Neutral Citation Number: [2014] EWHC 4108 (Admin)

Case No: CO/2725/14

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 05/12/2014

Before :

MR JUSTICE GILBART

- -

Between :

THE QUEEN	**Claimant**
(on the application of)	
FRACK FREE BALCOMBE RESIDENTS ASSOCIATION	
- and -	
WEST SUSSEX COUNTY COUNCIL	**Defendant**

- -
- -

David Wolfe QC (instructed by **Leigh Day, Solicitors of London**) for the **Claimant**
James Maurici QC (instructed by **Rebecca Moutrey, Solicitor, West Sussex County Council**) for the **Defendant**

Hearing dates: 7th-8th November 2014

- -

Approved Judgment

MR JUSTICE GILBART:

1. I shall deal with this matter as follows

   a) Background facts

   b) The Claimant's and Defendant's cases in outline

   c) Determination of applications under section 70 *Town and Country Planning Act 1990*

   d) Relationship of planning control regime with other statutory regimes, and effect on the determination of planning applications

   e) Grounds 1-3 : submissions of Claimant and Defendant and Discussion

   f) Ground 4: submissions of Claimant and Defendant and Discussion

   g) Ground 6: submissions of Claimant and Defendant and Discussion

   h) Ground 7: submissions of Claimant and Defendant and Discussion

   i) Conclusions

   (Ground 5 was withdrawn after the Defendant WSCC served its Grounds for Resisting the Claim.)

2. This claim for judicial review seeks to quash the planning permission of 2nd May 2014 granted by West Sussex County Council ("WSCC"), as minerals planning authority, to Cuadrilla Balcombe Limited ("CBL") for

   > "temporary permission for exploration and appraisal comprising the flow testing and monitoring of the existing hydrocarbon lateral borehole along with site security fencing, the provision of an enclosed testing flare, and site restoration"

   at the Lower Stumble Hydrocarbon Exploration Site, London Road, Balcombe, West Sussex. The Claimant Frack Free Balcombe Residents Association ("FFBRA") was opposed to the application being granted. Permission was granted by Lang J to bring the claim. No reasons were given for the grant of permission, nor observations made.

3. I regret that this judgment is of some length. The Claimant's case involved examining aspects of the hearing before the WSCC planning committee and of the documents relating to it. It would not do justice to the Claimant's case were I not to refer to them, nor to the Defendant's case were I not to set out the effect of its arguments on the law.

A *Background facts*

4. The proposed development requires a number of statutory authorisations in addition to the grant of minerals planning permission

a) from the Environment Agency ("EA") in relation to drilling and testing. It addresses the protection of water resources (including groundwaters), treatment of mining waste, emissions to air, the treatment of naturally occurring radioactive substances, and the chemical content of fluids used in operations. A permit had already been granted.

b) from the Department of Energy and Climate Change ("DECC") pursuant to section 3 of the *Petroleum Act 1998* and which issues petroleum licences and consents for drilling, flaring and venting, including the assessment and monitoring the risk of seismic activity (see *Petroleum Licensing (Exploration and Production) (Landward Areas) Regulations 2014*);

c) from the Health and Safety Executive ("HSE") which, pursuant to the *Borehole Sites and Operations Regulations 1995* (SI 1995/2038) addresses the safety aspects of all phases of extraction, including the design and construction of well casings within a borehole. By Regulation 7 "The health and safety document"

> (1) No borehole operation shall be commenced at a borehole site unless the operator has ensured that a document (in these Regulations referred to as "the health and safety document") has been prepared, which—
>
> > (a) demonstrates that the risks to which persons at the borehole site are exposed whilst they are at work have been assessed in accordance with regulation 3 of the Management Regulations;
> >
> > (b) demonstrates that adequate measures, including measures concerning the design, use and maintenance of the borehole site and of its plant, will be taken to safeguard the health and safety of the persons at work at the borehole site; and
> >
> > (c) includes a statement of how the measures referred to in sub-paragraph (b) will be co-ordinated."

The HSE has its usual enforcement powers under sections 22-3 of the *Health and Safety at Work Act 1974.*

5. The application for the planning permission at issue in these proceedings was made by CBL on 3rd December 2013 and followed the drilling of a vertical and lateral well at the site during the summer of 2013. This drilling was done pursuant to an earlier planning permission granted in 2010 to

> "upgrade existing stoned platform and drill and exploratory borehole for gas and oil exploration"

This earlier permission was time limited to a period of 3 years from the date of commencement of site construction. Site implementation works were carried out in September 2010, but no further operations took place until drilling commenced

in July 2013. The operations on site had all necessary permits from the relevant regulatory authorities.

6. On 14th January 2014 a screening opinion determined that the proposal did not have the potential for significant effects on the environment within the meaning of the *Town and Country Planning (Environmental Impact Assessment) Regulations 2011*, so that no Environmental Impact Assessment was required. There has been no challenge to that decision.

7. As is I think well known, the operations under the previous permission had excited considerable opposition from those who disapprove of the use of hydraulic fracturing ("fracking") to extract shale gas. That had led to a great deal of protest taking place near the application site. On 14th November 2013, WSCC obtained an order in the High Court from His Honour Judge Seymour QC sitting as a Judge of the High Court against named Defendants as representatives of those currently protesting on the B 2036 London Road, other named Defendants and persons unknown, whereby

   a) WSCC was granted possession of land

   b) named Defendants and unknown Defendants served with the Order were restrained from camping or residing on the land, or obstructing or interfering with its use by the Council, save for lawful passage and repassage and save for peaceful assembly and freedom of association for the purposes of freedom of expression within Articles 10 and 11 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms* ("ECHR") within a defined area set aside for protest opposite the site entrance, which was not to be used at night, and upon which they could not reside, camp, remain overnight or erect any tent, caravan, shed or shelter;

   c) the named Defendants and those subsequently served were to remove all personal property from the land, including any tent, caravan, shed or shelter or camping paraphernalia, and were also to remove any obstruction from the land.

8. In November 2013, WSCC had published a sheet of answers to "Frequently Asked Questions" ("FAQs") about onshore hydrocarbons including Hydrocarbon Extraction, and Hydraulic Fracturing ("Fracking"). I shall refer to its contents in due course (reference to it formed a part of the Claimants' case), but its purpose was plainly (and commendably, given the degree of public concern or interest on the topic) to assist the residents of areas where proposals were made to have a more informed grasp of the issues and of how planning control related to other statutory regulatory regimes. It was however published before the date of the application for planning permission, but it does refer to the CBL proposals (see its section H).

9. An issue arose in the hearing about the content of the application so far as the assessment of emissions to air was concerned. I shall deal with that question, and the issue of the application for, and grant of, the EA permit, when I deal with Grounds 1 to 3.

10. After the application was submitted, statutory consultation replies were received from, among others, the local planning authority (Mid Sussex District Council) Balcombe Parish Council, the EA, the HSE, WSCC Drainage, WSCC Highways, Southern Water, Sussex Police and the three neighbouring parish councils of Ardingly, Ansty and Staplefield , and Worth.

11. I shall deal in due course with the comments received from the EA and the HSE.

12. Representations were also received from Public Health England ("PHE"), and objections from Sussex Wildlife and from CPRE Sussex Countryside Trust. 889 objections were received from others, with 9 representations in support. The objection of the claimant FFBRA was noted, as was the fact that it had 300 members. The issues raised by objectors were summarised in the officer's report.

13. The FFBRA objection consisted of a 67 page document, with appendices, which was well prepared and argued. In particular, the section on emissions to air had plainly been drawn up with the assistance of someone with some knowledge of emissions modelling and monitoring.

14. I have noted the quality of the FFBRA objection. So too must I note the quality of the officer's report to committee by Ms Jane Moseley, a Principal Planner on behalf of the Strategic Planning Manager. It is itself 37 pages long, and contains an executive summary, a very full description of the proposals and of the consultations received, and a thorough consideration of the issues raised. While some criticisms are made of it by Mr Wolfe for FFBRA, it is in my judgment well written, informative and clear. I shall in due course consider some aspects of that report to which Mr Wolfe and Mr Maurici drew my attention.

15. At the meeting of the Planning Committee, which determined the application on 29th April 2014, many people attended. So did two representatives of the EA. Minutes were taken, and I have also been shown a transcript of what took place. The meeting took from 10.30 to 2.45 pm. It proceeded as follows:

    a) the officer Ms Moseley introduced her report. She also produced details of some amended proposed conditions. Her presentation included photographs of the site, an account of the representations received and a list of the issues. She also informed the Committee that at a very late stage (that morning) the solicitors for FFBRA had delivered a letter requesting deferral of the meeting. That request was rejected. It is not suggested before me that the planning committee had acted unlawfully in doing so;

    b) Mr Kevin Bottomley spoke against the proposal for Balcombe Parish Council;

    c) Miss Sue Taylor, Vice Chair of FFBRA spoke against the proposal;

    d) Mrs Louisa Delpy, a local resident, spoke against the proposal;

    e) Mr Charles Metcalfe, a local resident, spoke against the proposal;

    f) Mr Rodney Jago, a local resident, spoke in support of the proposal;

g) Mr Nigel Gould, of Ove Arup, planning consultants, spoke on behalf of CBL in support of the proposal;

h) County Councillor William Acraman spoke against the proposal;

i) The Chairwoman asked Ms Moseley to comment on what had been said thus far;

j) WSCC Committee members were then asked to make their contributions. After the first County Councillor had spoken , the Chairwoman asked the WSCC legal adviser and Mr Wick of the EA to provide information;

k) County Councillor Mullins then asked questions, and then raised a question to which I shall devote more attention when I come to deal with ground 7 raised by the claimants. She referred to the disruption caused, and what she described as the consequent distress to the local community by the protest that went on. Then she referred to the

> "……cost to West Sussex. Whatever we decide here will have an ongoing effect on what happens in the future…..I would like to ask how much it actually did cost West Sussex County Council to actually have this…action happening in this area. We have no guarantee that this is not going to happen again and can the council actually afford millions and millions of pounds to enable companies to extract….."

She was then stopped by the Chairwoman, who asked for the view of the legal advisers to the WSCC. The Committee was advised that the matter could only be decided on planning grounds and that such costs and expenses were not relevant to the determination of the application. County Councillor Mullins then accepted that the issue should not affect how the Committee determined the application.

l) Other members raised issues relating to noise re noise and traffic. Reference was made to issues of noise monitoring and the routing of HGVs.

m) The committee then discussed what planning conditions should be attached to the permission. I shall refer to those conditions shortly.

16. During the course of the discussions which took place at the committee meeting there were a number of occasions upon Miss Moseley gave advice relating to the way in which the committee should deal with matters which could also be dealt with by the other statutory bodies. When I come to deal with Ground 1 of the Claimant's case I shall refer to that in more detail. I shall also refer to other advice given by Miss Moseley and by the legal officer to the council. I do so because Mr Wolfe places some reliance on what he says were pieces of improper advice given to the committee.

17. The application was granted subject to 20 conditions, dealing inter alia with

a) Timescale: all operations approved were to be completed within 6 months (condition 2).

b) Scope of development: the proposed development was not to take place other than in accordance with plans and documents set out in the condition, together with supporting information, including Version 2 of the Planning Statement submitted by CBL, as varied by the conditions. High pressure hydraulic fracturing was not to take place as part of the development (Condition 2).

c) Pollution Prevention Statement: development was not to begin until such a statement had been submitted to, and approved by, WSCC setting out details of the construction of the engineered site to prevent pollution. It was to include details of an impermeable membrane, and detailed pollution prevention assessments and mitigation methods to prevent pollution of the water environment. It was to be implemented in full and maintained throughout the development (Condition 6).

d) Surface water: development was not to begin until a scheme dealing with surface water drainage had been submitted (and in doing so to follow an approved Drainage Strategy Report) and approved by WSCC. Details of what it must contain were set out (Condition 7).

e) Traffic management: development was not to begin until a traffic management plan had been submitted to and approved by WSCC. It was to include details of the number, type and frequency of vehicles used in the development, their access and routing (including consideration of routing to the south), security hoarding (if relevant), the provision of works required to mitigate the impact of development on the highway, details of public engagement, traffic management such as timing restrictions and signage, and measures to avoid HGVs travelling past Balcombe CE Primary School for periods before and after the beginning and end of the school day (Condition 10).

f) Noise: noise limits were set for the noise from the development, to be measured at a property. There was to be continuous monitoring of noise levels at that location, with weekly submissions to WSCC (or on request) and provision for mitigation (Conditions 12-13). Development was not to begin until a Noise management Plan had been submitted and approved (Condition 14).

g) Development was not to begin until a scheme had been submitted to WSCC and approved for the establishment of a liaison group to include representatives from CBL, WSCC and local residents (Condition 20).

18. An "Informative" advised the applicant CBL to contact the Highway Authority to enter into an agreement under s 59 *Highways Act 1980* to recover any costs caused by the passage of construction traffic.

B *The Claimant's and Defendant's cases in outline*

19. The Claimant, represented by Mr Wolfe QC argues that

    a) the Planning Committee was wrongly advised that it should leave matters such as pollution control, air emissions and well integrity to the EA, HSE and other statutory bodies;

    b) the Committee was misled with regard to the views of PHE on air emissions monitoring, and of HSE on well integrity;

    c) the Committee was wrongly advised to treat as immaterial evidence of past breaches of planning condition by CBL;

    d) the Committee was wrongly advised that the number of objections received (as opposed to their content) was immaterial;

    e) the Committee was wrongly advised that the issue of the costs generated by protests at the activities of CBL was immaterial.

20. The Defendant, represented by Mr Maurici QC, argues that:

    a) the approach to matters dealt with under other statutory regimes was quite consistent with national policy and with well established legal authority;

    b) the Committee treated the issue of the effects on the environment as material. It was quite entitled to assume that they would be addressed by the relevant statutory agencies ;

    c) the Committee was not misled about the views of PHE, nor about the issue of well integrity and the conduct of HSE;

    d) the Committee was properly advised about relevance of past breaches. In any event, they were addressed by the conditions which could be attached to the permission, or had already been addressed;

    e) the Committee was not wrongly advised on the topic of objections. The Committee was aware of them, and of the numbers. The Committee was entitled to treat the numbers as being immaterial as opposed to the weight to be attached to their contents;

    f) the Committee should not have had regard to the costs of dealing with protests.

C *Determination of planning applications under s 70 Town and Country Planning Act 1990 (TCPA 1990)*

21. A Planning Authority when determining a planning application

    a) must have regard to

        a) the statutory development plan

b) any local finance considerations, so far as material to the application, and

c) any other material considerations.

b) Must determine the proposal in accordance with the development plan unless material considerations indicate otherwise.

(see s 70(1) *TCPA 1990* as amended by the *Localism Act 2011* s 143 and section 38(6) *Planning and Compulsory Purchase Act 2004*)

22. National Planning Policy is par excellence a material consideration. I refer to the lucid exposition of this topic by Lindblom J *in Cala Homes (South) Ltd v Secretary of State for Communities & Local Government* [2011] EWHC 97 (Admin), [2011] JPL 887 at paragraph 50

> "50 The power of a minister to issue a statement articulating or confirming a policy commitment on the part of the government does not derive from statute. As was noted by Cooke J. in *Stringer* (at p.1295), section 1 of the Town and Country Planning Act 1943 imposed on the minister a general duty to secure consistency and continuity in the framing and execution of a national policy for the use and development of land. Although that duty was repealed by the Secretary of State in the Environment Order 1970, Mr Mould submitted, and I accept, that it still accurately describes the political responsibility of the Secretary of State for planning policy. The courts have traditionally upheld the materiality of such policy as a planning consideration. In his speech in *Tesco Stores Limited* (at p. 777F) Lord Hoffmann acknowledged that the range of policy the Secretary of State may promulgate is broad. The example cited by Lord Hoffmann was "a policy that planning permissions should be granted only for good reason". In *ex parte Kirkman* Carnwath J. said (at pp. 566 and 567):
>
> "… A distinction must be drawn between (1) formal policy statements which are made expressly, or are by necessary implication, material to the resolution of the relevant questions, (2) other informal or draft policies which may contain relevant guidance, but have no special statutory or quasi-statutory status.
>
> Even though the planning Acts impose no specific requirement on local planning authorities to take account of Government policy guidance, it is well established that it should be treated, so far as relevant, as a material consideration (see *Gransden v. Secretary of State, ex parte Richmond L.B.C.* [1996] 1 W.L.R. 1460, 1472). Given the Secretary of State's general regulatory and appellate jurisdiction under the Acts, his policies, and those of the Government of which he forms part, they can no doubt be regarded as "obviously material" within the *Findlay* tests. The same can be said of his policies in respect of the Environment Protection legislation …"
>
> In *Re Findlay* [1985] A.C. 318, to which Carnwath J. referred there, Lord Scarman approved (at p. 333) as a "correct statement of principle" the following observations made by Cooke J. in *Creed N.Z. Inc. v. Governor-General* [1981] 1 N.Z.L.R. 172 (at p. 183):
>
> "… What has to be emphasised is that it is only when the statute expressly or impliedly identifies considerations required to be taken into account by

> the authority as a matter of legal obligation that the Court holds a decision invalid on the ground now invoked. It is not enough that a consideration is one that may properly be taken unto account, or even that it is one which many people, including the Court itself, would have taken into account if they had to make a decision."
>
> and
>
> "… There will be some matters so obviously material to a decision on a particular project that anything short of direct consideration by the ministers … would not be in accordance with the intention of the Act."

23. No one has suggested to me in this matter that statements of national planning policy are anything other than material.

24. I shall turn to the definition of "local finance consideration" below.

D *Relationship of planning control regime with other statutory regimes, and effect on the determination of planning applications*

25. Planning control is but one of the statutory regimes which can affect the carrying out of a development, or its use. At paragraph 4 above I have set out the various statutory regimes in play here. They do not all operate in the same way. Thus, while a planning permission cannot be revoked or modified by the minerals or local planning authority (as the case may be) without giving rise to a liability to compensation (see *s 97-100 TCPA 1990*) (and such revocations or modifications are therefore extremely rare) a permit from the EA can be modified by the EA to reflect changes in circumstance or knowledge without a right to compensation – see Regulation 20 of the *Environmental Permitting (England and Wales) Regulations 2010.* (A planning permission may only be changed without there being an entitlement to compensation where the owner proposes the change, and then only so far as its conditions are concerned - see s *96A TCPA 1990* as amended).

26. Plainly, while the effect of an activity on the environment is a material consideration, so too is the existence of a statutory code or codes which address(es) the effect(s) being considered. Thus, the generation of airborne emissions or the potential for contamination of groundwaters are matters falling squarely within the purview of the EA permit regime: similarly, well integrity falls within the purview of DECC and of the HSE, and so on. Some fall within the remit of more than one statutory body.

27. It is therefore sensible that where one has a statutory code to address some technical issue, one should not use another statutory regime as an alternative way of addressing the issue in question.

28. It has been the stated policy of the First Secretary of State and his predecessor Secretaries of State for many years that while the effects of emissions to air or water generated by an installation are a material planning consideration, yet the planning system should recognise that the judgments on the acceptability of those emissions in pollution control terms are to be made by the pollution control authorities/regulators, whose judgments should then be accepted by the planning

system. That has been extended to the interrelationship between planning control and other statutory codes.

29. In paragraph 122 , within Chapter 11 of the National Planning Policy Framework, it is stated that

> …….. local planning authorities should focus on whether the development itself is an acceptable use of the land, and the impact of the use, rather than the control of processes or emissions themselves where these are subject to approval under pollution control regimes. Local planning authorities should assume that these regimes will operate effectively. Equally, where a planning decision has been made on a particular development, the planning issues should not be revisited through the permitting regimes operated by pollution control authorities.

30. In the policy specific to Minerals Planning, which is of application here, under the heading "Assessing environmental impacts from minerals extraction" this appears at paragraph 12;

> "What is the relationship between planning and other regulatory regimes?
> The planning and other regulatory regimes are separate but complementary. The planning system controls the development and use of land in the public interest and, as stated in paragraphs 120 and 122 of the National Planning Policy Framework, this includes ensuring that new development is appropriate for its location – taking account of the effects (including cumulative effects) of pollution on health, the natural environment or general amenity, and the potential sensitivity of the area or proposed development to adverse effects from pollution."

31. Paragraphs 13 and 14 continue

> 13 What are the environmental issues of minerals working that should be addressed by mineral planning authorities?
>
> The principal issues that mineral planning authorities should address, bearing in mind that not all issues will be relevant at every site to the same degree, include:
>
> - noise associated with the operation
> - dust;
> - air quality;
> - lighting;
> - visual impact on the local and wider landscape;
> - landscape character;
> - archaeological and heritage features ……..
> - traffic;
> - risk of contamination to land;
> - soil resources;
> - geological structure;
> - impact on best and most versatile agricultural land;
> - blast vibration;
> - flood risk;

- land stability/subsidence;
- internationally, nationally or locally designated wildlife sites, protected habitats and species, and ecological networks;
- impacts on nationally protected landscapes (National Parks, the Broads and Areas of Outstanding Natural Beauty);
- nationally protected geological and geo-morphological sites and features;
- site restoration and aftercare;
- surface and, in some cases, ground water issues;
- water abstraction.

14 What issues are for other regulatory regimes to address?

Since minerals extraction is an on-going use of land, the majority of the development activities related to the mineral operation will be for the mineral planning authority to address. However, separate licensing, permits or permissions relating to minerals extraction may be required. These include:

- permits relating to surface water, groundwater and mining waste, which the Environment Agency is responsible for issuing;
- European Protected Species Licences, issued by Natural England (where appropriate), and;
- ……..

Hydrocarbon extraction will involve other regulations."

32. That approach is not new. It existed (for example) in earlier planning policy guidance, PPG 23 **"***Planning and Pollution Control*" which was published in the light of the leading authority of *Gateshead MBC v Sec of State for Environment* [1994] Env LR 37, 1 PLR 85, which endorsed this approach as the sensible one to adopt. That case concerned a proposed incinerator, which would be the subject of what was then Her Majesty's Inspectorate of Pollution, the predecessor in this field of the EA. I refer to the judgment of Glidewell LJ (sitting with Hobhouse and Hoffman LJJ), who gave the lead judgment dismissing an appeal from Mr Jeremy Sullivan QC (as he then was, sitting as a deputy judge) where the local planning authority challenged the grant of planning permission on appeal, on the grounds that (inter alia) the Secretary of State had been wrong to conclude that the powers of the then regulator (Her Majesty's Inspectorate of Pollution) were sufficient to deal with concerns over releases. Glidewell LJ referred to passages from *This Common Inheritance; Britain's Environmental Strategy*, which was then draft Government policy;

> "……..Mr David Mole QC, for Gateshead, has referred us to two paragraphs in particular. These are:
>
> > 125. It is not the job of the planning system to duplicate controls which are the statutory responsibility of other bodies (including local authorities in their non-planning functions). Planning controls are not an

> appropriate means of regulating the detailed characteristics of industrial processes. Nor should planning authorities substitute their won judgment on pollution control issues for that of the bodies with the relevant expertise and the responsibility for statutory control over these matters.
>
> 126……The dividing line between planning and pollution control is therefore not always clear-cut……

Neither……..are statements of law. Nevertheless, it seems to me they are sound statements of common sense. Mr Mole submits, and I agree, that the extent to which discharges from a proposed plant will necessarily or probably pollute the atmosphere……is a material consideration to be taken into account when deciding to grant planning permission. The deputy judge accepted that submission also. But the deputy judge said at page 17 of his judgment, and in this respect I also agree with him

> "Just as the environmental impact of such emissions is a material consideration, so also is the existence of a stringent regime under the EPA" (Environmental Protection Act 1990) "for preventing or mitigating that impact (or) rendering any emissions harmless. It is too simplistic to say "the Secretary of State cannot leave the question of pollution to the EPA.""

33. Glidewell LJ also said at [1994] Env LR 49

> "The central issue is whether the Secretary of State is correct in saying that the controls under the *Environmental Protection Act are* adequate to deal with the concerns of the Inspector and assessor. The decision which was to be made on the appeal to the Secretary of State lay in the area in which the regimes of control under the Planning Act and the Environmental Pollution Act overlapped. If it had become clear at the inquiry that some of the discharges were bound to be unacceptable so that a refusal by HMIP to grant an authorisation would be the only proper course, the Secretary of State following his own express policy should have refused planning permission.
>
> But that was not the situation…….Once the information about air quality at both of those locations was obtained, it was a matter for informed judgment, i) what, if any, increases in polluting discharges of varying elements into the air were acceptable, and ii) whether the best available techniques etc would ensure those discharges were kept within acceptable limits.
>
> Those issues are clearly within the competence and jurisdiction of HMIP. If in the end the Inspectorate conclude that the best available techniques etc would not achieve the results required by section 7(2) and 7(4) it may well be that the proper course would be for them to refuse an authorization. …….they" (HMIP) "should not consider that the grant of planning permission inhibits them from refusing authorisation if they decide in their discretion that this is not the proper course.
>
> The Secretary of State was, therefore, justified in concluding that the areas of concern which led to the Inspector and the assessor recommending refusal were matters which could properly be decided by HMIP, and that their powers were adequate to deal with those concerns."

34. It can thus be seen that the Court of Appeal endorsed what was then the approach in national policy, and remains so, as "sound common sense." The *Gateshead* approach has been followed ever since. In *Cornwall Waste Forum St Dennis Branch v Secretary of State for Communities and Local Government* [2012] EWCA Civ 379 [2012] Env LR 34 a challenge was made to a grant on appeal of planning permission for an "energy from waste" plant. The Inspector and Secretary of State had relied upon an EA permit as showing that there was no need for an appropriate assessment of the permission – the main issue being emissions into the air. Carnwath LJ accepted that approach, stating at paragraph 30, 34 and 38:

> "30. … there was no misdirection. The inspector was not saying that the emissions were irrelevant to the planning decision, but was simply following the well-established principle, approved by this court in *Gateshead MBC v Secretary of State* (1971) 71 P. & C.R. 350 (citing the then current policy guidance, which is reflected in similar guidance today) that:
>
> > "It is not the job of the planning system to duplicate controls which are the statutory responsibility of other bodies… Nor should planning authorities substitute their own judgment on pollution control issues for that of the bodies with the relevant expertise and the responsibility for statutory control over those matters."
>
> …
>
> 34. … He observed correctly that the control of such emissions in this case was a matter for the Environment Agency. Although the overall planning judgment was one for the Secretary of State, he was entitled to be guided on this issue by the agreed position of the two specialist agencies. That was entirely consistent with the familiar approach approved in cases such as *Gateshead*. Mr Wolfe was right not to put this point at the forefront of his case.
>
> 38. By the same token, in so far as the possibility of harm to those interests arose from stack emissions, he was entitled – in either capacity – to be guided by the expertise of the relevant specialist agencies, the Environment Agency and Natural England. It would be only if their guidance was shown to be flawed in some material way that his own decision, relying on that guidance, would become open to challenge for the same reason."

35. In *R (An Taisce (The National Trust for Ireland) v The Secretary of State for Energy and Climate Change* [2013] EWHC 4161 (Admin) Patterson J was considering an application by An Taisce to seek permission to apply for judicial review of a decision on the part of the Secretary of State for Energy and Climate Change (the defendant) to grant a development consent order on the 19th March 2013 for a new nuclear power station at Hinkley Point C. One of the points taken by the Claimant was that it was wrong for the Secretary of State to have relied on

the future exercise of regulatory controls. Patterson J (who is of course very experienced indeed in this area of the law), said this:

177. "The claimant submits that the decision maker cannot have regard to the future role of the regulatory regime. The defendant submits that it would be odd if that was indeed the case. There is nothing in the Directive or Article 7 to require regulatory standards to be disregarded. Further, regulation by ONR" (Office of Nuclear Regulation) "penetrates the entire design so that it is inseparable from the scheme being advanced. As a result ONR is an integral part of the proposal and a key characteristic of the development itself.

178. The existence of another regulatory regime with powers which overlap with the regime of control under the Town and Country Planning Act is not new. The case of *Gateshead MBC v Secretary of State for the Environment* [1995] Env LR 37 dealt with an application to construct and operate an incinerator for the disposal of clinical waste. …….

36. Patterson J then referred to the passage from Glidewell LJ in *Gateshead* [1995] Env LR 49 set out above, and went on

180. "The position in *Gateshead* is analogous to the situation here. First, there is no doubt that the existence of a stringent regime for authorisation and planning control is a clear material consideration. Second, where, as here, at the time of the development consent determination the matters to be left over for determination by another regulatory body were clearly within the competence and jurisdiction of that body, as they are here within the remit of ONR it is, in principle, acceptable for the Secretary of State not only to be cognisant of their existence but to leave those matters over for determination by that body.

181. At the time of the Secretary of State's consideration of whether to grant development consent there was no evidence to suggest that the risk of an accident was more than a bare and remote possibility. In the instant case the regulatory regime is in existence precisely to oversee the safety of nuclear sites. There is nothing in the Directive and Article 7, in particular, to require the regulatory regime to be disregarded. NPS EN-6 refers to reliance being placed in the DCO process on the licensing and permitting regulatory regime for nuclear power stations, to avoid unnecessary duplication and delay and to ensure that planning and regulatory processes are focused in the most appropriate areas. *It would be contrary to the accepted principle in Gateshead not to have regard to that regime, and in my judgment it would also be entirely contrary to common sense".* (My italics)

182. "The claimant has relied upon a large number of cases as set out above. The defendant and interested party submit that the claimant has either misread or misapplied them.

183. The case of *Lebus"* (*R (on the application on Lebus) v South Cambridgeshire District Council* [2003] ENV LR 17) "concerned whether there was a screening opinion for EIA development. But the case also

concerned a further error of law which was that the question was not asked whether the development described in the application would have significant environmental effects but rather whether the development as described and subject to certain mitigation measures would have certain environmental effects. It was held not to be appropriate for a person charged with making a screening opinion to start from the premise that although there may be significant impacts they could be reduced in significance as a result of implementation of conditions of various kinds. What was required was a clear articulation in the application of the characteristics of the development proposed and mitigation to offset any harm.

184. The case of *Gillespie*" (*Gillespie v First Secretary of State* [2003] 3 PLR 20) "established that the Secretary of State was not obliged to ignore remedial measures submitted as part of the planning proposal when making his screening decision. Pill LJ said (at paragraph 36),

"In making his decision, the Secretary of State is not required to put into separate compartments the development proposal and the proposed remedial measures and consider only the first when making his screening decision."

185. The submission that when considering a screening decision the proposed development was the proposal shorn of remedial measures incorporated into it was rejected on the basis that it would be to ignore the "actual characteristics" of some projects. The problem there was that the disputed condition 6 required future site investigations to be undertaken to establish the nature, extent and degree of contamination present on site. Until that was done a scheme for remediation could not be proposed. That was held to be too open and too uncertain. That is very different from the instant case where extensive design work, licensing work and site investigation has been carried out, the overall design and site licence have been approved and the final solutions are in the process of being worked up.

186. The case of *Blewett" (R (Blewett) v Derbyshire CC* [2003] EWHC 2775 (Admin)) "concerned an application for judicial review of a planning permission for the third phase of a large landfill site. The application was accompanied by an environmental statement in accordance with the Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999. The argument was that the environmental statement was defective as it did not include an assessment of the potential impact on the use of the proposed landfill on groundwater. The planning authority had left those matters to be assessed after planning permission and had granted the permission assuming that complex mitigation measures would be successful. The measures described refer to the appropriateness of the lining system and site design being assessed as part of the integrated pollution prevention and control permit application. It was held that,

"Reading the environmental statement and the addendum report as whole, it is plain that a particular cell design, which is not in the least unusual, and a lining system were being proposed. The details of that system could be adjusted as part of the IPPC authorisation process… The defendant had placed constraints

upon the planning permission within which future details had to be worked out."

187. The role of the EA, as the authority that would be in charge of the IPPC process was considered. They had initially been concerned that existing contamination had not been adequately addressed. There was an addendum report to address that concern. After receipt of that they acknowledged that the issue had been discussed but said that no final remediation strategy had been proposed. Sullivan J continued [66],

"If the Environment Agency had had any concern in the light of the geological and hydrogeological information provided in the addendum report as to the remediation proposals contained therein, then it would have said so. Against this background the defendant was fully entitled to leave the detail of the remediation strategy to be dealt with under condition 29. "

188. The role of the authorising body was thus clearly taken into account and, given their lack of objection, the decision maker had been fully entitled to leave the detail of the measures to deal with ground water pollution to be assessed after planning permission had been granted. As a matter of law, therefore, the role of another regulatory body is clearly a material consideration in the determination of development consent. ……..

193. In my judgment there is no reason that precludes the Secretary of State from being able to have regard to, and rely upon, the existence of a stringently operated regulatory regime for future control. Because of its existence, he was satisfied, on a reasonable basis, that he had sufficient information to enable him to come to a final decision on the development consent application. *In short, the Secretary of State had sufficient information at the time of making his decision to amount to a comprehensive assessment for the purposes of the Directive. The fact that there were some matters still to be determined by other regulatory bodies does not affect that finding. Those matters outstanding were within the expertise and jurisdiction of the relevant regulatory bodies which the defendant was entitled to rely upon.*" (My italics)

37. There was an unsuccessful appeal by the Claimant against that decision on this (and another) ground to the Court of Appeal – see [2014] EWCA Civ 1111. Sullivan LJ, with whom Longmore and Gloster LJJ agreed, said

45. " Ground 2

46. The judge dealt with this issue in paragraphs 177-193 of her judgment. She concluded in paragraph 193.....":

Sullivan LJ then cited it, and went on;

"I agree with the judge. Had this ground of challenge stood alone I would not have granted the Claimant permission to apply for judicial review.

47. There is no dispute that the Defendant was in principle entitled to have regard to the UK nuclear regulatory regime when reaching a conclusion as to the likelihood of nuclear accidents: see *Gateshead Metropolitan Council v Secretary of State for the Environment* [1995] Env LR 37.

48. Many major developments, particularly the kind of projects that are listed in Annex I to the EIA Directive, are not designed to the last detail at the environmental impact assessment stage. There will, almost inevitably in any major project, be gaps and uncertainties as to the detail, and the competent authority will have to form a judgment as to whether those gaps and uncertainties mean that there is a likelihood of significant environmental effects, or whether there is no such likelihood because it can be confident that the remaining details will be addressed in the relevant regulatory regime. In paragraph 38 of his judgment in *R (Jones) v Mansfield District Council* [2004] 2 P & CR 14, Dyson LJ (as he then was) adopted paragraphs 51 and 52 of the judgment of Richards J (as he then was) which included the following passage:

> "It is for the authority to judge whether a development would be likely to have significant effects. The authority must make an informed judgment, on the basis of the information available to it and having regard to any gaps in that information and to any uncertainties that may exist, as to the likelihood of significant environmental effects. Everything depends on the circumstances of the individual case."

49. This is precisely what happened on the facts of the present case. The elaborate regulatory regime for nuclear power stations is described in the Witness Statements filed on behalf of the Defendant and the Interested Party. For present purposes, it is sufficient to note that by the time the Defendant made his decision dated 19th March 2013 the Office for Nuclear Regulation ("ONR") had issued a nuclear site licence, and both the ONR and the Environment Agency had completed the Generic Design Assessment (GDA) process, including a severe accident analysis, for the EPR, the type of reactor to be used at HPC. All of the GDA issues had been addressed, and the ONR had issued a Design Acceptance Confirmation ("DAC"). The ONR had said that it was confident that the design was "capable of being built and operated in the UK, on a site bounded by the generic site envelope, in a way that is safe and secure". Site specific matters not covered by the GDA process would still need to be considered, but the ONR was confident that they could, and would, be addressed under the site licence conditions. As the ONR explained:

> "Whilst the GDA process, leading to the issue of a DAC, is not part of the licensing assessment, the successful completion of GDA does provide confidence that ONR will be able to give

permission for the construction, commissioning and operation of a nuclear power station based on that generic design."

50. In view of this factual background, it might be thought that this case was the paradigm of a case in which a planning decision-taker could reasonably conclude that there was no likelihood of significant environmental effects because any remaining gaps in the details of the project would be addressed by the relevant regulatory regime. Undaunted, Mr. Wolfe submitted that there was a distinction between reliance upon a pollution regulator applying controls "which it has *already* identified in the light of assessments which it has *already* undertaken on the basis of a scheme which has *already* been designed", which he said was permissible, and reliance upon "*current*" gaps in knowledge "being filled by the fact of the *existence* of the pollution regulator [who] will make *future* assessments… on elements of the project still subject to design changes….", which was not.

51. *There is no basis for this distinction, which is both unrealistic and unsupported by any authority.* (My italics) The distinction is unrealistic because elements of many major development projects, particularly the kind of projects within Annex I to the EIA Directive, will still be subject to design changes, and applying Mr. Wolfe's approach those projects will not have "already been designed" at the time when an environmental impact has to be carried out. The detailed design of many Annex I projects, in particular nuclear power stations, is an immensely complex, lengthy and expensive process. To require the elimination of the prospect of all design changes before the environmental assessment of major projects could proceed would be self-defeating. The promoters of such projects would be unlikely to incur the, in some cases, very considerable expense, not to mention delay, in resolving all the outstanding design issues, without the assurance of a planning permission. If the environmental impact assessment process is not to be an obstacle to major developments, the planning authority (in this case the Defendant) must be able to grant planning permission so as to give the necessary assurance if it is satisfied that the outstanding design issues – which may include detailed design changes – can and will be addressed by the regulatory process. …….”

38. It is right to emphasise that *R (Jones) v Mansfield District Council* is not to be taken as implying that, in the event that some issue has arisen about environmental effects, the local planning authority *cannot* decide that the matter may be left to the other statutory body to decide. That principle was reiterated in the important Supreme Court authority of *Morge v Hampshire County Council* [2011] UKSC 2, which considered the relationship of planning control and the Habitats Directive 92/43/EEC of the European Union. The scheme in question was a busway between Fareham and Gosport. The proposed new rapid busway was to run along the path of an old railway line, last used in 1991. Although most of the scheme lay

within a built-up area, there are a number of designated nature conservation sites nearby and, once the railway line had ceased to be used, the surrounding area became thickly overgrown with vegetation and an ecological corridor for various flora and fauna. Although, therefore, the scheme was widely supported, it also attracted a substantial number of objectors one of whom Mrs Morge, the appellant in that case, who lived close by.

39. Natural England, which had originally objected, then withdrew its objections. The Planning Committee was advised that mitigation and compensation measures could be provided to deal with any impacts. But an issue was also raised about the prospect of disturbance as the result of the development, where Natural England would be the enforcing authority, and about the local planning authority relying on Natural England to deal with it. Lord Brown of Eaton-under-Heywood JSC, with whom on this issue Lord Walker of Gestinghope, Baroness Hale of Richmond and Lord Mance JJSC all agreed, with Lord Kerr of Tonaghamore JSC dissenting, said this at paragraphs 28-32 when considering what it was the Planning Authority had to consider:

> 26. …….Regulation 39 of the 1994 Regulations (as amended) provides that: "(1) a person commits an offence if he . . . (b) deliberately disturbs wild animals of any such species [i.e. a European protected species]". It is Natural England, we are told, who bear the primary responsibility for policing this provision.
>
> 27. It used to be the position that the implementation of a planning permission was a defence to a regulation 39 offence. That, however, is no longer so and to my mind this is an important consideration when it comes to determining the nature and extent of the regulation 3(4) duty on a planning authority deliberating whether or not to grant a particular planning permission.
>
> 28. Ward LJ dealt with this question in paragraph 61 of his judgment as follows:
>
> > "61. 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 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."

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.

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"* (My italics). "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'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'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.*" (My italics)

40. Baroness Hale said this at paragraph 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 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 licences 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*." (My italics)

41. Against that background, I turn now to the Grounds argued before me.

D Grounds 1-3 : submissions of Claimant and Defendant and Discussion

42. I shall start with the general advice given to the Committee by its planning officer. I have referred already to the fact that in November 2013 a document entitled "Onshore Hydrocarbons (Oil and Gas) - frequently asked questions" was produced. It stated in its introduction :

> "This information paper provides some answers to questions that have been asked in recent months with regard to hydro carbon extraction fracking and related matters. The county council's intention is that the answers provide useful information; *they are not intended to be a source of definitive advice*." (my italics).

43. It went on at C3:

> "C3: Before a company can explore (to see whether gas reserves are available) they must obtain a Petroleum Exploration Development License (PEDL) from the Department of energy and Climate change (DECC). This enables them to "search and bore for and get" the Crown's resources (i.e. oil and gas). They must then go to the Minerals Planning authority (MPA) for planning permission and exploration appraisal.
> As well as planning permission, the operator must also gain a "well consent" for the exploration from the DECC before commencing works. DECC also consults with the Environment Agency (EA) and the Health and Safety Executive (HSE) at this stage.

If a company intended to "frack" it is at this stage that DECC would impose the new controls introduced in December 2012. These controls require the geological assessment identifying faults, provision of a "frack plan" (which would show a fracking process gradually building in intensity, with close monitoring to access signs of problems) and measure seismic activity before, during and after fracking.
The EA may also require an environmental permit at the exploration phase, and are likely to require abstraction licence.
If the company then wish to go into production (i.e. actually extracting gas) they must gain a new planning permission for the MPA, a Field Development Consent from DECC and an environmental permit form the EA, with processes similar to the above.

44. At E1 onwards it stated

"What is the County Council's Role?
The County Council is the mineral planning authority (MPA – other than for the area of the south Downs National Park) and is responsible for determining planning applications for onshore hydrocarbon extraction. The County Council has to work within the planning system which governs the development and use of land in the public interest. It may not address any emissions, control processes, or health and safety issues that are matters to be addressed under other regulatory regimes.

E2: What Issues are dealt with by other Organisations and Regulatory Regimes?
There are a number of matters that lie outside the planning system and which are not the responsibility of the County Council as the minerals planning authority (MPA). They include:

- Seismic risks (Department for Energy and climate change - DECC)
- Well design, construction, and integrity (Health and Safety Executive);
- Mining waste (Environment Agency – EA);
- The chemical content of fracking fluid (EA);
- Flaring or venting of gas(DECC/EA but the MPA considers the noise and visual impacts);
- The impact on water resources (EA); and
- The disposal of water following fracking (EA).

E3: What is the Role of the Department of Energy and Climate Change (DECC)?
DECC issues Petroleum Licences, gives consent to drill under the licence once other permissions and approvals are in place and have responsibility for accessing risk of and monitoring seismic activity, as well as granting consent to flaring or venting.
E4: What is the role of the Minerals Planning Authority (MPA)?
An MPA, such as the County Council, grants planning permission for the location of any wells and wellpads, and imposes conditions to ensure that the impact on the use of the land is acceptable.

E5: What is the role of the Environment Agency (EA)?
The EA, through the environmental planning regime, protects the resources (including ground water aquifers), ensures appropriate treatment and disposal of

mining waste, emissions to air, and suitable treatment and management of naturally occurring radioactive materials.

E6 What is the role of the Health and Safety Executive (HSE)?
The HSE regulates the safety aspects of all phases of extraction, in particular responsibility for ensuring the appropriate design and construction of a well casing for any borehole."

45. At G5 onwards it stated, inter alia;

"G5: What Issues can I address when commenting on a Planning Application?
The County Council can take certain issues into account. These issues include:

- Whether the proposal is an acceptable use of the site;
- The visual impact of a new building or structure (location, size and appearance) on the local area and on the wider landscape (including designated landscapes);
- The impact on neighbours and surrounding area resulting from overshadowing, overlooking, loss of privacy, and disturbance caused by noise and lighting;
- The impact on the local environment including dist and air quality;
- Whether new roadways, accesses and parkways are adequate and the impact on highway capacity and road safety:
- The impact of the rights of way network;
- The impact on the historic environment including archaeological and heritage sites or features;
- The impact on the ecology and biodiversity including designated wildlife sites, and protected habitats and species;
- The risk of contamination of land and impact on soil resources;
- The risk of flooding;
- Land stability and subsistence;
- Site restoration and aftercare; and
- Consistency with national and local planning policies.

The County Council **cannot** take into account some issues including:

- The demand for, or alternatives to, onshore oil and gas resources;
- emission, control processes, or health and safety issues that are matters to be addressed under other regulatory regimes;
- loss of views;
- boundary and other disputes between neighbours, for example, private rights of way or covenants; or
- loss of property value.

G7: What can the County Council take into Account in determining a Planning Application?
Planning application must be determined in accordance with the statutory "development plan" (i.e. adopted local plans) unless "material considerations" indicate otherwise; the latter include draft plans, Government guidance, and the views of consultees, landowners, and the public.

The government has stated that a mineral planning authority should not consider the national demand for onshore hydrocarbon resources but only when the use of land, and the impacts of the proposed development (including on health, the natural environment, and amenity), are acceptable or can be made acceptable (e.g. by attaching conditions to a permission to minimise or mitigate potential adverse impacts).

G8: What weight is given to the views of the public and others?
The responses submitted by statutory consultees and by objectors and supporters are "material considerations" and they are fully considered before a decision is made. However, it should be noted that the number of objections or supporting representations is not important; consideration is only given to the validity of the objection or representation in planning terms regardless of whether one in 100 people hold that view.

G9: Why can't the County Council consider "non-planning" issues?
As the minerals planning authority, the County council is required to assume that non-planning regimes will operate effectively. Accordingly, in determining planning applications for onshore hydrocarbons, it may not address any emissions, control processes, or health and safety issues that are matters to be addressed by other organisations under different regulatory regimes."

46. The planning officer put forward the report which I have already referred. As I have indicated above it is a very full clear and informative document. It started with an executive summary, which contained these passages among others :-

"Impact on Amenity and Public Health
The development has the potential to adversely affect residential amenity and health primarily through increased noise and emission to air. In terms of noise, there is potential for the flare and plant on site to result in noise disturbance, but it is concluded that this can be adequately controlled by conditions requiring monitoring, and remediation of levels are exceeded. The development has the potential to have impacts on air quality through the flare, and an increase in vehicles travelling to and from the site. However, emissions from the flare are controlled by the Environmental Permit which applies to the operations. The potential impact upon the amenity and air quality as a result of increased vehicle numbers is not considered to be significant, as numbers are relatively low, on B- and A- roads, and for a temporary period"

Impacts on the Water Environment
The potential impact of the development on the water environment is a material consideration, but PPG: Minerals, paragraph 12 notes that mineral planning authorities must assume that non-planning regimes operate effectively. This means that assuming that the well is constructed and operated appropriately, that surface equipment operates satisfactorily, and that waste and NORMs are appropriately managed, in accordance with the requirements of the Health and Safety Executive, Department of Energy and Climate Change, and Environment Agency.

> The Environment Agency and Health and Safety Executive have not raised concerns in relation to this proposal. The risk to surface water would be minimised by carrying out activities on an impermeable membrane with a sealed drainage system. Conditions would be added to the permission requiring the submission of a scheme to protect the water environment, as well as surface and foul water drainage schemes. With regards to groundwater, it must be assumed that the well is constructed and operated to the appropriate standards. Mapping and standards ensure that there is no risk of the present well intersecting with the well drilled in the 1980's. It is proposed to use dilute hydrochloric acid to clean the well, which is a standard procedure with many boreholes, including those for drinking water. The hydrochloric acid would react with material in the borehole to become non hazardous salty water. It is therefore concluded that the development does not pose a risk to the water environment, wither at the surface of groundwater.
>
> *Overall Conclusion*
> The six month flow testing and monitoring operation proposed at the Lower Stumble Wood site has the potential to result in impacts on the highway, people and the environment, issues which have been raised in the large number of objections to the application. Balcombe Parish Council and Ardingly Parish Council have objected to the application, but no other statutory consultees have objected, subject to the imposition of conditions. It is concluded that the number of vehicles required to carry out the development is not significant enough to raise concerns regarding highway capacity or safety. Emissions from the development would be controlled through the planning regime as well as through the Environment Permitting and health and safety regimes and the Health and Safety Executive which would ensure that water quality would not be compromised and that emissions to air would be acceptable. The rig and flare on the site would be visible at times on the site during the development, but the impact would be short-lived so would not compromise the landscape qualities of the High Weald Area of Outstanding Natural Beauty.

47. After the Executive Summary, the report then continued, having described the proposal which was the subject of the application. It referred at paragraph 4.24 to Environmental Permits stating that the implemented and proposed testing programmes are and would be subject to Environmental Permits granted by the EA.

48. At paragraph 5.8 it recorded the fact that the EIA screening opinion of 14th January 2014 concluded that the proposal would not have the potential for significant effects on the environment within the meaning of the EIA regulations whereby an EIA was not considered necessary. It also referred to the fact that that had been reconsidered in the light of the new planning guidance of 6 March 2014 and the same conclusion had been reached.

49. In section 6 the report considered the statutory development plan which consisted of the West Sussex Minerals Local plan and the Mid Sussex Plan. It also referred to the National Planning Policy Framework ("NPPF") It set out the relevant parts of the planning policy guidance on minerals at considerable length.

50. It then recited the objections to the development and other representations received and then passed to a section 9, headed "Consideration of Key Issues"

> " 9.1 The key issues in relation to this application are considered to be whether:
>
> - There is a need for the development
> - The development is acceptable in terms of highway capacity and road safety
> - The development is acceptable in terms of amenity and public health;
> - The development is acceptable in terms of impact on water environment;
> - The development is acceptable in terms of impact on landscape; and
> - The development is acceptable in terms of impacts on ecology."

51. The report addressed the first issue of the "Need for the Development". Having considered national policy in the NPPF, specific national guidance on minerals, and the Development Plan it stated this at paragraph 9.6

> "Taking this into account the present proposal is considered to accord with the approach set in national guidance by investing in energy infrastructure to establish whether indigenous oil and gas reserves are available and worth exploiting in Balcombe".

52. It also concluded that policy 27 of the West Sussex Minerals local plan created a presumption in favour of allowing temporary hydrocarbon exploration subject to environmental matters.

53. The officer also addressed the question of alternative sites and she concluded as follows at paragraph 9.12 and 9.13:-

> 9.12 Taking the above into account it is concluded that there is a need for continued exploration and appraisal at the site to establish whether there are hydrocarbon resources which can be utilised. It is also concluded that that site represents the best option within the search area, namely the PEDL boundary.
> 9.13 The NPPF gives "great weight" to the benefits of mineral extraction, including to the economy and highlights that minerals can only be worked where they are found. PPG: Minerals notes that oil and gas will continue to form part of the national energy supply, and gives a clear steer from Government that there is a continuing need for indigenous oil and gas. The West Sussex Minerals Local Plan (2003) notes that planning permission for oil and gas exploration will normally be granted subject to environmental considerations and the development being the "best option" in the area of search. The present proposal would make use of an existing well on a site with established infrastructure to establish whether oil and gas resources are exploitable so is considered to represent the "best option". It is therefore concluded that the is an identified need for local oil and gas production and

that there is an identified need for development on this particular site to establish whether the hydrocarbons identified in drilling in 2013 are exploitable."

54. Having considered traffic issues the report then at paragraph 9.26 went on to consider the impact on amenity and public health.

> "9.26 A key concern raised in objections is the potential impact of the development on public health and the amenity of local people.
> 9.27 The nearest dwelling to the site is a Kemps Farm, some 340 metres north and the nearest residential street, Oldlands Avenue, is some 780 metres north.
> 9.29 The key potential impacts on amenity and public health resulting from the proposed development are likely to be increased noise and reduced air quality."

55. Having considered noise (about which no issue is taken in these proceedings) it then went on to consider the topic of air quality.

> "9.40 Concern has been raised in third party objections over the potential impact of the flare in particular on air quality and human health.
> 9.41 The flare would be on site for seven days to dispose of natural gas which is a by-product of oil exploration which is not always viable to use.
> 9.42. PPG: minerals (paragraph 112) is clear that the flaring or venting of gas is subject to DECC controls and regulated by the Environment Agency with Minerals Planning Authorities needing to consider only "*how issues of noise and visual impact will be addressed.*" It is clear therefore that the potential impact of the flaring of gas on air quality is not a matter for the County Council.
> 9.43 However, in leaving this issue to other regimes, PPG: Minerals also makes it clear that the Minerals Planning Authority must be satisfied that the issues can or will be addressed by taking advice from the relevant regulatory body (paragraph 112). The Environment Agency has commented on this application and has raised no objection. In addition, the environment Agency has granted an Environmental Permit which addresses the flaring of waste gas resulting from the proposed operations, and considers it can be done without risk to people or the environment.
> 9.44 A number of representations have picked up on issues raised in a response from Public Health England which has questioned the air quality information provided and suggested that wider emissions monitoring would be required. However, it is important to note that their response was similar to that made to consultation regarding Environmental Permit influencing an influencing the monitoring scheme in place as a result. In direct response to the issues raised, the Environment Agency has confirmed that it is satisfied with the baseline and ongoing air quality monitoring results provided to them.
> 9.45 The development also has the potential to result in impacts on air quality through increase traffic on the road to and from the site. However, the level of vehicles associated are not considered to be significant enough to reduce air quality, particularly given the short term nature of the project and the small increase over existing HGV numbers already on the local highway network.

> 9.46 Taking the above into account, it is concluded that the potential impact of the development on air quality is satisfactory, particularly given the controls in place through the Environmental Permitting regime.
> 9.47 The development has the potential to adversely affect residential, amenity and health primarily through increased noise and emission to air. In terms of noise, there is a potential for the flare and plant on site to result in noise disturbance, but it is concluded that this can be adequately controlled by conditions requiring monitoring, and remediation if levels are exceeded. The development has the potential to result in impacts on air quality through the flare, and increase in vehicles travelling to and from the site. However, emissions from the flare are controlled by the Environmental Permit which applies to the operations. The potential impact of increased vehicle numbers is not considered to be significant as numbers are relatively low on B and A roads, and for a temporary period."

56. It then went on to consider the impact on the water environment:

> "9.48 One of the key issues raised in objections to the proposal is the potential impact on the water environment. PPG: minerals notes that "surface, and in some cases ground water issues", should be addressed by Minerals Planning authorities as well as flood risk and water (paragraph 13). The impact on the water environment is, therefore, a material planning consideration.
> 9.49 The site is not within a groundwater source protection zone, with the nearest of these some 2.3 Km north-west of the site, without an abstraction licence to pump water (though $20m^3$ can be abstracted without such a licence). The Environment Agency has confirmed that there are no licensed ground water abstractions within 3km of the site.
> 9.50 There are small streams as close as 15m from the site access road.
> 9.51 In terms of geology of the site, it lies on Wadhurst Clay some 47 metres thick, classified as "unproductive strata" (formally "non-aquifers"). It is identified as being generally unable to provide usable water supplies and unlikely to have surface water and wetland dependant upon them. The clay also acts as a natural barrier to the migration of either groundwater of gases between permeable strata.
> 9.52 Below the clay are the Ashdown Beds of some 212 metres thickness, a "Secondary Aquifer" formed of fine-brained silty sandstone and mudstone. The Environment Agency notes that this contains naturally high levels of methane but that due to geology and well construction this does not pose a risk to ground water. Below the Ashdown Beds is another layer of Kimmeridge clay below which are the Hydrocarbon-bearing micrite beds into which the lateral well extends.
> 9.53 In considering the potential impact on the water environment, it is important to note that the County Council must assume that other, non-planning regimes operate effectively (PPG: Minerals paragraph 112). In relation to water, this means assuming that the construction, design and operation of the borehole have been undertaken appropriately, in accordance with Health and Safety Executive (HSE) requirements. It also means assuming that the Environment Agency will ensure that surface equipment operates satisfactorily, and that mining waste NORMs are appropriately managed.

9.54. Nonetheless, as already noted paragraph 112 of PPG:Minerals notes that before granting permission the county council will need to be satisfied that the issues dealt with under other regimes can be adequately addressed "by taking advice from the relevant regulatory body". The County Council has consulted with the Environment Agency and HSE, neither of which has objected.

9.55 The main risks to surface water are due to run off from the surface of the site. For any development, it is important to ensure that fluids, particularly where they are potentially polluting, are managed within the site. This development, impacts on water quality would be migrated by ensuring potentially-polluting activities are undertaken on an impermeable surface with sealed drainage system. A condition would be added, as requested by the Environment Agency, requiring the submission and approval of a Construction Method Statement detailing: how the impermeable membrane is constructed; remediation of the existing membrane; inspection and maintenances; and pollution prevention assessments and mitigation methods. Fuel tanks and chemicals stored outside of the impermeable area would have their own bunded containers, as is common practice in industry and agriculture.

9.56 It is considered these mechanisms, which satisfy the Environment Agency, would ensure that surface water is protected.

9.57 Details of surface and foul water drainage are required by conditions at the request of WSCC Drainage Officers, which would ensure that the site does not increase the risk of flooding off-site, and that foul waste is managed appropriately.

9.58 The main risk to groundwater are through failure of the well casing, leaking of chemicals and hydrocarbons, and through migration of liquid from the borehole. All of these matters are address through regulation by the Environment Agency and HSE. The Environment Agency has considered the sites location in terms of a range of issues including geology and hydrogeology, and protected sites and species. The HSE has considered the potential interaction with nearby wells, as well as geological strata and the fluid within them. Neither consultee has raised concerns about the proposal.

9.59. Concern has been raised that the works presently proposed would interact with the borehole drilled in the 1980s (Balcombe-1) which is 10 metres from the present borehole. HSE has confirmed that Balcombe-1 has not been inspected since it was abandoned, but there is no regulatory requirement for them to do so as it was abandoned in accordance with approved procedures to minimise the risk to the environment. The drilling of boreholes in close proximity to other boreholes is common practice and is not considered to pose particular risks. As an example, there are seven wells drilled from a pad at singleton oil field near Chichester with no resultant problems emerging.

9.60 The vertical (and horizontal, where relevant) position of existing wells is mapped prior to new wells being drilled so there is no risk of collision.

9.61 Specific concerns have been raised regarding the use of hydrochloric acid. This is a standard procedure in the cleaning of boreholes for not just oil and gas development but also more generally for many drinking water boreholes. The acid would be diluted to a maximum of 10%, with almost 2,000 litres being used with 18,000 litres of water.

9.62 The Environment Agency has considered the use of dilute hydrochloric acid in responding to the present application, as well as in granting its Environmental Permits and has raised no concerned. The decision document relating to the Environmental Permit for this operation notes that "the dilute hydrochloric acid reacts with the residual drilling mud's debris and surrounding rocks to become salty water (calcium carbonate, calcium chloride and water)." (Decision Document for Draft Permit number EPR/AB3307XD, Page 7). This salty water (spent hydrochloric acid) is considered non hazardous with the Environment Agency concluding that it "does not create a risk to groundwater as it cannot migrate to where there is groundwater as there is no pathway to where groundwater can be found." (ibid, page 18).

9.63 It has been suggested that a bond or financial guarantee should be sought to cover remediation in the event that contamination occurs. However, for minerals project, typically quarries and similar financial guarantees are only justified in "exceptional cases" involving very long term projects, novel approaches, or reliable evidence of the likelihood of financial or technical failure (PPG; Minerals, paragraph 48). For oil and gas projects, the operator is explicitly liable for any damage or pollution caused by their operations, with DECC checking that operators have appropriate insurance against these liabilities in granting a PEDL Licence.

9.64. Finally, Southern Water has set out a number of measures to protect and monitor groundwater resources including an Environmental and Hydrogeological Risk Assessment, baseline sampling and ongoing groundwater monitoring, consultation with relevant environmental/nature agencies and agreeing waster management, drainage and well design with the appropriate agencies. All of these requirements have been addressed through the Environmental Permit which relates to the site, and through the HSE requirements. It is not therefore considered necessary to require any of these measures in relation to the present application.

9.65 Taking the above into account it is considered that subject to the imposition of appropriate conditions the development does not pose a risk to the water environment.

9.66 The potential impact of the development on the water environment is a material consideration, but PPG: Minerals paragraph 12 notes that Mineral Planning Authorities must assume that non-planning regimes operate effectively. This means assuming that the well is constructed and operated appropriately, that surface equipment operates satisfactorily, and that waste and NORMs are appropriately managed in accordance with other regulatory regimes. The Environment Agency and Health and Safety Executive have not raised concerns in relation to the proposal. The risk to surface water would be minimised by carrying out activities on an impermeable membrane with a sealed drainage system. With regards to groundwater, it must be assumed that the well is constructed and operated to the appropriate standards. Mapping and surveys ensure that there is no risk of the present well intersecting with the well drilled in the 1980s. it is proposed to use dilute hydrochloric acid to clean the well, which is a standard procedure with many boreholes, including those for drinking water. The hydrochloric acid would react with material in the borehole to become non-hazardous salty water. It is therefore concluded that the development does not pose a risk to the water environment, either at the surface or groundwater.

57. Having considered landscape and ecology issues as well it went on to say at paragraph 10.1:

> "Overall Conclusions and Recommendations
> 10.1 The six month flow testing and monitoring operation proposed at the Lower Stumble Wood site has the potential to result in impacts on the highway, people and the environment, issues which have been raised in the large number of objections to the application. Balcombe Parish Council and Ardingly Parish council have objected to the application, but no other statutory consultees have objected, subject to the imposition of conditions.
> 10.2. It is concluded that the number of vehicles required to carry out the development is not significant enough to raise concerns regarding highway capacity or safety. Emissions from the development would be controlled through the planning regime as well as through the environmental permitting and health and safety regimes to ensure that water quality would not be compromised and that emissions to air would be acceptable. The rig and flare on the site would be visible at times during the development, but the impact would be short-lived so would not compromise the landscape qualities of the High Weald Area of Outstanding Natural Beauty.
> 10.3. It is therefore ***recommended*** that planning permission is granted, subject to conditions and informatives set out at appendix 1." (emphasis as per the report)

58. At paragraph 11 the report stated that there were no *Crime and Disorder Act* implications. It then considered the *Equality Act* implications and *Human Rights Act* implications.

59. The court has also been provided with a copy of minutes that were kept. Paragraph 13 of the minutes reads as follows (all italics are as per the original);

> "13. The following points of clarification were provided to the committee arising from the speakers' addresses:
>
> - The requirement for an EIA was considered during the initial screening opinion and again during the writing of the report. There was not felt to be justification within the EIA regulations or in government guidance for an EIA. Environmental issues and impacts of relevance to the application were considered in studies submitted with the application which informed the officer recommendation.
> - There was a reliance on the technical ability of EA and HSE and it must be assumed that such agencies were discharging their duties effectively. The NPPF sets out the responsibilities of the County Council and government agencies. The consideration of the impact of the flare on air quality and the requirements of the well-casing were the responsibility of agencies with the necessary technical expertise.
> - During the production of the report the issues raised in representations were considered but the number of representations was not a material consideration.

- There was sufficient information in the application to enable a decision by the committee. Conditions requiring the submission of further information were not grounds to defer consideration of the application.
- Condition 14 required the continuous monitoring of noise and the application would employ a traffic lights system to indentify the incidence and severity of adverse noise impacts. It was acknowledged that there had been problems with noise under the previous permission and to address such problems noise specialists had been engaged by the County Council to monitor levels from the site.
- To respond to concerns regarding the solvency of applicants it was confirmed that planning permission was linked to the land rather than the applicant and officers must assume that there will be compliance with the imposed conditions.
- The Balcombe-1 well was considered by the HSE in relation to the well drilled in 2013. It was not in the interests of the applicant that any interrelation existed between Balcombe-1 and the new well.

14. The Committee considered those points below:
    - Whether the applicant could have been required to undertake an EIA. *The requirement for an EIA was considered during assessment of the application. The applicant could appeal any request to undertake an EIA if they considered it was not justified.*
    - The advantage of deferring the application and requesting further information. The additional information that could be gained and its value was queried. *The County Council considered the information was adequate to make a decision. The EA was satisfied with the proposal and had issued Environmental Permits.*
    - Clarification of the time frame for the application was requested. *The exploration was for 6 months which would have to be undertaken 3 years from the date of approval.*
    - The location of Balcombe-1 in relation to the bore hole in the present application.
    - It was felt that the traffic route South of the site to the A23 was over-complicated and unnecessary. The committee asked what consideration had been undertaken of the alternative lorry route to the South of Balcombe. *The route to the north of the site was the most direct and short way to reach the strategic network – the A23. There was no evidence that the roads to the South of Balcombe were not suitable for HGVs and an alternative route for the site could be established.*
    - Limited public consultation between the local community and the applicant following the protests in 2013. *The applicant was encouraged but not required to engage with the local community but the committee could agree a condition for the establishment of a liaison group.*
    - It was felt that condition 10 regulating the movement of HGVs should specify precise timings that lorries were prohibited from passing the Church of England Primary School in Balcombe.
    - The monitoring of noise levels from the site should be undertaken on a continuous basis; conditions 12 and 13 needed to be amended to incorporate mention of continuous monitoring. A comparison was requested of the noise of passing trains and noise emanating from the

site. *Train noises had been recorded at 78dB at the site and the noise from the site was limited in the conditions, operations at the site during the day are predicted to produce maximum noise levels of 37dB and 31dB during the night.*

- The financial status of the applicant and whether a bond could be sought to require the restoration of the site. *The financial status of the applicant was not a material planning consideration. The use of a bond was not supported by planning guidance. A number of enforcement mechanisms were available to the local planning authority including powers of entry to ensure the site was safe.*
- The objections heard by the committee were based on arguments against planning policy. The committee was required to determine the application with regard to planning policy and other material planning considerations. It was felt that the application accorded with these considerations.
- The application was for temporary permission of 6 months and there were no significant concerns with the site. Significant grounds for approval existed and it was not feasible to present a compelling case for refusal based on planning considerations.
- The impact of the flare and plume on the local Area of Outstanding Natural Beauty was queried and what monitoring and recording measures would be in place. *It was confirmed that the flare would only be required for a week before the well was enclosed and that there would be no visible plume.*
- The mechanism for the monitoring and recording of light impacts was raised. *Lighting was limited in the conditions to a spill of 1 lux from the site to protect the local bat population.*

60. The court has also been provided with a transcript of what happened at the committee meeting. Mr Maurici on behalf of the Defendant took no objection to it being put before the court. As I have indicated above one of the points being taken by the objectors to the proposal was that there was insufficient material before the committee so far as the technical aspects of the development were concerned. There is a reference in the transcript to submissions made by County Councillor Acraman to the committee. During the course of his submission he said this:-

> "My recommendation actually is that the application be deferred until more satisfactory answers are forthcoming from all departments involved. I don't think that we are in a position to give the go ahead today will be a hostage to fortune and it will leave you far too many things to be done as it were behind closed doors in the future. There is not enough research being done and the conditions are not adequately or completely expressed".

61. The chairwoman turned to the planning officer Miss Moseley for advice and she said this:-

> "..the lack of an EIA does not mean that environmental issues and environmental impact have not been considered and dealt with as appropriate. In terms of being reliant on the Environment Agency and the Health and Safety Executive we have to be and we have to assume that they are doing their job just as they assume that we are doing ours, the National Planning Policy Framework and the planning guidance makes it clear what our role is and what is the role of other regulators,… Paragraphs 110 and 112 of the minerals planning guidance makes it clear that issues such as the flare we as a minerals planning authority can consider the noise from the landscape impact …it is not for us to consider …the air quality impact of the flare and in terms of the casing around the well and things like that that is all for the Health and Safety Executive to consider and I am satisfied that they are doing their job."

62. Two representatives of the EA were present at the meeting. It is recorded at the meeting that one of them said this:-

> "At the Environment Agency we have obviously issued Environmental Permits which authorise the activity which was subject to this planning permission. As part of that process we carried out our own assessment of environmental risk and the necessary controls which need to be put into place. For our benefit there is nothing to be gained by an additional delay. I don't believe there is any additional information that we need to obtain."

63. I accept that so far as one can ascertain from the minutes and from the transcript the Councillors appeared to accept the advice that they were given by the planning officer. I shall deal with the specifics relating to the advice of the EA and the HSE shortly when I have set out the basis of the case for the claimant and for the defendant.

64. Mr Wolfe contends that WSCC had been wrong to assume that the EA and HSE would exercise effective control so as to deal with concerns over emissions to air, groundwater contamination and well integrity. It is argued that there was some reason to think that the HSE and EA had not exercised, or would not exercise adequate control, and that therefore WSCC had to form its own judgment on that issue, and could not do as national policy advised and assume that the other statutory regimes would deal with matters properly.

65. Mr Wolfe put his case as follows:

a) the advice given to members by the planning officer was to the effect that they must assume that the control of such matter should be left to the EA and HSE;

b) that advice, which the Committee followed, was in conflict with national planning guidance, and was thus unlawful, and was wrong in law anyway;

c) in the case of emissions monitoring, the committee members were misled as to the representations of Public Health England (PHE) on emissions monitoring, and in particular because the Committee was wrongly assured that PHE's concerns on the monitoring of sulphur dioxide ("SO^2") had been or would be addressed by the EA (Ground 2);

d) in the case of the HSE, the committee members were misled on the degree to which the HSE had addressed the interaction between the proposed well and an earlier abandoned well nearby (Ground 3).

66. Mr Maurici contended that

a) WSCC had done as was advised by national planning guidance and consulted the relevant statutory bodies. None had any objection to the proposal;

b) the approach it adopted was endorsed by the courts in the *Gateshead* line of cases;

c) the officer's report:

a) correctly cited, considered and gave effect to paragraph 112 of the MPG;

b) considered the Claimant's objections in so far as these related to the HSE and EA's scrutiny of the proposed development;

c) set out the results of consultation with the EA and HSE in respect of the Claimant's concerns and had regard to the responses of both bodies;

d) concluded, having regard to the guidance contained in paragraph 112 of the MPG, that a number of issues raised in the planning application process were dealt with in the other regimes operated by the EA and the HSE and could be adequately addressed in those regimes;

e) was justified in treating the absence of comment by HSE as indicating that it had no objection, in an approach endorsed in *Elliott v The Secretary of State for Communities and Local Government* [2012] EWHC 1574 @52 per Keith J.

f) EA made no error so far as PHE's advice was concerned, and in any event the Committee was not misled;

g) HSE had yet to give any approval, but there was no reason to think that it could not do so. The Committee had not been misled.

67. So that those submissions may be put in context, I must refer to the facts surrounding the involvement of EA and HSE, who are statutory consultees (under the *Town and Country Planning (Development Management Procedure) (England) Order 2010*) and PHE, which is not, but had made a representation.

68. As originally argued by Mr Wolfe on behalf of the claimant his case was that PHE, when it made a representation about the planning application asked that there be monitoring of the flare for SO^2, by which he said PHE meant monitoring within the flare. He further contended that the representation made by PHE had been wrongly described to the committee in a way which I shall describe shortly. Because there appeared to me to be some room for doubt as to the nature and content of the documents that were considered by PHE and referred to in their letters, I asked at the conclusion of the hearing that the court be provided with a copy of the planning application, and in particular its Appendix dealing with air emissions (to which the PHE consultation of 2014 related), and also with the application for a permit made to the EA the previous year (to which the PHE representation to the EA related.)

69. The court was then supplied with those documents after hearing the oral argument. However, Mr Wolfe took it upon himself to supply the court with a further document.

70. Mr Wolfe now placed before the court a letter from PHE dated 12th November 2014 written in response to an email which he had sent to PHE asking for some clarification of what they had said earlier. That email was sent after argument had concluded, and has not been disclosed by Mr Wolfe. Unsurprisingly Mr Maurici on behalf of the defendant objects in the strongest terms to Mr Wolfe taking it upon himself to seek and obtain evidence which was not before the planning committee at the date of the hearing. I agree with Mr Maurici. This Court is concerned with what was before the Planning Committee when it considered the application, and whether the planning officer had misled the Committee on PHE's known position, not with evidence which Mr Wolfe has seen fit to obtain during or after the hearing in this Court. However I must also add that in my judgment it adds absolutely nothing to the debate.

71. Having dealt with that side issue I now return to the issue relating to the representations made by PHE of which the planning committee were aware.

72. Mr Wolfe referred me to paragraph 9.44 of the officers report where it stated

> "A number of representations were picked up of issues raised in response from PHE which has questioned the air quality provided and suggestions that wider emissions monitoring should be required. However, it is important to note that their response was similar to that made to a consultation regarding the environmental permit and influencing the monitoring scheme in place as a result. In direct response to the issues raised the Environment Agency has confirmed that it is satisfied with the base line and ongoing air quality monitoring results provided to them."

73. Mr Wolfe contends that that description of the PHE representation was misleading, and in particular that the response was not "similar," which at some times he treated as equivalent to "the same." He contends that PHE was asking for monitoring of sulphur dioxide within the flare which was more than they had asked for in their original submissions to the agency. Mr Maurici contends that it

was not a misleading description. It is therefore necessary to see what had actually happened. That is why it was necessary to obtain copies of the relevant appendix to the planning application, and the previous application for an EA permit.

74. As already noted EA had issued a permit on 24th July 2013. That had followed an application for a permit made on 12th June 2013. In that application, CBL had assessed the air emissions without addressing SO^2, but had only addressed carbon monoxide (CO) and oxides of nitrogen (NOx). On 10th July 2013, PHE responded to the consultation made of them by the EA. It stated

> "PHE are aware that some local residents have expressed concern with regards to possible impacts on the health and environment as a result of the process activities, specifically from the potential flaring of natural gas which may be encountered during well testing.
>
> The applicant has commissioned modelling to assess the potential impact the flaring on local air quality. There are no air quality management areas in the immediate vicinity on the site. The applicant states that the flare will comply with the best available techniques; will be enclosed with a chimney to minimise noise and light and will operate continuously fuelled by propane.
>
> The natural gas, which will be flared if detected, is primarily composed of methane and as such, combustion products principally carbon dioxide and water vapour. The modelling of the air quality emissions focused on nitrogen dioxide and carbon monoxide to access any potential impact on human health. The modelling indicated that the emissions of nitrogen dioxide and carbon monoxide were within the relevant short term air quality strategy objectives for human health during well testing.
>
> However it would be advisable to ensure that the flare used during flaring is operated in line with best available techniques to ensure that appropriate combustion temperature is maintained.
>
> The applicant has stated that air quality monitoring for the following compounds will be undertaken before during and after the operations: oxides of nitrogen (NOx): volatile organic compounds; BTEX (Benzene Toluene Ethylene and Xylene), hydrogen sulphide; CO; SO^2 and methane from the extracted gas waste stream. We recommend that any Environmental Permit issued for this site should contain additions to ensure that these potential emissions do not enact upon public health…. Based solely on the information contained within the application provided, PHE has no significant concerns in relation to the potential emission

> form the site adversely impacting on the health of the local population from this proposed activity, providing that the applicant takes all appropriate measures to prevent or control pollution, in accordance with the relevant sector technical guidance for industry best practice…"

75. The EA issued a permit, which addressed monitoring for SO^2 as well as for CO and NOx.

76. In the permit the EA stated (bundle page D18)

> "We have included monitoring conditions in the permit requiring the Capital Operator to monitor the temperature, nitrogen dioxide, sulphur dioxide, hydrogen sulphide, methane, Volatile Organic compounds and BTEX (Benzene Toluene Ethylene and Xylene) and to provide monthly reports of the monitoring results. These cover the most significant emissions that are expected to occur and will also demonstrate whether the flare is operating effectively."

77. The permit at schedule 3 deals with emissions and monitoring. It is divided into two parts. The first deals with point source emissions to air – i.e. monitoring at the location of the part of the plant which generates the emission. That monitoring would be of the gas flare for the temperature and carbon dioxide and would be carried out continuously. The second part dealt with air quality monitoring, including monitoring for SO^2. As the description cited above makes clear, that monitoring addresses the question of emissions of SO^2 and other substances from the flare. The monitoring of the gas flare was to be conducted monthly and that of air quality was to be conducted monthly as well.

78. In the planning application, CBL again addressed emissions of CO and NOx, and perhaps because FFBRA had raised the questions about SO^2 with PHE, PHE made a representation to the planning authority by letter of the 4 March 2014. It stated the following

> "The applicant has identified a number of air quality parameters i.e. nitrogen dioxide; sulphur dioxide; hydrogen sulphide; methane; VOCs and benzene, toluene, ethelbenzine and xylenes (BTEX) related to proposed operations at the site. The applicant states that a contractor has been employed to undertake air quality monitoring prior to, during and after the well testing operation. However, the application does not appear to enclose the air quality monitoring data stated to have been undertaken <u>prior to</u> well testing operations. The planning statement Section 4.14 states that a report of such monitoring will be issued to the

> Environment Agency as part of the Mining Waste Directive permit condition.
>
> Modelling has been undertaken on potential omissions of nitrogen oxides and carbon-monoxide from flaring which indicated that the emissions would not affect the achievement of the relevant short-term air quality objectives. The application does not appear to provide a clear justification for only selecting nitrogen oxides and carbon-monoxide as potential emissions from flaring. Sulphur dioxide emissions appear to have been discounted on the basis that no sulphur dioxide has is present in the extracted gas however it does not appear that the monitoring data to justify this has been included within the application. The Planning Authority may wish to seek the assessment of sulphur dioxide emissions from flaring activities."…"The application appears limited in its consideration of the potential for future release of VOCs into atmosphere either directly of as a result of incomplete combustion during flaring. The planning authority may wish to request the applicant considers the potential for impacts in fugitive VOC emissions and other combustion emissions and undertakes baseline air quality monitoring for VOCs. The results of such monitoring could then be compared to monitoring results during operations to provide an accurate assessment of air quality impacts due to the [proposed operations."….
>
> Summary
>
> "Based solely on the information contained in the application provided, PHE has no significant concerns regarding risk to health of the local population from potential emissions associated with the proposed activity, providing that the applicant all appropriate measures to prevent or control pollution, in accordance with relevant technical guidance or industry best practice."
>
> PHE would like to suggest that:
>
> wider emission monitoring may be required to better assess the impact on the environment from any development.
>
> ……"

79. Mr Wolfe also referred to the fact that the Committee was informed (see the transcript at C 151) that the EA permit required a range of chemicals to be monitored including those set out by PHE.

80. I have already set out what the officer said in the report. I have also already noted above that at the meeting, after the reference to PHE had been made by objectors, the EA stated itself satisfied with the information it had.

81. Mr Wolfe argued that the officer misled the committee on this issue. I regard that submission as being entirely without substance. PHE had asked for monitoring of SO^2 in 2013 when consulted by the EA, and that was included by EA in the permit. Contrary to the way the case was first argued by Mr Wolfe, PHE never asked at any stage for monitoring of sulphur dioxide *within* the flare. Indeed monitoring of its emission in the manner proposed by EA is a perfectly usual approach, and not one ever criticised by PHE. In 2014 PHE correctly pointed out that the planning application did not ask for monitoring of sulphur dioxide, and quite understandably PHE asked for it again. The description by the planning officer of what was asked for in the letter of 2014 as "similar" was therefore fair and beyond any criticism.

82. The fact is that at all times the EA have agreed with PHE that there should be air quality monitoring, which among other matters will address the emission of sulphur dioxide and other chemicals which will be produced by the flare. This argument by Mr Wolfe about the PHE consultation is in my judgment a claim which is completely without substance. It is a point which could not have been taken had the relevant documents been examined correctly before the case was pleaded.

83. In any event, even if the summary of what was said could have been improved upon by the officer, it did not go to any significant point. PHE has twice emphasised that it has no significant concerns about the proposal. Any question of the degree of monitoring is a matter to be taken up with the EA, which in the knowledge of the PHE representation, voiced no concern before the planning committee and has indeed already acted in the way in which PHE have sought.

84. It follows that I consider that there is no merit whatever in Ground 2 as taken by Mr Wolfe. Further, in so far as this matter supports his attack on the council in Ground 1 it demonstrates that much of the attack was misconceived.

85. I turn now to the questions that were raised concerning the Health and Safety Executive (HSE). In the officers report at paragraph 7.4 the officer described the consultation response of the HSE as "No comment."

86. In its objection document the claimant at paragraph 4.2.3 had referred to the HSE as having responsibility for regulating well design and construction and it pointed out that in the guidance on the regulation on well construction it stated that the HSE would "initially scrutinise the well design for safety and then monitors progress on the well to determine of the operator conducting operations as planned……HSE uses and inspection and assessment process consisting of the following main elements, all of which utilise HSE's experienced specialist wells inspectors:

> "Assessment of well notifications submitted to HSE. This assesses well design prior to construction, a key phase of work where the vast majority of issues are likely to have an

> impact on the well integrity will be identified and addressed by the well operator
>
> Monitoring of well operations during construction…This ensures the construction phase matches the design intent.
>
> Meetings with well operators prior to, and during, the operational phase to be undertaken (including joint meetings with the EA) these will include site inspections to access well integrity during the operational phase…."

87. Having recited Minerals Planning Guidance the representation went on

> "both the EA and HSE have confirmed that they have not inspected the well. The HSE has therefore failed to adhere to their own best practice and the new practice planning guidance on minerals. As such the integrity of the well is simply unknown and the risk to groundwater is unquantifiable. Part of paragraph 4.8 of the planning statement is misleading. It says
>
> " In summary the EA and HSE have assessed in detail the site, the proposal and any potential impact from surface and ground water and concluded that the methods are safe."
>
> The EA's assertions that the process is safe are based on certainty of well integrity – and they cannot be certain."

88. In the next paragraph it then referred to the danger of well failure and it referred to the fact that should there be failure of the well, there could be a migration of contaminated fluids into the Ashdown Beds and that could lead to contamination of local water courses including those feeding the Ardingly Reservoir and the River Ouse.

89. The officer addressed impacts on the water environment at paragraphs 9.48 ff of her report. She stated with regard to well integrity the following at paragraph 9.58

> "The main risks to groundwater are through failure of the well casing, leaking of chemicals and hydrocarbons, through migration of liquid through the borehole. All of these matters are addressed for regulation by the Environment Agency and HSE. The Environment Agency has considered the sites location and terms of a range of issues including geology and hydrogeology, and protected sites and species. The HSE has considered the potential interaction with nearby wells, as well as geological strata and t he fluid within them. Neither consultee has raised concerns about the proposal.
>
> 9.59. Concern had been raised that the works presently proposed would interact with the borehole drilled in the 1980s (Balcombe-1) which is ten metres from the present

> boreholes. HSE has confirmed that Balcombe-1 has not been inspected since it was abandoned but that there is no regulatory requirement for them to do so as it was abandoned in accordance with agreed procedures to minimise the risk to the environment. The drilling of boreholes in close proximity to other boreholes is common practice and is not considered to pose particular risk. As an example there are seven wells drilled from a pad at Singleton oil field near Chichester with no resultant problems emerging.
>
> 9.60. The vertical (and horizontal, where relevant) position of existing wells is mapped prior to new wells being drilled so there is no risk of collision."

90. The transcript of the meeting shows at page C173 of the bundle that this was said by the planning officer

> "In terms of the Balcombe-1 well that is an issue considered in detail by the Health and Safety Executive in relation to the well drilled last summer and by the applicant themselves because it is not in their interest to have any interrelations between the to wells"

91. Mr Wolfe referred me to an email exchange that took place between the HSE and the Planning Officer. The Planning Officer on 19 March 2014 sent an email to Mr Green of the HSE stating as follows

> "We have had a number of objections to the application noting a lack of confidence that HSE are doing their job at Balcombe which I was hoping you could help with.
>
> Can you please clarify whether it is the case that HSE has not checked the well casing for Balcombe-1 since it was sealed and abandoned in 1987. Would you usually check wells once they are sealed and abandoned – and is this the reason for any concern? Is there added concern given that Balcombe-2 has been drilled 10 metres from it?"

92. This appears then to have been inserted in the email at this point by the HSE officer as its comment

> "There is no legal or regulatory requirement for the Executive to inspect wells that have been abandoned. This well was abandoned in accordance with agreed procedures, guidelines and legal requirements in place at that time and was abandoned such that the risk of release of fluids in the well were as low as is reasonably practicable. There should be no added concern that the Balcombe-2 well is drilled 10 metres from Balcombe-1. It is common practice for development wells to be drilled from slots which are based

> at less then 10.0 metres. (an example was given) the verticality and direction of the new well was plotted against the known surveyed position of the vertical Balcombe -1 to ensure that there was no collision risk. The horizontal section was also surveyed to ensure there was no risk between the two wells."

93. That was the answer by Mr Green to the first part of the email. The officer attached a summary of the objection to the planning application by Miss Taylor of the claimants, and in it she referred to the fact that the other well had not been inspected and the contention that there was an unquantifiable risk of explosion if further work was carried out in close proximity to the first well. She was informed by Mr Green that there was no legal or regulatory requirement for the HSE to inspect wells that had been abandoned.

94. He went on

> "The HSE are not statutory consultees for planning applications. The application will not contain sufficient information to assess well integrity aspect. If a planning application is granted then a Well Operator will submit a Well Notification of the proposed workscope" (sic) "which will be inspected by the Well Operations Group of the HSE.
>
> The HSE will inspect the Well Notification submitted by the Well Operator. If the HSE are not satisfied that the risks are as low as is reasonably practicable then the appropriate enforcement action will be taken."

95. The case for Mr Wolfe under Ground 3 was that it was wrong to describe HSE as having addressed the question of the relationship of the two wells in detail. That charge is in my judgment incorrect. The HSE *had* assessed the question in detail, albeit by means of a desk study. Mr Wolfe's real complaint is that he says that the HSE should have inspected the wells and should have carried out its assessment of the wells at this stage in advance of applications being made to them for the working of the well. But in my judgment that misses the point. For the point about the comments that had been made by the Health and Safety Executive was that they had ample powers to deal with well integrity before the drilling of the well took place. They would do so as a result of the requirements of the Borehole Regulations to which I have already drawn attention at the beginning of this judgment. Mr Wolfe submitted to me in reply to Mr Maurici that it was immaterial that the HSE would act in the future and that what mattered was what they had done in the past. That argument is again misconceived. The prospect of future control by a statutory body is just as capable of being material as what has happened already. The committee had ample material before it that the HSE would be concerned in the overseeing of the drilling works and indeed that they would be an active regulatory body.

96. I note that a very similar point was taken by Mr Wolfe when acting on behalf of the claimants in the *An Taisce* case. It will be noted that at paragraphs 50-1 Sullivan LJ said this

> "In view of this factual background, it might be thought that this case was the paradigm of a case in which a planning decision-taker could reasonably conclude that there was no likelihood of significant environmental effects because any remaining gaps in the details of the project would be addressed by the relevant regulatory regime. Undaunted, Mr. Wolfe submitted that there was a distinction between reliance upon a pollution regulator applying controls "which it has *already* identified in the light of assessments which it has *already* undertaken on the basis of a scheme which has *already* been designed", which he said was permissible, and reliance upon "*current*" gaps in knowledge "being filled by the fact of the *existence* of the pollution regulator [who] will make *future* assessments… on elements of the project still subject to design changes….", which was not.
>
> 51 *There is no basis for this distinction which is both unrealistic and supported by any authority…"* (My italics)

97. A precisely similar submission was made to me by Mr Wolfe in reply when he stated under Ground 3:

> "What HSE was going to do in the <u>future</u> is not the issue here."

This argument conflicts also with the approach endorsed in *Morge v Hampshire CC* by Lord Brown at paragraph 29 about being able to rely on the future "policing" by Natural England.

98. I reject Mr Wolfe's submission that there was any misleading of the committee so far as the HSE was concerned. Further, it is entirely evident in my view that ample controls existed and that the officer and Committee took the view that they would be applied by the HSE to ensure well integrity.

99. Given the matters that I have set out above and the findings I have made, I regard Grounds 2 and 3 as unsustainable.

100. So far as Ground 1 is concerned, it essentially comes down to Mr Wolfe arguing that it is wrong for a planning authority to consider that it can assume that environmental controls would be properly applied. He contends that it should not make the assumption if it has material placed before it which raises issues which could persuade the Planning Committee that such controls would not exist or would not be properly applied. I have already determined that in my judgment that was simply was not the case here. But in any event, in my judgment there is ample authority to the effect that the Planning Authority may in the exercise of its discretion consider that matters of regulatory control could be left to the statutory

regulatory authorities to consider. There was ample material before it that all matters of concern could be and would be addressed, as set out in the officer's very careful report.

101. In my judgment what happened here was that the committee accepted its officer's advice that it had sufficient information to determine the application, and that it should and could assume that the matters could be dealt with by the EA and by the HSE. That is what she advised them, and that is what the Minutes record. She did so after setting out all the issues. That approach was entirely in keeping with long standing authority, and also with long standing policy advice. There is no question here of any gap being left in the environmental controls, and none was identified by Mr Wolfe. Each question raised by the objectors was dealt with in the officer's report with great thoroughness, and the Committee was quite entitled to accept her professional view that the matters in question could be left to the other regulatory bodies.

102. Indeed, the existence of the statutory regimes applied by the HSE, the EA and the DECC shows that there are other mechanisms for dealing with the very proper concerns which the Claimant's members have about the effects on the environment. The Claimant and its members' concerns are in truth not with the planning committee's approach of relying on the other statutory regimes, but rather with the statutory bodies whose assessments and application of standards they disagree with. That does not provide a ground of legal challenge to the decision of the planning committee.

103. Mr Wolfe has drawn the Court's attention to the use of the word "must" in the advice given by the officer. I do not regard that as altering the sense of the advice, which was that the Committee ought to assume that, and was in a position to do so. Given the terms of national policy advice, and its endorsement by the Courts, and the fact that there was ample material before the Committee on the topic, nothing turns in this case on the choice of verb.

104. Mr Wolfe's arguments on Ground 1 are in truth not a challenge to the lawfulness of the decision. They are an attempt to dress up as a challenge in law what is actually a merits argument that the WSCC Committee should have accepted that it should not regard the matters as being capable of being dealt with by HSE and EA.

F Ground 4: submissions of Claimant and Defendant and Discussion

105. Mr Wolfe contended that there had been past breaches of the conditions attached to the earlier permission by CBL, and that they should have been, but were not, treated as material considerations by the planning officer, and therefore by the Committee. He contended that it was wrong for the officer to advise the Committee that (bundle C173)

> " ……..in planning terms the permission goes with the land rather than with the applicant and as with any application we have to assume that they would comply with the conditions attached to the permission if granted."

106. He argued also, by reference to *Great Portland Estates PLC v Westminster City Council* [1985] AC 661 @670E that this was an exceptional case where the personal aspect of CBL's breaches could be taken into account.

107. Mr Maurici argued that the Planning Committee had the evidence of past breaches placed before them, as is undoubtedly the case. One breach had related to noise levels. That had been remedied by the suspension of activities, and the erection of noise barriers. The other had related to the timing of lorry movements. That had occurred when the Police had required CBL to move lorries outside the times permitted, because of the activities of protesters.

108. Mr Maurici also pointed out that the planning permission as granted contained more stringent conditions on HGV movements and noise monitoring. Two of the conditions (12 and 13) proposed by the Planning Officer were strengthened by the Planning Committee in the permission itself. Traffic routing was also addressed (see condition 10), and the establishment of a liaison group was also proposed and approved (Condition 20).

109. I regard this ground argued by the Claimant as also quite without substance. No one doubts that the enforceability of a planning condition is a material matter, and evidence of past breaches must be relevant in that context. That evidence was put before the Committee. The transcript shows (page C 173) that the planning officer advised the Committee that she considered that it had enough information to assess the application. The Committee dealt with the issue carefully, and addressed the points of concern about noise and traffic routing, which had led to the breaches of the conditions under the earlier permission. The Minutes at paragraphs 16-33 show that the Committee gave very full consideration to the issues of noise monitoring and HGV movements, which were actually the subject matter of the conditions of the previous permission which had been breached.

110. It follows that the only remaining argument could be one that because CBL had breached the conditions, therefore there was an argument that there should not be a further permission on an application by CBL. The Claimants argue that because it was CBL which had breached the previous conditions, the officer was not entitled to advise the Committee, and it to consider, that in planning terms it should assume that the conditions would be complied with. As I pointed out to Mr Wolfe in argument, that was a very unwise way to take a quite different point. The occurrence of past breaches is of course relevant to the policy tests which apply to the imposition of a condition- such as necessity and enforceability (see NPPF paragraph 206) but as planning permission runs with the land, it is very hard to justify a refusal based on past breaches *unless* they go to the issue of enforceability. After all, the grant of a personal permission (i.e. one limited by condition to a particular applicant) is rare but permissible in policy when there are personal circumstances which are material considerations (see PPG: "Use of Planning Conditions" paragraph 15), but the grant of a personal refusal is simply unknown.

111. The Council carefully addressed how noise monitoring and traffic routing were to be achieved and enforced. It considered all the evidence put before it of past breaches. It follows in my judgment that it addressed all matters material to this issue.

G *Ground 6: submissions of Claimant and Defendant and Discussion*

112. It is contended by Mr Wolfe that the officer was wrong to advise the Committee that

> " the issues raised in representations were considered but the number of representations was not a material consideration." (Minutes paragraph 13).

113. He relied on *R(Redcar and Cleveland BC) v Sec of State for Business etc and EDF (Northern Offshire Wind) Ltd* [2008] EWHC 1847 (Sullivan J) . He also argued that while the numbers of objections were put before the Committee, the results of an opinion poll conducted by the Parish Council were not. He also referred to *Newport BC v Secretary of State for Wales* [1998] 1 PLR 47.

114. Mr Maurici argued that the Committee were told about all the objections, including the opinion poll conducted by the Parish Council (the results are at paragraph 7.2 of the officer's report on page C97). He submitted that the proper approach was to look at the issues raised rather than the number of objections received.

115. I consider that Mr Wolfe's point is entirely without substance in the context of this case. The subject matter of all the objections was recited with care in the officer's report (including the opinion poll results). I note that *in R (Redcar and Cleveland BC)* a very similar point was taken. Sullivan J said this at paragraphs 33-35

> 34. "The list of material considerations which the claimant now contends that the defendant should have taken into account is as follows:
>
> (i) – (iv) ……
>
> (v) the weight of objections, including that of the adjacent planning authority, to which he should have given substantial weight;
>
> (vi) the lack of support;
>
> (vii)-(viii) ……..
>
> 35. ……..
>
> 36. Since the decision letter carefully considers all of the points that were made in the objections, it is difficult to see why it is said that the defendant failed to have regard to points (v) and (vi). The submission that the defendant should have given "substantial weight" to the objections, including the objection from the claimant, is misconceived in any event. It was for the defendant to decide what weight should be given to the objections……..."

116. Mr Wolfe's point appears to be that the Committee had been advised that the number of representations could not be material. But in the context of this current case the Committee was very well aware of the fact of the substantial opposition, and was directed to the scale of the opposition, including the number of objections , but also advised to look at the issues raised rather than the numbers raising them. I can see nothing wrong with that advice in the context of this case.

117. For completeness I should add that the *Newport BC* case adds nothing. It concerns the question whether an unfounded public perception of risk could ever amount to a reason for refusing planning permission. It was not suggested before me that such an issue arose here.

H *Ground 7: submissions of Claimant and Defendant and Discussion.*

118. Here Mr Wolfe refers to a case not made by his client, but by County Councillor Mullins, which he now argues for the Claimant. He says that she raised the question of the costs incurred as the result of protesters attending the application the site and the village to protest against the activity permitted by the previous consent. I have already set out what she said in the account of the meeting, at paragraph 15 above.

119. Mr Wolfe says that the costs incurred as a result of the protests against the activities of CBL amounted to a "local finance consideration" within the meaning of s 70(1) (b) of the *Town and Country Planning Act 1970* as amended by the *Localism Act 2011*. He also argues that the prospect of crime and disorder occurring when CBL is carrying out the activities authorised by the permission amount to a crime and disorder implication for the purposes of s 17 of the *Crime and Disorder Act 1998*, and that the Committee was wrongly advised that there were no Crime and Disorder implications.

120. Mr Maurici contended that the cost of dealing with the protests do not fall within the definition of "local finance consideration." He says also that the Police had no objections to the development, and that the effect of the injunctive relief which was obtained makes any protest outside the excepted area unlawful. Then he submits that it is wrong in principle for a statutory authority to be influenced in deciding whether or not to permit lawful activities by the prospect of others seeking to protest against it and, in the course of such protests, acting unlawfully. He referred the Court to *R(Phoenix Aviation) v Coventry Airport and others* [1995] EWHC 1 (Admin) [1995] 3 All ER 37 [1995] .

121. A "local finance consideration" is defined in s 70(4) *TCPA 1990 (as amended)* as

> " (a) a grant or other financial assistance that has been, or will or could be provided to a relevant authority by a Minister of the Crown, or
> (b) sums that a relevant authority has received . or could or will receive in payment of Community Infrastructure levy"
> A "relevant authority" means—
> (a) a district council;
> (b) a county council in England;
> (c) –(l).....

122. There was no evidence at all that any relevant grant or financial assistance paid or to be paid to any relevant body would be in any way affected, nor could Mr Wolfe point to any.

123. Mr Wolfe was also very reluctant to identify any item of expenditure which would fall on WSCC as a result of the activities of those who were protesters against CBL's activities. It was common ground that the costs of policing came from a precept which did not fall on WSCC. When pressed, he referred to the costs of repairing damage to the highway, but offered nothing which justified that observation. He also referred to County Councillor Mullins referring to "millions and millions of pounds" as showing that a cost had fallen on WSCC. I note also that there was no objection from the Highways Authority nor from the Police and Crime Commissioner, nor from the Police. The other item referred to in argument (by the court, it should be said) was the unquantified cost of obtaining injunctive relief. I am prepared to accept that some costs will fall on the County Council if there is further protest, but I have no evidence at all of its degree. I am not prepared to accept that County Councillor Mullins' estimates of "millions and millions of pounds" (upon which estimate Mr Wolfe placed reliance as evidence that there would be a cost to WSCC), was anything other than an emphatic, vigorous and perhaps hyperbolic way of her expressing her point.

124. So far as the *Crime and Disorder Act 1998* is concerned, one must in my judgment distinguish the effects of a development in terms of it leading to crime and disorder, from the effects of the protests of those who disagree with the activity permitted. Thus, the effects of a new public house or night club in a residential area could be relevant, because of the activities of those leaving the club late at night the worse for wear. They are a direct result of the clientele making use of and enjoying the facilities provided. Other commonplace examples are that housing developments should be designed so as to deter burglars, or that motorway service area car parks should be lit and laid out so as to deter car thieves. But this is quite different; this has nothing to do with the design or use of the development applied for. It relates to policing the activities of those who consider that a protest must be made against an entirely lawful activity, permitted by an elected authority according to a statutory code enacted by Parliament. On any view the previous protests had exceeded what was lawful. That must be so, because the High Court had granted the application for injunctive relief referred to at paragraph 7 above.

125. It follows that what was really being argued here (albeit not by FFBRA before the Committee) was that the County Council should take into account the cost of dealing with the activities of those who disagree with their decision, and were and are prepared to misuse the right to protest to do so. In *Phoenix Aviation* the Divisional Court was dealing with an airport and two ports which had refused to accept livestock being transported for slaughter, because of the extensive protests against it. As Simon Brown LJ put it at the outset of his judgment, in a passage which shows a closely analogous situation to that existing here

> "The export of live animals for slaughter is lawful. But many think it immoral. They object in particular to the shipment of live calves for rearing in veal crates, a practice banned in this country since 1990. The result is that for some months past the trade has attracted widespread concern and a great deal

> of highly publicised protest. Some of that protest is lawful; some alas is not. The precise point at which the right of public demonstration ends and the criminal offence of public nuisance begins may be difficult to detect. But not only is all violent conduct unlawful; so too is any activity which substantially inconveniences the public at large and disrupts the rights of others to go about their lawful business.
>
> It is the actual and threatened unlawful activity of animal rights protesters which underlies these three judicial review challenges. Two are brought by those wishing to export live animals, respectively through Coventry Airport and Dover Harbour; they seek to compel the port authorities to accept their trade. The third, by contrast, is brought by Plymouth City Council against its own harbour authority in an attempt to ban the trade. It is the fear of unlawful disruption which has prompted Coventry and Dover to refuse the trade (Coventry's ban being subject to the court first lifting the injunction requiring it at present to accept the trade); and which prompts Plymouth City Council to seek a similar ban. All three authorities, let it be clear at once, expressly now disavow animal welfare considerations as any part of their motivation (although earlier it was otherwise with both Coventry and Plymouth City Councils).
>
> The central questions raised by all three applications are these.
>
> (1) Given that their trade is lawful, what if any rights are enjoyed by animal exporters to have it accepted by the public authorities administering the respective (air and sea) ports here under consideration? Or, putting it the other way round, what, if any, discretion have the authorities to refuse it?
>
> This question falls to be decided by reference to the respective statutory regimes under which each of these authorities operates.
>
> (2) Assuming the authorities have a discretion to refuse trade which it would be within their physical capacity to handle, can they properly refuse it so as to avoid the disruptive consequences of threatened illegality? When, if ever, can a public authority properly bar lawful activity in response to unlawful protest? How absolute is the principle that the rule of law must prevail?
>
> (3) If it be lawful under national law for these authorities to refuse this trade so as to avoid the disruptive consequences of accepting it, does such refusal nevertheless contravene European Community law?

126. At page 58 ff he addressed the rule of law, and said

> "English law is unsurprisingly replete with examples of ringing judicial dicta vindicating the rule of law. Amongst them are these:
>
> > 'The law must be sensibly interpreted so as to give effect to the intentions of Parliament; and the police must see that it is enforced. The rule of law must prevail.' *(R v Metropolitan Police Comr, ex p Blackburn* [1968] 1 All ER 763 at 770, [1968] 2 QB 118 at 138 per Lord Denning MR.)
> >
> > 'Any suggestion that a section of the community strongly holding one set of views is justified in banding together to disrupt the lawful activities of a section that does not hold the same views so strongly or which holds different views cannot be tolerated and must unhesitatingly be rejected by the courts.' (*R v Caird* (1970) 54 Cr App Rep 499 at 506 per Sachs LJ.)
> >
> > 'There is, I think, no principle more basic to any proper system of law than the maintenance of the rule of law itself.' (*Bennett v Horseferry Road*

Magistrates' Court [1993] 3 All ER 138 at 155, [1994] 1 AC 42 at 67 per Lord Bridge.)

Those cases, however, were all decided in very different contexts to the present. So too was *Singh v Immigration Appeal Tribunal* [1986] 2 All ER 721 at 728, [1986] 1 WLR 910 at 919, where Lord Bridge said:

> 'Extraneous threats to instigate industrial action could only exert an improper pressure on the Secretary of State and if he allowed himself to be influenced by them, he would be taking into account wholly irrelevant considerations.'

Nor, despite the submissions of Lord Kingsland QC, have we found *Wheeler v Leicester City Council* [1985] 2 All ER 1106, [1985] AC 1054 a helpful case. It was there held that the Leicester Football Club 'could not be punished because the Club had done nothing wrong' (see [1985] 2 All ER 1106 at 1112, [1985] AC 1054 at 1079 per Lord Templeman). But Coventry City Council here, unlike Leicester City Council there, are not intent on punishing Phoenix. That is not their purpose and different considerations accordingly apply.

Coventry and Plymouth City Councils and Dover Harbour Board argue against any absolute principle that the rule of law must prevail. Unlawful disruptive activity cannot simply be ignored. Rather it will on occasion justify or even require the suspension of lawful pursuits. An obvious illustration is the closure of an airport following a bomb threat. The question therefore becomes: what are the permissible limits within which a public authority may properly respond to unlawful action?"

127. He then reviewed the authorities. He placed particular emphasis on R *v Chief Constable of the Devon and Cornwall Constabulary, ex p Central Electricity Generating Board* [1981] 3 All ER 826, [1982] QB 458. He said at page 61

"The Court of Appeal there was concerned with the board's attempt to survey land in Cornwall with a view to constructing a nuclear power station, a survey which was being impeded by the non-violent activities of protesting demonstrators. The police had thought themselves powerless to act. The Court of Appeal disagreed. Lord Denning MR said ([1981] 3 All ER 826 at 832–833, [1982] QB 458 at 470–471):

> '… I cannot share the view taken by the police. English law upholds to the full the right of people to demonstrate and to make their views known so long as all is done peaceably and in good order (see *Hubbard v Pitt* [1975] 3 All ER 1, [1976] QB 142). But the conduct of these demonstrators is not peaceful or in good order. By wilfully obstructing the operations of the board, they are deliberately breaking the law … I go further. I think that the conduct of these people, their criminal obstruction, is itself a breach of the peace. There is a breach of the peace whenever a person who is lawfully carrying out his work is unlawfully and physically prevented by another from doing it. He is entitled by law peacefully to go on with his work on his lawful occasions … If I were wrong on this point, if there was here no breach of the peace or apprehension of it, it would give a licence to every obstructor and every passive resister in the land. He would be able to cock a snook at the law as these groups have done. Public works of the greatest national

> importance could be held up indefinitely. This cannot be. The rule of law must prevail.'

Lawton LJ asked ([1981] 3 All ER 826 at 834, [1982] QB 458 at 472–473):

'… can those who disapprove of the exercise by a statutory body of statutory powers frustrate their exercise on private property by adopting unlawful means, not involving violence, such as lying down in front of moving vehicles, chaining themselves to equipment and sitting down where work has to be done. Such means are sometimes referred to as passive resistance. The answer is an emphatic No. If it were otherwise, there would be no rule of law. Parliament decides who shall have statutory powers and under what conditions and for what purpose they shall be used. Those who do not like what Parliament has done can protest, but they must do so in a lawful manner. What cannot be tolerated, and certainly not by the police, are protests which are not made in a lawful manner.'

Templeman LJ agreed, adding ([1981] 3 All ER 826 at 840, [1982] QB 458 at 481):

> '… the powers of the police and the board are adequate to ensure that the law prevails. But it is for the police and the board to co-operate and to decide on and implement the most effective method of dealing with the obstructors.'

In the result the court refused the board's application for an order of mandamus requiring the chief constable to instruct his officers to remove the objectors. No one contemplated, however, that the protesters should have their way. On the contrary, the case stands as another trenchant endorsement of the imperative requirements of the rule of law.

In our judgment, that body of authority, taken as a whole, provides singularly little support for the contentions advanced by those now seeking to bar the livestock trade from their ports.

If we are right in holding in each case that the port authority enjoys no discretion in the matter, then plainly there presently exists no such emergency as could begin to justify non-compliance with their duty to accept this lawful trade; they would have no defence of necessity. We speak of 'enjoying' a discretion but it is right to record ABP's cogent view that in truth any discretion here would be unwelcome: they have no desire to make judgments between legal trades (or shippers) according to whatever popular protest these may attract. Still less do they relish being dragged into court to justify their judgment.

Even, however, if the port authorities are to be regarded as having a discretion to determine which legal trades to handle, then in our judgment they could not properly exercise it here in favour of this ban. One thread runs consistently throughout all the case law: the recognition that public authorities must beware of surrendering to the dictates of unlawful pressure groups. The implications of such surrender for the rule of law can hardly be exaggerated. Of course, on occasion, a variation or even short-term suspension of services may be justified. As suggested in certain of the authorities, that may be a lawful response. But it is one thing to respond to unlawful threats, quite another to submit to them—the difference, although perhaps difficult to define, will generally be easy to recognise. Tempting though it may sometimes be for public authorities to yield too readily to threats of

> disruption, they must expect the courts to review any such decision with particular rigour—this is not an area where they can be permitted a wide measure of discretion. As when fundamental human rights are in play, the courts will adopt a more interventionist role."

128. In my judgment that very clear statement of principle is one which must apply in this case. While I have no doubt that County Councillor Mullins meant well, the reality of her objection was that she asked WSCC to refuse to permit that which it would otherwise have permitted, on a basis that its granting permission would excite opposition leading to protests designed and intended to disrupt a perfectly lawful activity. In my judgment, had it taken County Councillor Mullins' original argument into account, WSCC would have had regard to an immaterial consideration and would have acted unlawfully.

129. In any event, I note that after the intervention of the Chairwoman and the legal advice being taken, County Councillor Mullins actually accepted that it was not material.

130. I therefore reject this ground, which to my mind has not the slightest merit.

I Conclusions

131. I have no doubt whatever that this proposal has caused considerable concern to the Claimant Association. I recognise also that some parts of the public are concerned about the process commonly known as "fracking" although I must observe also that this application did not seek permission for that activity.

132. My task has been to consider whether West Sussex County Council acted lawfully in the way in which it dealt with the planning application. It was for it, and not for this Court, to determine the merits. It did so after a very full discussion and a thorough exploration of all the issues raised. It was entitled to consider that it could leave matters within the purview of the EA, the HSE and other statutory bodies and their regimes for those bodies to address. It had ample material to justify such an approach.

133. This application was for a lawful activity, which (and this has never been challenged in these proceedings) was a development which national and development plan policy supported, and which would be the subject of statutory control as well as planning conditions. The approach adopted by WSCC towards the relationship of planning control with other regulatory codes and regimes followed national policy guidance as repeatedly endorsed by the courts.

134. In each respect argued by the Claimants as showing that those regulatory bodies were not able to deal with the proposals, the case for the Claimants has failed, both because the legal arguments neither addressed nor reflected long accepted principles, but also because the case that the Committee was misled was unsustainable on the facts.

135. The Claimant's other grounds were also unsustainable.

136. I feel considerable sympathy for the Claimant association and its members, who have mounted what is no doubt an expensive claim on what FFBRA and its members no doubt considered and were advised were respectable grounds in law.

137. This claim for judicial review is dismissed.