specimens of the species would occur if planning permission were granted and the removal of specimens did not involve action incompatible with Article 12 of the Habitats Directive. Alternatively, Mr Whale submitted that the inspector had done sufficient to demonstrate that he had had regard to the requirements of the Habitats Directive. Mr Lancaster for the second defendant adopted those submissions.

58. A straightforward reading of the inspector's decision letter, and paragraphs 67 and 68 in particular, leads to the conclusion that the inspector did consider the provision of Articles 12 and 16 of the Habitats Directive. He proceeded on the basis that there had been sightings of European Protected Species including great crested newts, and bats, on the site (see paragraph 67). Against that background, in paragraph 68, the inspector referred to the Habitats Directive. He proceeded on the basis that the proposal would destroy some habitat and "some species will require relocation". He considered that that would have to be undertaken under the terms of a Natural England licence but that, nevertheless, there was potential for significant habitat enhancement. The natural, straightforward reading of the decision letter is that the inspector proceeded on the basis there were European Protected Species on the site which would have to be relocated under a licence.

59. In relation to Article 12, it is not feasible, in my judgment, to read the paragraphs as indicating anything other than that the inspector was proceeding on the basis that there may be European Protected Species on the site. A close, forensic analysis of the terms of paragraph 68 – even if appropriate – would only reinforce that conclusion. The first sentence refers to the requirements of the Habitats Directive which are concerned with European Protected Species. The next sentence, referring to the relocation of species, is far more likely to refer back to the previous sentence (which implicitly must be dealing with European Protected Species) rather than badgers or some other species. That is reinforced by the third and fourth sentences which talk of the need for a Natural England licence (which must be a reference to a licence under regulation 53 of the Regulations to remove European Protected Species, albeit it may be the Secretary of State not Natural England, which will have to consider whether to grant a licence if regulation 53(2)(e) is relied upon). Similarly, there is no basis for reading in the words "specimens of" before "some species". That is not to give a straightforward reading to the letter; it is to re-write it.

60. Furthermore, it would not be appropriate for this court on an application under section 288 of the 1990 Act to seek to determine as a matter of fact that there were no great crested newts or bats on the site so that consideration of the requirements of the Habitats Directive was not necessary. Nor, on the evidence, could this court make such a finding. On analysis, the evidence on which the defendants rely in relation to great crested newts shows that no survey had been undertaken. The applicant for planning permission did not consider it was likely that the site supported a population of great crested newts and considered that a survey was not necessary. One of the

claimant's officers (the ecologist) shared the view that a survey was not necessary. The planning officer's report does not express a concluded view on that issue. On bats, the applicant's report indicated that no survey had been undertaken and, if the works were not implemented by May 2011 (which, of course, is the case), a survey should be undertaken. Natural England noted that no survey information was available and requested that further information be provided. The officer's report noted that a European Protected Species had been recorded on site and that there was evidence of significant activity by other protected species. The inspector proceeded on the basis that there were European Protected Species on site so regard had to be paid to the requirements of the Habitats Directive (whether he was correct in doing so may ultimately need to be decided by the relevant licensing authority). There is no basis for concluding on the evidence that the inspector erred in proceeding on the basis that there may be European Protected Species on the site.

61. That then raises the question of the scope of the duty on the inspector under regulation 9(5) of the Regulations and whether he discharged that duty. In my judgment, if an inspector (or the Secretary of State) when exercising the functions of considering an appeal under 78 of the 1990 against the refusal of planning permission considers that planning permission should, otherwise, be granted, he is ordinarily entitled to grant planning permission unless, on the material before him, he concludes that (1) the proposed development would be likely to offend Article 12(1) and (2) be unlikely to be licensed pursuant to the derogation powers in Article 16 of the Habitats Directive.

62. The inspector here proceeded on the basis that the proposed development could offend Article 12. It is clear that the inspector also considered whether a licence would be granted and it is implicit, in my judgment, that he did not consider that it was unlikely that any such licence would be granted. He was entitled, on the material advanced before him during the planning inquiry to come to that conclusion. No one was contending that the grant of a licence would be unlikely. The claimant planning authority and the applicant for planning permission considered that any issues relating to the removal of European Protected Species could be adequately dealt with. There is no suggestion that any other person or body advanced any evidence or argument that the grant of a licence, if it ultimately proved necessary to obtain one, would be unlikely. In those circumstances, the inspector was entitled to grant planning permission. In my judgment, he was not required, in the absence of advice from Natural England, to undertake a detailed assessment of each element of Article 16 to determine whether there was a likelihood that those elements would be satisfied so that the likelihood was that the relevant licensing body would grant a licence.

63. I reach that conclusion for the following reasons. First, as a matter of domestic law, the obligation is "to have regard" to the requirements of the Habitats Directive. Secondly, the function of deciding if a licence is necessary and should be granted is for the relevant licensing body not the inspector dealing with the section 78 planning appeal. It is not to be expected or inferred that the need to have regard to the requirements of the Habitats Directive requires a planning inspector to make a detailed assessment of matters that are primarily the responsibility of another body. Thirdly, that approach is consistent with the judgments of Lord Brown and Baroness Hale in *Morge* and the decision of Lindblom J. in *R (Prideaux) v Buckinghamshire County Council and FCC Environment UK Ltd.* [2013] EWHC 1054 (Admin.) at para. 96.

64. Furthermore, it is important to bear in mind that that conclusion still ensures that the obligations of the United Kingdom under the Habitats Directive can be fully complied with. The relevant obligation in Article 12 of the Habitats Directive is to ensure the protection of certain species and derogation from that obligation would only be permitted in strictly defined circumstances. The United Kingdom has chosen to achieve that result by making the disturbance of European Protected Species a criminal offence unless the disturbance is done pursuant to a licence granted in accordance with tests which implement the requirements of Article 16 of the Habitats Directive. Those provisions apply, and ensure compliance with the Habitats Directive, notwithstanding the grant of planning permission.

CONCLUSION

65. In deciding whether to allow the appeal and grant planning permission, the inspector correctly considered the question of whether or not the claimant was able to demonstrate it had a five year supply of housing land. The inspector was entitled to reach the conclusion that the claimant had not done so and gave adequate intelligible reasons for that conclusion. In those circumstances, the inspector correctly considered the question of whether the proposed development represented sustainable development. He was entitled on the material before him to conclude that it was. Permission is granted to allow the claimant to amend the claim form to allege that there had been a failure to comply with the obligation in regulation 9(5) of the Regulations to have regard to the requirements of the Habitats Directive. For the reasons given, the inspector in the present case proceeded on the basis that the implementation of the proposed development may involve the disturbance of European Protected Species but he did not consider that it would be unlikely that the relevant licensing body would grant any licence ultimately found to be necessary. He did, therefore, on the facts of this case discharge his obligation under regulation 9(5) of the Regulations. The claim is, therefore, dismissed.

66.