[2020] EWHC 2579 (Admin)

Case No: CO/5052/2019

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 01/10/2020

Before:

THE HON. MR JUSTICE HOLGATE

- -

Between:

Joan Girling	**Claimant**
- and -	
East Suffolk Council	**Defendant**
- and -	
(1) EDF Energy Nuclear Generation Limited	**Interested Parties**
- and -	
(2) NNB Generation Company (SZC) Limited	

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- -

David Wolfe QC and Ashley Bowes (instructed by **Leigh Day**) for the **Claimant**
Andrew Tait QC and Isabella Tafur (instructed by **East Suffolk Council**) for the **Defendant**
Hereward Phillpot QC (instructed by **Herbert Smith Freehills LLP**) for the **Interested Parties**

Hearing date: 8 September 2020

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Judgment Approved by the court for handing down

Covid-19 Protocol: This Judgment was handed down remotely by circulation to the parties' representatives by email and released to Bailii.

Mr Justice Holgate :

Introduction

1. The Sizewell B ("SZB") power station in Suffolk is expected to continue in operation until 2035. It may then be licensed to operate for a further 20 years. It currently generates about 3% of the UK's electricity. The adjacent Sizewell A ("SZA") station is in the process of being decommissioned.

2. For a number of years there have been proposals to develop a further nuclear power station, Sizewell C ("SZC"). At the time of the decision under challenge it was envisaged that, subject to obtaining all necessary consents, construction on this project would begin in 2022 and last for some 9 to 12 years. An application for a development consent order under the Planning Act 2008 ("PA 2008") for SZC was submitted to the Planning Inspectorate on 27 May 2020. On 24 June 2020 the Secretary of State accepted the application for examination. Once the Examining Authority makes its initial assessment of the principal issues arising on the application and holds a preliminary meeting in public under s. 88 of PA 2008, it will be under a duty to complete the examination process within 6 months of the date of that meeting and to make its report to the Secretary of State within a further 3 months (s.98). The Secretary of State must then determine the application within the following 3 months (s.107).

3. The SZC project would involve the use of land currently needed for the operation of SZB, namely a substantial outage store, laydown area and associated facilities. Every 18 months or so it is necessary for a planned outage to take place at SZB for maintenance. This lasts for about 2 months. The reactor is taken off-line, fuel rods are removed or installed, and other essential works carried out. A typical planned outage requires between 600 to 1300 workers on site in addition to the 500 or so who routinely work there. Before these parts of the SZB site may be used for the SZC project, it is necessary for the facilities to be relocated, so that the normal operational cycle of SZB is maintained and the conditions of the nuclear site licence satisfied. These facilties are also necessary for dealing with any unplanned outages that may occur.

4. The first Interested Party, EDF Energy Nuclear Generation Limited, is the owner and operator of SZB. The second Interested Party, NNB Generation Company (SZC) Limited, is the promoter of SZC. Both interested parties form part of the EDF Energy Group.

5. On 18 April 2019 the first Interested Party applied to the Defendant, East Suffolk Council ("the Council"), for planning permission to provide replacement facilities for SZB. The development related to the demolition of the existing outage store, laydown area, operations training centre, technical training centre, visitor centre and a garage, the removal of some 676 parking spaces and the provision of a new outage store (2,778 sq. m.), laydown area (11,990 sq. m.), training centre (4,032 sq. m.), and 688 parking spaces, access roads and landscaping. The proposal is for the relocation works for these facilities at SZB to begin in advance of a decision on whether to grant development consent for SZC, so as to reduce the delay to the SZC project that would occur if these relocation works could not be carried out until the whole scheme is consented. This was said to be in the national interest because national policy supports

the development and deployment of additional nuclear power capacity as soon as possible. EDF informed the Council that these advance relocation works needed to start at the beginning of 2020 and would take 4 to 4.5 years.

6. It was common ground that the application relating to the relocation works was properly made under the Town and County Planning Act 1990, It was not required to be dealt with under PA 2008.

7. The Claimant is a resident of Leiston and lives about 2 miles from SZB. She is the Secretary and a member of an unincorporated association, "Together Against Sizewell C" ("TASC"), which comprises about 300 supporters. The group was formed because of concerns about the sensitive nature of the environment around Sizewell and the effects of the SZC project, to which it is opposed.

8. It is important to emphasise that although the proposals for the advance works permitted by the Council and for the SZC project give rise to strongly held views, both in favour and against, this court is only concerned with whether the decision being challenged was flawed by any error of law. These proceedings are not concerned with the merits, the pros and cons, of the proposals.

9. The existing SZA and SZB stations have frontages to the North Sea. SZB lies to the north of SZA. SZC would lie to the north of SZB. The application site has an area of nearly 31 hectares. It is a long site running north south and generally to the west of the buildings on SZA and SZB but it also continues further north and south beyond those two stations. The site lies within the Suffolk Coast and Heaths Area of Outstanding Natural Beauty ("AONB") and the Suffolk Heritage Coast. The Sizewell Marshes Site of Special Scientific Interest ("SSSI") lies immediately west and north of the site. Within the western boundary of the site lies Coronation Wood, a mixed plantation just over 100 years old, mainly comprising semi-mature and mature pines, with some mature broadleaf trees. The proposal would involve the loss of 229 trees, but there would be a substantial amount of new planting, albeit much younger specimens.

10. The key policy for the protection of the AONB is to be found in paragraph 172 of the National Planning Policy Framework ("NPPF"), which states: -

> "Great weight should be given to conserving and enhancing landscape and scenic beauty in National Parks, the Broads and Areas of Outstanding National Beauty, which have the highest status of protection in relation to these issues. The conservation and enhancement of wildlife and cultural heritage are also important considerations in these areas, and should be given great weight in National Parks and the Broads. The scale and extent of development within these designated areas should be limited. Planning permission should be refused for major development other than in exceptional circumstances, and where it can be demonstrated that the development is in the public interest. Consideration of such applications should include an assessment of:

> a) the need for development, including in terms of any national considerations, and the impact of permitting it, or refusing it, upon the local economy;
>
> b) the cost of, and scope for, developing outside the designated area, or meeting the need for it in some other way; and
>
> c) any detrimental effect on the environment, the landscape and recreational opportunities, and the extent to which that could be moderated."

It is common ground that the Council correctly treated the proposal as involving "major development" in the AONB.

11. The application was considered by the Strategic Planning Committee on 9 September 2019. The officer's report to the members was a very careful and detailed document which helpfully summarised the views of consultees and those who made representations. It set out the various policy and technical issues in clear terms. The committee discussed the application at some length after having had the benefit of presentations from officers and interested parties, including the Claimant. The approved minutes provide a detailed and helpful record of the process.

12. The committee resolved to approve the application in the following terms: -

> "That **AUTHORITY TO APPROVE** be granted subject to:
>
> - receipt of additional bat survey information including impacts and mitigation measures;
>
> - receipt of a Shadow Habitat Regulation Assessment (HRA) report providing sufficient detail for this Authority to undertake the necessary assessment in accordance with the habitats regulations;
>
> - the signing of a section 106 legal agreement requiring a payment in relation to residual impacts on the AONB; and
>
> - the inclusion of appropriate conditions including those detailed below."

13. The additional bat survey information and a "shadow" HRA were provided by the developer to the Council. Mr Meyer the Council's ecologist confirmed that the Council was satisfied with those materials. A s.106 agreement was entered into with which the Council was satisfied. Accordingly, on 13 November 2019 the Council granted planning permission for the relocation development. The Council considered the possibility that this development might be carried out but the application for development consent in respect of SZC refused. To address that potential outcome Condition 16 provides: -

> "In the event that Sizewell C Nuclear Power Station is not permitted by the Secretary of State, a scheme of restoration in accordance with details first submitted to and agreed in writing

> by the Local Planning Authority will occur at Pillbox Field and any other areas previously vacated by Sizewell B buildings and not to be re-used.
>
> The Scheme shall be submitted to and approved in writing within 18 months of the date of the final decision by the Secretary of State to refuse consent for the Sizewell C Nuclear Power Station (or, if later, the date that any legal challenge to such decision is finally resolved).
>
> All restorative works shall be carried out in accordance with a Restoration Scheme, including a timeframe for the restoration works, in accordance with details first submitted to and approved in writing by the Local Planning Authority."

The claim for judicial review

14. The Claimant asks for an order quashing the grant of planning permission. At a hearing on 3 June 2020 Andrews J (as she then was) granted permission to apply for judicial review on ground 2 but refused permission on grounds 1(a) and (b). On 9 July 2020 Lewison LJ granted the Claimant permission to apply for judicial review additionally under ground 1(b). No further application was made in respect of ground 1(a) and Mr David Wolfe QC accepted that that could not be pursued. In other words, he did not seek to argue that the Council had erred in law by treating the designation in the National Policy Statement for Nuclear Power Generation ("EN-6") of SZC as a potentially suitable site for a nuclear power station as amounting in itself to "exceptional circumstances" justifying major development in the AONB.

15. The two grounds now raised in this challenge are therefore: -

> Ground 1(b)
>
> The Council unlawfully failed to consider the need for, and alternatives to, the proposal for the purposes of paragraph 172 of the NPPF in addressing whether there were exceptional circumstances to justify development;
>
> Ground 2
>
> The Council failed to reach a lawful conclusion that the environmental information was "up to date" contrary to regulation 26 of the Town and County Planning (Environmental Impact Assessment) Regulations 2017 (SI 2017 No. 571) ("the 2017 Regulations).

16. It is common ground between the parties that if the Claimant succeeds on either of these two grounds then the planning permission must be quashed. Section 31(2A) of the Senior Courts Act 1981 is not relied upon.

17. Bearing in mind the terms of the resolution passed by the Council, I should record that Mr Wolfe accepted that no complaint arises in relation to the way in which the

Council applied the Conservation of Habitats and Species Regulations 2017 (SI 2017 No. 1012).

General legal principles

18. The principles on which the Court deals with an application for judicial review of a decision by a local planning authority to grant planning permission have been established in a number of cases and are well-known. Relevant authorities include *R (Mansell) v Tonbridge and Malling Borough Council* [2019] PTSR 1452 [42]; *R (Luton Borough Council) v Central Bedfordshire Council* [2014] EWHC 4325 (Admin) at [90] to [95].

19. Where, as in this case, the members of the committee voted to accept the recommendation in the officer's report, it is a reasonable inference that they accepted the reasoning in the officer's report, in the absence of evidence to the contrary (*R (Palmer) v Herefordshire Council* [2017] 1 WLR 411 at [7]). Here, there is no contrary evidence. The parties agreed that this principle extends to include material in the minutes of the meeting. This is also relevant to the Court's assessment of the "main reasons and considerations on which the decision" was based (regulation 30(1)(d) of the 2017 Regulations).

Ground 1(b)

A summary of the submissions

20. Mr Wolfe QC submits that the Council was required by paragraph 172 of the NPPF to make an assessment of the matters referred to in sub-paragraphs (a), (b) and (c). He accepts that the Council discharged that obligation in relation to (a) the impact of granting or refusing the application on the local economy, (b) the cost of, and scope for, carrying out the development outside the designated area or meeting the requirement for the scheme in some other way and (c) any detrimental effect upon the environment, landscape and recreational facilities. But he submits that the Council failed to meet the requirement to assess the need for the advance works, as an essential component of the balance which they had to strike in order to determine whether there were "exceptional circumstances" and the development was in the public interest to justify granting the permission.

21. Mr Wolfe rightly submits that the need for the development was a relevant consideration which the planning authority was mandated by national policy to take into account. This legal concept has recently been explained by the Supreme Court in *Samuel Smith Old Brewery (Tadcaster) Limited v North Yorkshire County Council* [2020] PTSR 221 at [29] to [32] and encapsulated by the Court of Appeal in *Oxton Farm v Harrogate Borough Council* [2020] EWCA Civ 805 at [8] as follows: -

> "In *R (Samuel Smith Old Brewery (Tadcaster)) v North Yorkshire County Council* [2020] PTSR 221 the Supreme Court endorsed the legal test in *Derbyshire Dales District Council* [2010] 1 P & CR 19 and *CREEDNZ Inc v Governor General* [1981] 1 NZLR 172, 182 which must be satisfied where it is alleged that a decision-maker has failed to take into account a material consideration. It is insufficient for a claimant simply to

> say that the decision-maker did not take into account a legally relevant consideration. A legally relevant consideration is only something that is *not* irrelevant or immaterial, and therefore something which the decision-maker is *empowered* or *entitled* to take into account. But a decision-maker does not *fail* to take a relevant consideration into account *unless he was under an obligation to do so*. Accordingly, for this type of allegation it is necessary for a claimant to show that the decision-maker was expressly or impliedly required by the legislation (or by a policy which had to be applied) to take the particular consideration into account, or whether on the facts of the case, the matter was so "obviously material", that it was irrational not to have taken it into account."

22. The facilities required for SZB already exist. So, it is common ground that there is no need for the proposed works to enable SZB to continue to operate unless development consent is granted for SZC. However, the SZC proposal was not before the Council. Instead, the Council properly had regard to national policy statements on the importance of developing new nuclear power capacity as soon as possible and identifying a number of potential sites including Sizewell (subject to consent being obtained). Accordingly, the specific need for the works proposed in the application before the Council was to reduce delay in the carrying out of the SZC project in the event of that being authorised by a development consent order pursuant to national policy.

23. Paragraph 172 of the NPPF requires the need for "major development" in an AONB to be assessed but does not stipulate how that assessment is to be carried out, other than by the partial explanation in limb (a). The word "need" is an ordinary English word and it would be inappropriate in this case for it to be the subject of judicial interpretation. Mr Wolfe QC did not suggest otherwise. It is one of those broad expressions which are to be understood at a high level of abstraction, given the wide range of circumstances to which such policy is to be applied across the country.

24. In this case we are dealing with the *application* of policy. The application of the word "need" to the circumstances of each case is essentially left to the judgment of the planning authority. That judgment can only be challenged on the grounds of irrationality.

25. Mr. Wolfe QC relied upon the dictum of Lord Diplock in *Tameside Metropolitan Borough Council v Secretary of State for the Environment* [1977] AC 1014 at 1065B: -

> "… the question for the court is, did the Secretary of State ask himself the right question and take reasonable steps to acquaint himself with the relevant information to enable him to answer it correctly."

However, he also accepted that the apparent width of that statement has been qualified by the principle established in, for example, *R (Khatun) v Newham London Borough Council* [2005] QB 37 at [35] and *Flintshire County Council v Jayes* [2018] EWCA Civ 1089 at [14]. Accordingly, it was for the Council to judge how far to go into the

question of need and to obtain information on that aspect. That judgment is only open to challenge on the grounds of irrationality. In the light of the *Samuel Smith* case, the question for the Court is whether the amount of time which would be saved in the construction of SZC by carrying out the advance works was an "obviously material" consideration, such that it was irrational not to take it into account.

26. The Claimant has to accept that, when applying the "exceptional circumstances" test, the officer's report did rely upon reduction in delay to the completion of the SZC project as the need for the advance works. However, it is submitted that because the focus of the enquiry had to be why those works are needed now, rather than as part of the SZC scheme if consented in future, it was "obviously material" for the Council to consider the implications of the advance works on the timings for the SZC project. Thus, it is said that it was necessary for the Council to know about the developer's timeline for the construction of SZC and how the carrying out of the advance works would impact on those plans. How much time would they save in the development of SZC?

27. Mr Wolfe QC submitted that it was legally insufficient for the Council merely to have proceeded on the basis that some time would be saved, without having an assessment of how much that would be. He argued that without that information the Council could not rationally decide how much weight to give to this highly specific form of need so as to see whether the claimed benefits of the proposal outweighed any harm to the AONB identified, "great weight" being required to be given to that harm in accordance with paragraph 172 of the NPPF (see paragraph 50 of the Claimant's skeleton).

28. It is common ground that no such estimate of the amount of time that would be saved was supplied by the developer to the Council or was estimated by the latter. There was, for example, no quantitative analysis of the effect of the advance works on the schedule for the construction of SZC. Instead the Council and the Interested Parties submit that the authority's decision was based upon a "qualitative" appreciation of the benefit claimed in the context that it is national policy, and therefore in the national interest, that additional nuclear power capacity be developed as soon as possible. They also submit that because the Council's overall assessment was that there would be no material adverse impact upon the AONB - rather the proposal would be beneficial - there was no legal requirement for a quantitative or numerical assessment of the time savings to be made so that the "exceptional circumstances" test could be lawfully applied. In the circumstances of this case, a quantitative assessment was not an "obviously material" consideration such that it was irrational for the Council to decide to grant planning permission for the advance works without it.

Discussion

29. The parties referred to *Calverton Parish Council v Nottingham City Council* [2015] EWHC 1078 (Admin) and *Compton Parish Council v Guildford Borough Council* [2019] EWHC 3242 (Admin), both of which were concerned with the "exceptional circumstances" test in paragraphs 136-7 of the NPPF for the alteration of a Green Belt boundary. The relevant principles were analysed and summarised in *Keep Bourne End Green v Wycombe Council* [2020] EWHC (Admin) at [146] to [155]. Thus, the concept of "exceptional circumstances" is deliberately broad and not susceptible to dictionary definition. The matter is left to the judgment of the decision-maker in all

the circumstances of the case. In *R (Luton Borough Council) v Central Bedfordshire Council* [2015] 2 P&CR 19 Sales LJ pointed out at [56] that the "exceptional circumstances" test for the alteration of a Green Belt boundary is less onerous than the "very special circumstances" test for development control in relation to "inappropriate development" within the Green Belt.

30. Here we are dealing with the "exceptional circumstances" test in paragraph 172 of the NPPF for "major development" in an AONB. Nonetheless, I accept that in broad terms the approach summarised in *Keep Bourne End Green* at [146] may be read across to the present context. However, it should be remembered that in development control, "inappropriate development" in the Green Belt is treated as being harmful in itself to Green Belt policy by reason of its inappropriateness (see paragraph 144 of NPPF), quite apart from any additional harm that would be caused by the impact of the particular proposal on the Green Belt and its purposes in that location. It is common ground between the parties that under AONB policy in the NPPF there is no notion of harm simply through development being treated as inappropriate in policy terms. Instead, the issue is what harm to the AONB (if any) would actually be caused by the development in the location proposed. AONB policy is also different from Green Belt policy in that (a) it explicitly requires consideration of whether the development would be in the public interest and (b) it sets out some of the factors which should be addressed, where relevant, in the assessment of whether "exceptional circumstances" exist.

31. I summarise first how the officer's report approach the issue of need. For example, paragraph 8.1.8 of the officer's report summarised the national policy position as follows: -

> "National Policy Statement EN-1 – Energy and EN-6 – Nuclear Power identify a need for new nuclear power generation in England and Wales, EN-6 identifies Sizewell as a potential site for new nuclear development. Parts of the Sizewell B generating station are on the identified site for Sizewell C. In order to facilitate the efficient development of Sizewell C, it is of national importance for the B Station facilities to be moved to enable the B Station to continue operating and to avoid greater delay to the construction timetable for Sizewell C. EN-1 refers to there being an 'urgent need for new electricity generation plant, including new nuclear power' and EN-6 refers to there being an 'urgent need for new nuclear power stations'. Once published the draft new NPS will also be a consideration – no timetable for this has yet been released by Government."

No criticism is made of that summary.

32. National Policy Statements ("NPSs") on nationally significant infrastructure projects are designated by the Secretary of State subject to strategic environmental assessment, sustainability appraisal, consultation, and consideration by Parliament. In July 2011 the Secretary of State designated the "Overarching National Policy Statement for Energy" (EN-1), along with the "National Policy Statement for Nuclear Power Generation" (EN-6). These policies remain extant, although the Government has

undertaken consultation on "the siting criteria and process" for a new NPS on nuclear power.

33. There is no dispute that if SZC were to go ahead, the facilities at SZB the subject of the planning permission would need to be relocated and the Council accepted that they would need to be sited in the vicinity of the present station. Paragraph 8.1. of the officer's report explained why the facilities could not be relocated to the site of SZA.

34. The officer's report accepted that to meet the current construction programme for SZC, work on the relocation of the facilities at SZB would need to begin at the start of 2020 (paragraph 3.1). It was also accepted that the early delivery of these works (a) could lessen the impact of the construction programme in relation to SZC and (b) would reduce the cumulative impacts of SZC and the nearby development proposed by Scottish Power Renewables in connection with the East Anglia One North and East Anglia Two offshore windfarms (paragraphs 8.14.1 to 8.14.2, 9.3 and 9.6). The minutes also record that a representative of EDF Energy explained that the advance relocation of SZB facilities would allow a faster delivery of SZC if the latter were to be approved.

35. I now summarise how the officer's report addressed harm to the AONB. To put the matter into context, an AONB may be designated for the purpose of "conserving and enhancing the natural beauty of the area" (s.82(1) of the Countryside and Rights of Way Act 2000). In this context, "the conservation of the natural beauty of an area" includes a reference to "the conservation of its flora, fauna and geological and physiographical features" (s.92(1)). This broad approach, which Mr Wolfe QC emphasised, is reflected in paragraph 172 of the NPPF.

36. The officer's report discussed in some detail the loss of 229 trees in Coronation Wood, of which 73% were assessed as being of low quality, that is plantation trees with a limited life expectancy and limited amenity value. It was judged that this loss would be "balanced" by the planting of over 2500 juvenile woodland trees, including a mixture of broadleaf and coniferous species appropriate for the prevailing soil and coastal conditions (paragraph 8.3.14). In the short to medium term, the loss of the wood would have a moderate adverse effect, but taking into account the species and habitat present, the loss was judged to be "minor" and "not significant" following mitigation (8.3.15). EDF Energy had increased the amount of planting proposed since the application was made and the Council's officers concluded that "the balance is in favour of the scheme *on this matter*" (emphasis added) (paragraph 8.3.16). Officers considered that the wood had limited public amenity value, its principal value being for users within the Sizewell complex (8.4.3). Coronation Wood was not considered to be in a sustainable condition and much of it was judged to be unsuited to the local landscape character (8.4.5). Increased planting on Pillbox Field provided by EDF would "fully compensate for the loss of woodland" (8.4.6).

37. The effect of the proposal on the landscape was assessed in section 8.5 of the officer's report. Not surprisingly, the officer's report identified some negative impacts during the demolition and construction phase lasting 4 to 4.5 years. More generally at paragraph 8.5.15 officers concluded: -

> "With regard to the high-level designated landscape of the AONB and its natural beauty indicators and special qualities,

> long term permanent effects, where they occur, do so over a very limited area of the AONB. The greatest rated scale of effect is a Small effect on landscape quality through the removal of Coronation Wood, the conversion of part of Pillbox field to outage carpark, and the partial visibility of the proposed new structures. Other AONB special qualities such as wildness, scenic quality, and tranquillity are already considered to be compromised by the presence of the existing power station site."

and at 8.5.17: -

> "it is concluded that the proposed development would have a negligible magnitude of effect on the natural beauty and special qualities of the AONB. Factoring in the medium sensitivity of the AONB in this location, the effects are judged to [be] of minimal significance and on balance neutral."

These passages referred not only to the landscape but also "natural beauty".

38. Mr Wolfe QC placed emphasis on one particular paragraph of the officer's report (8.6.4) in the section dealing with effects on the AONB: -

> "However, it is important to acknowledge that the proposal will move existing development from one area of the AONB to another, and the footprint will be increased. As such, there is a residual impact on permanent loss of the AONB that cannot be addressed through mitigation."

It is important to note the words "as such" and the fact that this passage was only dealing with the increase in the area of the footprint. Plainly, that increase would represent a permanent loss of the area involved. But that formed only part of the overall assessment of the effect of the advance works on the AONB and it is necessary to read the report as whole.

39. Mr Wolfe QC also relied upon an earlier part of the detailed assessment in the officer's report, namely paragraph 8.3.26, which had stated that the proposed development would result in an overall net loss of habitat for breeding birds in Coronation Wood, Pillbox Field and hedgerows, after taking into account the replacement planting. However, paragraph 8.3.27 went on to say that given the small amount of habitat impacted "there is unlikely to be any significant change in the breeding bird assemblage" and there are also methods for supporting net biodiversity gain which should be addressed in planning conditions. Paragraph 8.3.33 explained that EDF was then undertaking further work on biodiversity gain and how a net gain could be achieved by various measures, including the use of native species in the replanting proposals to provide better food sources for birds.

40. The minutes of the committee meeting record further information given to the members. They were told by officers that trees in Coronation Wood were not suited to the soil and there were signs of blight which would lead to future decline in the state of the wood through wind blow. The members were also advised that the proposals

for new planting in Pillbox Field, the current condition of Coronation Wood and the suitability of the new species to be planted, "meant that overall the proposals could be considered a benefit to the AONB landscape; it would provide more appropriate species, provide an improved layout and offer more long-term prospects for landscape and wildlife than Coronation Wood." Subsequently, some members speaking in the debate endorsed the view that the proposed mitigation planting would result in a net gain.

41. Accordingly, I accept the submission of Mr Andrew Tait QC for the Council that, read as a whole, the officer's report and the minutes show that the Council considered that the overall impact of the proposal would not be materially harmful. As the report itself recognised, there are many people who disagree with particular parts of the assessment and/or with the overall conclusion. It is necessary to repeat that it is not for the court to adjudicate on the correctness of the rival views. The key point here is that the Claimant does not contend that it was *unlawful* for the Council to reach any of these judgments. I agree.

42. In other cases there might be force in Mr Wolfe's submission that where it is necessary for a planning authority to consider whether there are exceptional circumstances and public interest sufficient to outweigh harm to an AONB, and the developer relies upon a need to carry out advance works in order to speed up the subsequent delivery of the main project, then it may well be "obviously material" for the authority to consider some quantitative information so as to be able to understand approximately how much time would be saved and to decide how much weight to give to that factor as against the net harm actually resulting from those works. However, in the circumstances of this case, where the Council was legally entitled to conclude that, viewed overall, there was no material harm to the AONB, but rather benefits to the AONB, I do not accept that the Council acted irrationally by not requiring a quantitative assessment of the time saving for the SZC project or to consider that matter. I am reinforced in that conclusion by the combination of other factors which the Council accepted as forming part of the overall "exceptional circumstances" case for the proposal, notably the urgent national need for new nuclear power generation endorsed in the NPSs, the identification of the SZC site as potentially appropriate for an additional nuclear power station, the public interest in reducing the risk of overlapping construction programmes for SZC and other substantial infrastructure projects in the area, and the lack of suitable sites outside the AONB (paragraph 8.6.3 of the officer's report).

43. For all these reasons, ground 1(b) must be rejected.

Ground 2

A summary of the submissions

44. Regulation 3 of the 2017 Regulations prohibits a planning authority from granting planning permission for EIA development "unless an EIA has been carried out in respect of that development." The planning permission granted by the Council was for EIA development. Regulations 2(1) and 4 define "EIA" as the process consisting of the preparation of an environmental statement, any consultation, publication and notification required in respect of EIA development and "the steps required under regulation 26."

45. Regulation 26 of the 2017 Regulations provides (in so far as is material): -

> "(1) When determining an application or appeal in relation to which an environmental statement has been submitted, the relevant planning authority, the Secretary of State or an inspector, as the case may be, must-
>
> (a) examine the environmental information;
>
> (b) reach a reasoned conclusion on the significant effects of the proposed development on the environment, taking into account the examination referred to in sub-paragraph (a) and, where appropriate, their own supplementary examination;
>
> (c) integrate that conclusion into the decision as to whether planning permission or subsequent consent is to be granted; and
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> (d) if planning permission or subsequent consent is to be granted, consider whether it is appropriate to impose monitoring measures.
>
> (2) The relevant planning authority, the Secretary of State or the inspector, as the case may be, must not grant planning permission or subsequent consent for EIA development unless satisfied that the reasoned conclusion referred to in paragraph (1)(b) is up to date, and a reasoned conclusion is taken to be up to date if in the opinion of the relevant planning authority, or the Secretary of State or the inspector, as the case may be, it addresses the significant effects of the proposed development on the environment that are likely to arise as a result of the proposed development."

46. By schedule 4 to the 2017 Regulations, the Environmental Statement was required to include "a description of the relevant aspects of the current state of the environment (baseline scenario) …" (paragraph 3) and "a description of the likely significant effects of the development on the environment…" (paragraph 5).

47. The Claimant contends that the Council concluded that parts of the ecological survey work available were "not up to date" and therefore regulation 26(2) was not satisfied. Mr Wolfe QC submits that it follows that by regulation 3 the Council was prohibited from granting the planning permission which was *ultra vires*.

48. He bases his argument firstly on guidance from the Chartered Institute of Ecology and Environmental Management ("CIEEM") which was accurately explained in paragraph 8.3.1 of the officer's report

> "Guidance on survey validity from the Chartered Institute of Ecology and Environmental Management (CIEEM) states that reports of more than 3 years old are 'unlikely to still be valid and most, if not all, of the surveys are likely to need to be updated (subject to an assessment by a professional ecologist)'

> (Advice note on the lifespan of ecological reports and surveys, CIEEM, April 2019). Such an assessment must be based on a number of criteria as set out in the advice note, and a clear statement setting out appropriate justification must be provided. EDF Energy considers that they have provided a comprehensive suite of desk-study and field survey data for the estate, collated over the last 12 years. Surveys in 2018-19 have confirmed that habitat conditions on site have remained similar throughout the period under consideration and species present are unlikely to be changed. There is also ongoing monitoring of habitat conditions undertaken by both Suffolk Wildlife Trust and EDF Energy."

49. Mr Wolfe QC relies in particular upon two paragraphs of the officer's report, first, paragraph 8.3.2 which stated: -

> "There is a suite of desk study and field survey data provided with the application, much of it is more than 3 years old, including some surveys which relate to mobile species (such as breeding and wintering birds). *Whilst the habitat baseline used in the environmental statement is likely to be broadly similar now compared to the time of survey, the baseline for some species may have altered and therefore the assessment provided may under assess the impact of the proposed development. This is an area of professional disagreement between the statutory consultees, our own ecologist and EDF Energy's ecologists, with regards to the suitability and age of survey material supporting the application.* However, in taking a balanced approach and mindful that some surveys are currently being undertaken (bat) and others can be updated pre-commencement (badger etc.), on balance it is considered that is difficult to object to the proposal on these grounds as the identified impacts are likely to be the same as already identified. To ensure appropriate mitigation a condition is proposed requiring further survey work to be undertaken where required, in particular in relation to the outline elements of the proposal prior to those works starting."

I have italicised the words which were emphasised by Mr Wolfe QC.

50. Second, paragraph 8.3.27 stated in relation to breeding birds: -

> "The most recent survey work provided for this group dates from 2015 and therefore there is the potential that the range of species and the number of pairs, present may have changed since that time, however, as referenced earlier we are content that the 2015 bird survey along with the precautionary approach and ability to carry out further surveys if required under the CEMP, that we are content with this approach. EDF Energy considers that given the small amount of habitat to be impacted by their proposal there is unlikely to be any

> significant change in the breeding bird assemblage. There are methods to support biodiversity net gain that could be employed to mitigate adverse impact and it is suggested that these be required via planning condition."

51. Reading paragraphs 8.3.2 and 8.3.27 together, Mr Wolfe QC invites the court to infer that the Council's ecologist, and hence the committee acting in agreement, concluded that the survey information provided on breeding birds was out of date and therefore did not meet the requirements of regulation 26(2) of the 2017 Regulations. He submits that this was the response of the Council to a concern raised by RSPB that the developer was relying upon an absence of material changes in local habitat rather than carrying out fresh surveys of the species present.

52. Plainly, a good deal of survey work was carried out in relation to a wide range of species and habitats, but no legal challenge is raised in relation to any other aspect of that material. Nor can it be said that this is a case where a subject which the authority was legally required to assess was not surveyed or addressed at all as part of EIA process.

53. Ultimately, Mr Wolfe QC accepted, as became apparent at the permission hearing (see the judgment of Andrews J at [26] to [27]), that his argument depends on whether the officer's report to the committee is to be read as stating that the Council's ecologist disagreed with the developer's team on whether the survey material relating to breeding birds was sufficiently up-to-date.

54. The Defendant submitted firstly, that regulation 26(2) is dealing with the up to datedness of the Council's "reasoned conclusion" in regulation 26(1)(b) on "the significant effects of the proposed development on the environment." It is not dealing with the up to datedness of the environmental information. Secondly, and in any event, the issue of whether the surveys were sufficiently reliable, given the date when they were carried out, was a separate issue involving a matter of judgment. This was raised by (inter alia) the advice of CIEEM and was addressed by the officer's report relying on advice from the Council's ecologist. On a fair reading of that report, the ecologist concluded that the bird surveys were sufficiently reliable for the purposes of the Council reaching a "reasoned conclusion", such that fresh surveys were not required. In that sense they were up to date. A judgment of this kind may only be challenged on the ground of irrationality, which is not made out.

Discussion

55. Regulation 26 of the 2017 Regulations transposes Article 8a of Directive 2011/92/EU, which was inserted by Article 1(9) of Directive 2014/52/EU. Article 1(2)(g)(iv) refers to the "reasoned conclusion" of the competent authority on the significant effects of the project on the environment, taking into account its examination of the environmental information. Article 8a(1) requires that that conclusion be incorporated into the decision to grant development consent. Article 8a(5) requires relevant decisions to be taken within "a reasonable period of time." That has been transposed by regulation 26(4) of the 2017 Regulations.

56. Article 8a(6) then requires that the competent authority be satisfied that its reasoned conclusion under article 1(2)(g)(iv) is up to date when taking a decision to grant

development consent. To that end, Member States may set time frames for the validity of such a conclusion or any of the other decisions referred to in Article 8a(3). This provision has been transposed by regulation 26(2). It is therefore plain that regulation 26(2) is dealing with whether the competent authority is satisfied that its "reasoned conclusion" under regulation 26(1)(b) on the significant environmental effects of the proposal is up to date. The legislation, in particular regulation 3, does not make the validity of the development consent depend upon a formal conclusion by the authority that all the environmental information is up to date. The deeming provision in the second half of regulation 26(2) does not indicate otherwise. A "reasoned conclusion" of the authority is taken to be up to date if the authority judges that *its conclusion* addresses the likely significant environmental effects. Here the Council judged that the surveys relating to breeding birds were sufficiently reliable for present purposes. The object of regulation 26(2) is straightforward, namely to prevent a planning permission being granted if there has been a delay since the time when the authority's "reasoned conclusion" was reached without the authority being satisfied that it may still be relied upon. This deals with the risk of a material change of circumstances occurring between an authority reaching its "reasoned conclusion" and the grant of planning permission.

57. It is impossible to read the officer's report as indicating that the Council was not satisfied that its "reasoned conclusion" under regulation 26(1) was up to date, whether in relation to the whole or any part of the environmental information. The collective views of officers on the environmental assessment were brought together and included in the officer's report, which was considered by the committee not long afterwards. The decision was issued about 2 months after the committee's resolution. The Council did not consider that its reasoned conclusion, expressed through the officer's report and minutes, had become out of date during that period, and the Claimant suggest otherwise.

58. Quite apart from the construction of regulation 26(2), the issue of whether the survey information on breeding birds (which formed only one aspect of the overall ecological information) was "up to date", taking into account the more recent surveys of habitats, was a matter of judgment for the Council going to the *quality* of that information. It may therefore only be challenged in the courts if that judgement was irrational (*R (Blewett) v Derbyshire County Council* [2004] Env. L.R 29 at [41]; *R (Plan B Earth) v Secretary of State for Transport* [2020] EWCA Civ 214 at [136-144]; *Gathercole v Suffolk County Council* [2020] EWCA Civ 1179). This is the correct legal context in which ground 2 falls to be considered.

59. As regards the preparation of the officers' report on ecology matters, the sequence of events was that Mr. Meyer, the Council's ecologist, produced a note dated 20 June 2020 raising a number of concerns. The developer produced a response dealing with those matters dated 29 July 2020. In relation to breeding birds, EDF relied in part on the considerable extent of the survey work undertaken over a long period of time as well as the more recent habitat surveys.

60. In paragraphs 4 and 5 of his witness statement Mr. Meyer explains that this additional material led him to conclude that no further surveys were required, save on one aspect which was addressed before the grant of planning permission and is not the subject of this challenge. He says that he relayed his views orally to the officer responsible for the preparation of the report to committee before it was finalised, making it clear that

he had no outstanding concerns in respect of the age of the survey data or information on ecological effects (save in that one immaterial respect).

61. On a fair reading of the officer's report, it can be seen that the document addressed ecology topics one by one, referring to concerns which had been raised and relying upon the responses from EDF set out in summary form. Reading paragraphs 8.3.2 and 8.3.27 as a whole, it is plain that the Council's ecologist did accept that the impacts on breeding birds were "likely to be the same as already identified" and therefore did accept EDF's case on this point. The committee did likewise. Paragraphs 8.3.2 or 8.3.27 cannot be read as identifying an outstanding concern on the adequacy of the bird surveys. That paragraph did not depart from the clear statement by the officers that it was appropriate for the Council to rely *inter alia* on the 2015 surveys. The reference to further surveys being possible under the "CEMP" (Construction Environmental Management Plan) acknowledged that conditions might change during the construction period of 4 to 4.5 years so as to make further surveys appropriate *for that reason*, not to assess the current baseline adequately. Mr. Meyer's witness statement is therefore consistent with a fair reading of the officer's report.

62. For these reasons, ground 2 must be rejected.

Conclusion

63. For the reasons given above, this application for judicial review is dismissed.