*148 R. (ON THE APPLICATION OF SAVE WOOLLEY VALLEY ACTION GROUP LTD) v BATH AND NORTH EAST SOMERSET COUNCIL

No Substantial Judicial Treatment

Court
Queen's Bench Division (Administrative Court)

Judgment Date
27 July 2012

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Queen's Bench Division (Administrative Court)

Mrs Justice Land D.B.E.

July 27, 2012

Agricultural buildings; Development; Environmental impact assessments; EU law; Statutory interpretation;

H1 *Judicial Review—EIA—meaning of "development" within s.55 of Town and Country Planning Act 1990—"screening opinion" that prefabricated "mobile poultry units" not "EIA development" within meaning of Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999—whether s.55 sufficiently broad to include development within scope of Annex II to EIA Directive—whether screening opinion should have considered cumulative impacts*

H2. The claimant (SWVAG) was an action group which sought judicial review of two planning decisions made by the defendant local authority (B). The decisions related to the use of land for prefabricated "mobile poultry units" and a stock pond. The land had been the subject of an art.4 Direction removing permitted development rights, including those for agricultural use. In taking enforcement action, B had determined that the poultry units were not "development" within the meaning of s.55 of the Town and Country Planning Act 1990 and so did not require an Environmental Impact Assessment under the Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999 . In granting retrospective planning permission for the stock pond, B produced a "negative screening opinion", deciding that an EIA was not required. That decision did not consider the cumulative effect of the stock pond with other development, other than that of traffic. The site was within a "sensitive area" for the purpose of reg.2(1) as it was an Area of Outstanding Natural Beauty. The grounds of SWVAG's application raised six issues, whether: (1) B had made a material error of fact, or failed to have regard to relevant considerations; (2) B misdirected itself in law in its application of s.55 ; (3) the poultry units were capable of constituting "intensive livestock installations" within the scope of Annex II to the EIA Directive and Sch.2 to the EIA Regulations ; (4) B misdirected itself in law by failing to interpret the meaning of "development" in s.55 so as to give effect to the EIA Directive ; and (5) the screening opinion should have considered the cumulative effect of the other works and activities at the site.

H3. **Held:** *149

H4. (1) There had been no material errors of facts or failure to have regard to relevant considerations. B had, however, erred in law in taking too narrow an approach to the meaning of "development" in s.55 . The term "building" had a wide definition, which included any structure or erection. That had been interpreted by the courts to include structures that would not ordinarily be described as buildings, including a marquee and "polytunnels". B had also failed to have regard to the relevant authorities when concluding that the units were chattels, not buildings, since they were capable of being moved around the site. It had also failed to consider whether the units might come within the residual category in s.55(1) of "other operations, in, on, over or under land".

H5. (2) B had not addressed itself to the question of whether the units fell within the scope of the EIA Directive or Regulations, instead deciding solely on the basis that they did not constitute "development". Although the thresholds for "intensive livestock installation" in Sch.2 were set by reference to floorspace in buildings, that had to be considered in the light of the EIA Directive . Such criteria and thresholds could not narrow the meaning of projects in Annex II . "Intensive livestock installation" had the same meaning in the Regulations and the Directive, and that was not limited to installations that comprised buildings. The units were capable of coming within the meaning of that term.

H6. (3) If it was not possible to interpret national law so as to comply with a directive, then inconsistent national law had to be set aside. The definition of "development" in s.55 could, however, be interpreted broadly so as to include, wherever possible, projects which required EIA under the Directive. In the present case, B had misdirected itself in law by failing to have regard to the obligation to interpret s.55 in this way. If it concluded that the units were a project or development requiring EIA under the Directive or Regulations, the meaning of "development" was sufficiently broad to be capable of encompassing them. In the screening opinion, B had not treated the units as "development" for the purposes of cumulative impact. Accordingly the screening opinion had been inadequate and B had acted unlawfully. That opinion would have to be carried out afresh after it had reconsidered the decision as to whether the units were "development".

H7 Cases referred to:

Aannamaersbedrijf PK Kraaijveld BV v Gedeputeerde Staten van Zuid-Holland (C-72/95) [1997] All E.R. (EC) 134; [1996] E.C.R. I-5403; [1997] 3 C.M.L.R. 1; [1997] Env. L.R. 265
Barvis v Secretary of State for the Environment (1971) 22 P. & C.R. 710
Beronstone Ltd v First Secretary of State [2006] EWHC 2391 (Admin)
Berkeley v Secretary of State for the Environment, Transport and the Regions (No.3) [2001] EWCA Civ 1012; [2002] Env. L.R. 14
Cardiff Rating Authority v Guest Keen Baldwin's Iron & Steel Co Ltd [1949] 1 K.B. 385; [1949] 1 All E.R. 27
Brussels Hoofdstedelijk Gewest v Vlaams Gewest (Case C-275/09) [2011] Env. L.R. 26
Coleshill & District Investments Co Ltd v Minister of Housing and Local Government [1969] 1 W.L.R. 746; [1969] 2 All E.R. 525
Marleasing SA v La Comercial Internacional de Alimentacion SA (C-106/89) [1990] E.C.R. I-4135 ***150**
Pfeiffer v Deutsches Rotes Kreuz Kreisverband Waldshut eV (C-397/01) [2004] E.C.R. I-8835
R. (on the application of A) v Croydon LBC [2009] UKSC 8; [2009] 1 W.L.R. 2557
R. (on the application of Candlish) v Hastings BC [2005] EWHC 1539 (Admin); [2006] Env. L.R. 13
R. (on the application of Goodman) v Lewisham LBC [2003] EWCA Civ 140; [2003] Env. L.R. 28
R. (on the application of Hall Hunter Partnership) v First Secretary of State [2006] EWHC 3482 (Admin)
R. (on the application of Horner) v Lancashire CC [2007] EWCA Civ 784; [2008] Env. L.R. 10
R. (on the application of Loader) v Secretary of State for Communities and Local Government [2012] EWCA Civ 869; [2013] Env. L.R. 7
R. (on the application of Loader) v Secretary of State for Communities and Local Government [2011] EWHC 2010 (Admin); [2012] Env. L.R. 8
R. (on the application of Roudham and Larling Parish Council) v Breckland Council [2008] EWCA Civ 714

R. (on the application of Wells) v Secretary of State for Transport, Local Government and the Regions (C-201/02) [2005] All E.R. (EC) 323; [2004] E.C.R. I-723; [2004] Env. L.R. 27
R. (on the application of Wye Valley Action Association Ltd) v Herefordshire Council [2011] EWCA Civ 20; [2011] Env. L.R. 20
R. v Swansea City Council Ex p. Elitestone Ltd (1993) 66 P. & C.R. 422
Save Britain's Heritage v Secretary of State for Communities and Local Government [2011] EWCA Civ 334
Skerritts of Nottingham Ltd v Secretary of State for the Environment, Transport and the Regions (No.2) [2000] 2 P.L.R. 102
Tewkesbury BC v Keeley [2004] EWHC 2594 (QB)

H8 Legislation referred to:

Directive 85/337 (EIA) arts 1, 2 , 4 and Annexes I, II & III
Town and Country Planning Act 1990 ss.55, 57 , 171E , 336
The Town and Country Planning (General Permitted Development) Order 1995(SI 1995/418) art.4 , Sch.2
Directive 96/61 (IPPC)
The Environmental Impact Assessment (Forestry) (England and Wales) Regulations 1999 (SI 1999/2228)
The Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999 (SI 1999/293) regs 2, 3 , 25 , Schs 1, 2, 3
The Transport and Works (Assessment of Environmental Effects) Regulations 2006 (SI 2006/958)
The Town and Country Planning (Environmental Impact Assessment) Regulations 2011 (SI 2011/1824)

H9 Representation

Mr R. Harwood , instructed by Richard Buxton Solicitors, appeared on behalf of the claimant. ***151**
Mr J. Hobson QC and Ms L. Busch , instructed by Bath and North East Somerset Council Legal Services , appeared on behalf of the defendant.
Mr M. Horton QC , instructed by Linda S. Russell Solicitors, appeared on behalf of the first interested party.
Mr J. Strachan , instructed by Treasury Solicitor , appeared on behalf of the second interested party.

Judgment

Lang DBE J.:

1. The claimant is an action group set up by local residents concerned to protect the character and environment of Woolley Valley. It seeks judicial review of two planning decisions made by the defendant ("the Council"), in respect of the use of land at Meadow Farm, Woolley Lane, Charlcombe, Bath ("the site"), which is owned by the First Interested Party ("GVP").

2. The first claim is a challenge to the Council's conclusion, as set out in its Enforcement Delegated Report of May 21, 2010, that the poultry units, installed on the site by GVP Ltd, were not "development" susceptible to planning control, and did not require environmental impact assessment ("EIA"). For those reasons, the Council did not include the poultry units amongst the development prohibited by a Temporary Stop Notice dated April 23, 2010.

3. The claimant contended that the poultry units were "development" within the meaning of s.55 Town and Country Planning Act 1990 ("TCPA 1990"), and required EIA, pursuant to the Town and Country Planning (Environmental Impact Assessment) (England and Wales Regulations 1999) ("the EIA Regulations 1999"), and the Environmental Impact Directive 85/337 ("the EIA Directive").

4. The Second Interested Party ("the Secretary of State") supported the claimant's legal analysis, whilst remaining neutral as to the merits of the planning decisions made in this particular case. He submitted that the poultry units were capable of

constituting “development” under s.55 TCPA 1990 and coming within the scope of the EIA Regulations 1999 and the EIA Directive .

5. The second claim is a challenge to the Council’s decision that EIA assessment of a newly constructed stock pond was not required. Planning permission for this development was granted on January 21, 2011.

6. The claimant contended that the screening opinion wrongly failed to consider the cumulative effect of constructing the stock pond together with the poultry units.

7. In respect of both claims, the Council maintained that it had correctly interpreted the relevant provisions and lawfully exercised its judgment on the planning issues. GVP supported the Council’s position.

Facts

8. The site comprises 20.5 hectares and it is in a rural location within the Cotswold Area of Outstanding Natural Beauty (“AONB”) and the Green Belt.

9. The site has been in agricultural use throughout its planning history. However, it is subject to a direction made by the Secretary of State under Article 4 of the Town and Country Planning (General Permitted Development) (England and Wales) Order 1995 which removed agricultural permitted development rights. ***152**

10. The site was acquired by GVP in 2005, with a view to using it to breed alpaca and free range chickens for the production of eggs. Instead it has mainly been used for the rearing of ducks.

11. Following complaints about activities on the site, and visits by the Council’s officers, on April 22, 2010 the Council served a planning contravention notice on GVP seeking information about the activities that had occurred.

12. GVP’s response, dated May 14, 2010, gave the following information about the poultry units:

a) the poultry units would each house 1,000 laying hens, each hen weighing 2kg;
(ii) each unit was approximately 20m by 6m by 3.5m high;
(iii) the units were not fixed to the ground but were on metal skids to allow them to slide along the ground when pulled by a tractor;
(iv) if extreme winds were forecast, they could be held down with metal spikes;
(iv) each unit would weigh about 2 tonnes (in addition to the 2 tonne flock of hens);
(v) each unit would be in a fenced paddock of 1-2 acres and would stay in its paddock;
(vi) the units would be moved within their paddocks regularly (approximately every 8 weeks) by being dragged by a tractor or 4 x 4;
(vii) each unit could be assembled by a “skilled team” from metal hoops, metal skids, uPVC planks, polythene and insulation in “a couple of days”. If the metal hoops are not taken apart, a shed could be dismantled in three to four hours.

13. The units contain slatted floors, manually operated conveyor belts, drinkers, feeders and internal lighting. They are powered by an on-site external generator.

14. The units are supplied with mains water by means of a hosepipe connection to standpipes, which are located along the side of the access track.

15. The witness statement of Mr Kerr, on behalf of GVF, made on May 10, 2010, gave further information:

a) "they rest on their skids on the surface and are held down by metal pegs to stop them blowing over";
b) "the site chosen on which to assemble the first three of them was on a slope … Consequently a narrow trench had to be dug … on the upper side of the slope to receive the side of the unit so that it could be assembled on the level."

16. There is electric fencing around the paddocks, powered by batteries, which are charged on a regular basis within the barn.

17. Ducks, not hens, have been installed in the poultry units in phases during 2011. As at January 2011, there were four thousand ducks in eight sheds. At capacity, it is hoped to house five thousand ducks in ten sheds. The ducks are able to roam in the paddock, but do not have access to a pond.

18. The units have not, in fact, been moved in the way that was originally envisaged. Ms Bartlett, Development Manager at the Council, said in her statement dated July 14, 2011 that two units at the northern end of the site had been moved, and that Mr Shaw had informed her that the units would be moved in five to six weeks when additional ducks arrived. However, Mr Jones, who lives nearby and gave ***153*** evidence on behalf of the claimant, said that the two units to which Ms Bartlett referred were only moved in order to put them into position along the track, before being fitted out and receiving ducks for the first time. He said none of the units has been moved since being placed in position between April and October 2010.

19. According to Mr Shaw, Head of Rural Enterprises at GVP, the absence of moves was initially explained by the delay in bringing the units into use, caused by the decision to switch from hens to ducks. Two units were fully stocked in May 2011; two in August 2011; two in October 2011; one in January 2012 and two in April 2012. There have been some attempts to move the units within the paddocks but the towing support bars supplied by the manufacturer failed. Mr Shaw referred in court to the problem of the additional weight created by the internal fittings. On July 2, 2012, just before this hearing, GVP managed to move two units with a tractor and a newly fabricated tow bar and A frame.

20. Mr Shaw said that he anticipated that the units would in future be moved a minimum of three times a year, less frequently than required with hens, because ducks produce less waste and do not scratch the earth. But poor weather could result in the need to move them more frequently. Also, once a flock comes to the end of its useful laying life, it will be destroyed and the whole unit will be completely decontaminated and moved onto fresh ground.

21. Mr Shaw explained that a unit could only be moved off this particular site (where road access was restricted) by partial or complete dismantling, and transportation on a trailer or lorry.

22. On April 23, 2010, the Council served a Temporary Stop Notice on GVP pursuant to the provisions of s.171E TCPA 1990 . It prohibited the excavation of soil and surface materials from the land and the alteration of levels of the land.

23. On May 21, 2010, the Council issued an Enforcement Delegated Report. It concluded that some of the activities that had taken place at the site did constitute breaches of planning control, namely, works for the creation of an access track, hard standing, new water supply pipes, alterations to the existing bam, works in respect of ponds and drainage engineering works and the introduction of a mobile home.

24. However, the Council decided that the placing of the poultry units on the land at the site did not constitute development. The Council therefore concluded that no environmental impact assessment of that activity was required and no enforcement action could be taken.

25. The reasoning of the Council (through its officers) was set out as follows in the report:

> "Over the past few weeks ten prefabricated mobile poultry units have been delivered and assembled on site. Each one measures about 20m x 6m x 3.5 metres in height and will house 1,000 birds (known as a flock). This will provide for a free range egg production operation in which each flock will be free to roam over the land during daylight hours and return naturally [to] their unit at dusk to roost.
>
> Each unit consists of a series of 10 metal hoops which slot into metal skids. They are delivered to the site in kit form and assembled on site in a matter of a couple of days. Once assembled for the first time, the whole unit can be moved within the site in one operation. They can also be dismantled and loaded onto a flat bed lorry in a matter of 3-4 hours and reerected on another ***154*** site in a similar amount of time. The owners claim that no foundations or levelling of the land is required. However, observations on site showed that when assembling the units, an area of land had been levelled specifically for the purpose of assembly. The units were then moved and can be placed on sloping land.
>
> The lower sides are uPVC which slot into the metal hoops and are covered by two layers of green polythene with insulation between them. A slatted floor is inserted internally. They weigh about 2 tonnes and, when occupied by the birds, would weigh an estimated 4 tonnes. This is sufficient to stay on the ground under its own weight although they can be held down with metal spikes in extreme winds. Each unit has a hose pipe connection to mains water and solar panels/batteries to power internal lighting.
>
> It is proposed to site the units in fenced paddocks of between 1-2 hectares and to move them around the respective paddock approximately every 8 weeks or so. The units are mounted on skids which move easily over grass by using a tractor or 4x4 vehicles and have demonstrated this to enforcement officers. They have also filmed the operation for moving the units and supplied a DVD which shows that the unit can be towed with a tractor.
>
> It is well-established in law that there are three primary factors which are relevant to the question of what is a building: The question of whether these chicken units are buildings involves making a planning judgment based on their size, permanence and physical attachment to the ground. This is very much an area of fact and degree. There have been numerous reported cases on what constitutes a building in planning terms, however ultimately each case turns on its own facts.
>
> Factors weighing against the sheds being buildings are their lack of attachment to the ground and ability to be moved around the site. However weighing in favour of them being buildings are their

sheer size, weight and bulk, a recent planning appeal decision against the refusal of a Certificate of Lawful Use or Development dated December 2009 supplied by the owner's agent concluded that a mobile poultry unit measuring 9.5m x 5.5m x 3.2m high did not constitute a building for the purposes of s.55 of the Act. In this case, only one unit was proposed. It housed 465 laying hens, was delivered as a flat pack and assembled on site by 2 no. unqualified people in two days. It was not anchored to the ground nor required a hard standing, could be moved by a tractor and was expected to be moved every 15 months.

In the current case there would be at least 10 units, some 20 metres long and they would be moved every 2-3 months. These would therefore be larger and heavier but moved more frequently and assembled on site in the same way as the appeal case. It is also worth noting that the dimensions of each unit are almost the same as the dimensions of a twin-unit caravan as defined in section 13 of the Caravan Sites Act 1968 which are: 20 metres long, 6.8 metres wide and 3.05 metres high. Although attached to a water point, several points of connection have been established on the site so the units could be moved.

On the basis of the information to date and as a matter of fact and degree, the mobile poultry units would appear to be 'chattels' capable of being moved around the site by a 4x4 vehicle. Furthermore, once assembled they can be dismantled and loaded onto a flat bed lorry in a matter of hours and transported to other sites. ***155**

On this basis officers have concluded that these units do not constitute development.

It has been suggested by solicitors acting for objectors to the development that the chicken units require an Environmental Impact Assessment ('EIA') because they are part of an intensive agricultural operation. However, officers are of the view that there is no requirement to undertake an EIA unless the chicken sheds constitute development and fall within one of the classes for which an EIA can be required. In this case neither the chicken sheds nor their use constitutes development and therefore no EIA is required.

It is therefore considered that no enforcement action can be taken against the chicken sheds."

26. The Council decided that it was not expedient to take enforcement action at that stage in respect of some of the other forms of development that had occurred, but it did issue an Enforcement Notice and Stop Notice, both dated May 21, 2010, in respect of the excavation of soil and surface materials from the site, including the digging of pits and trenches and the alteration of levels of the site.

27. The prohibition in these Notices extended to the stock pond. A planning application was made in respect of the stock pond on September 27, 2010. Various objections were raised. There was a dispute as to whether there had previously been a pond on the same site which had become silted up, but the Council was satisfied that this pond had been newly engineered. It was 15m by 12m in size.

28. A screening opinion was carried out which concluded that an EIA was not required. It did not consider the cumulative effect of the stock pond with other development other than in the context of traffic, stating:

> "The development in itself has no traffic implications. Traffic associated with the agricultural use of the site and any increase in stocking as a result of the development is not considered to be significant."

29. The Council adopted the screening opinion that EIA was not required, stating in the Committee Report:

> "Environmental Impact Assessment: the development has been screened in accordance with the requirements of the EIA Regulations and it was determined that the proposed development is not likely to have significant effects on the environment by virtue of factors such as its nature, size or location, taking into account the criteria in Schedule 3 of the Regulations and guidance in Circular 2/00. It is not therefore EIA development."

30. On January 21, 2011, the Council granted retrospective planning permission for the retention of a 15m x 12m stock pond on the site, subject to conditions. The reasons given in the Committee Report were as follows:

> "1. The decision to grant permission has taken account of the Development Plan and is in accordance with the policies set out in A below.
>
> 2. The development is not inappropriate development and does not harm the openness of the Green Belt in this location and having regard to the scale and location of the pond there is not considered to be any visual harm to the Green Belt. There are no highway objections to the development. The retention of a small quantity of natural spring water is not considered likely to have any adverse impacts on pollution, nuisance or health. The retention of the pond ***156*** will not increase the quantity of surface water that previously left the field and will not result in any significant change to the drainage situation that existed before the pond was built. The pond is not considered to harm the landscape character or quality or views in the ANOB nor does it have a detrimental impact on the SNCI, protected species or the setting of the World Heritage site.
>
> 3. The proposed development accords with policies GB 1 and GB2 on Green Belt; ES.5 on Drainage; ES 9 and 10 on pollution, nuisance and health; ES14 on stability; NE1 and ME2 on landscape; NE9 on ecology; and NE14 on flooding; of the Bath and North East Somerset Local Plan, including mineral and waste policies, as adopted October 2007."

Statutory framework

The EIA Directive

31. The recitals to the EIA Directive include the following:

"Whereas general principles for the assessment of environmental effects should be introduced with a view to supplementing and coordinating development consent procedures governing public and private projects likely to have a major effect on the environment;

Whereas development consent for public and private projects which are likely to have significant effects on the environment should be granted only after prior assessment of the likely significant environmental effects of these projects has been carried out; whereas this assessment must be conducted on the basis of the appropriate information supplied by the developer, which may be supplemented by the authorities and by the people who may be concerned by the project in question;

Whereas the principles of the assessment of environmental effects should be harmonized, in particular with reference to the projects, which should be subject to assessment, the main obligations of the developers and the content of the assessment;

Whereas projects belonging to certain types have significant effects on the environment and these projects must as a rule be subject to systematic assessment;

Whereas projects of other types may not have significant effects on the environment in every case and whereas these projects should be assessed where the Member States consider that their characteristics so require;

Whereas, for projects which are subject to assessment, a certain minimal amount of information must be supplied, concerning the project and its effects;

Whereas the effects of a project on the environment must be assessed in order to take account of concerns to protect human health, to contribute by means of a better environment to the quality of life, to ensure maintenance of the diversity of species and to maintain the reproductive capacity of the ecosystem as a basic resource for life."

32. Article 1 of the EIA Directive provides, so far as is relevant, that: ***157**

"1. This Directive shall apply to the assessment of the environmental effects of those public and private projects which are likely to have significant effects on the environment.
2. For the purposes of this Directive:

"project" means:

- the execution of construction works or of other installations or schemes
- other interventions in the natural surroundings and landscape including those involving the extraction of mineral resources;[…]

"development consent" means: the decision of the competent authority or authorities which entitles the developer to proceed with the project."

33. Article 2(1) provides that:

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

34. Article 4 provides, so far as is relevant, that:

"1. Subject to Article 2(3), projects listed in Annex I shall be made subject to an assessment in accordance with Articles 5 to 10.
2. Subject to Article 2(3), for projects listed in Annex II, the Member States shall determine through:

(a) a case-by-case examination, or
(b) thresholds or criteria set by the Member State

whether the project shall be made subject to an assessment in accordance with Articles 5 to 10. Member States may decide to apply both procedures referred to in (a) and (b).
3. When case-by-case examination is carried out or thresholds or criteria are set for the purpose of paragraph 2, the relevant selection criteria set out in Annex III shall be taken into account.
4. […]"

35. Paragraph 17 of Annex I includes:

"Installations for the intensive rearing of poultry or pigs with more than:

85 000 places for broilers, 60 000 places for hens;
3 000 places for production pigs (over 30kg); or
900 places for sows."

36. Paragraph 1 of Annex II covers "Agriculture, Silviculture and Aquaculture" and includes, at subparagraph (e):

"Intensive livestock installations (projects not included in Annex I)" ***158**

37. Annex III describes the selection criteria referred to in Article 4(3) . Under the heading "Characteristics of projects", para.1 provides that:

"The characteristics of projects must be considered having regard, in particular, to:

the size of the project,
the cumulation with other projects,
the use of natural resources,

the production of waste,
pollution and nuisances,
the risk of accidents, having regard in particular to substances or technologies used."

The EIA Regulations 1999

38. The EIA Directive was, at all relevant times implemented in national law by the EIA Regulations 1999 .

39. Regulation 2 includes the following definitions:

"'EIA application' means -

an application for planning permission for EIA development; or
a subsequent application in respect of EIA development;

'EIA development' means development which is either-

Schedule 1 development; or
Schedule 2 development likely to have significant effects on the environment by virtue of factors such as its nature, size or location;

'Schedule 1 application' means-

an application for planning permission for Schedule 1 development; or
a subsequent application in respect of Schedule 1 development; and

'Schedule 2 application' means -

an application for planning permission for Schedule 2 development; or
a subsequent application in respect of Schedule 2 development;

'Schedule 1 development' means development, other than exempt development, of a description mentioned in Schedule 1;

'Schedule 2 development' means development, other than exempt development, of a description mentioned in Column 1 of the table in Schedule 2 where -

any part of that development is to be carried out in a sensitive area; or
any applicable threshold or criterion in the corresponding part of Column 2 of that table is respectively exceeded or met in relation to that development;

'screening opinion' means a written statement of the opinion of the relevant planning authority as to whether development is EIA development;

'sensitive area' means any of the following

(a) land notified under sub-section (1) of section 28 (areas of special scientific interest) of the Wildlife and Countryside Act 1981 ;
(b) land to which sub-section (3) of section 29 (nature conservation orders) of the Wildlife and Countryside Act 1981 applies; ***159**
(c) an area to which paragraph (u)(ii) in the table in article 10 of the Order applies;
(d) a National Park within the meaning of the National Parks and Access to the Countryside Act 1949 ;
(e) the Broads;

> (f) a property appearing on the World Heritage List kept under article 11(2) of the 1972 UNESCO Convention for the Protection of the World Cultural and Natural Heritage ;
> (g) a scheduled monument within the meaning of the Ancient Monuments and Archaeological Areas Act 1979 ;
> (h) an area of outstanding natural beauty designated as such by an order made by the Countryside Commission, as respects England, or the Countryside Council for Wales, as respects Wales, under section 87 (designation of areas of outstanding natural beauty) of the National Parks and Access to the Countryside Act 1949 as confirmed by the Secretary of State;
> (i) a European site within the meaning of regulation 10 of the Conservation (Natural Habitats etc) Regulations 1994 ;"

40. This site came within the definition of "sensitive area" in reg.2(1) as it is designated as an Area of Outstanding Natural Beauty.

41. By reg.2(2) , and subject to reg.2(3) , expressions used in the 1999 Regulations and the 1990 Act "have the same meaning" for the purposes of the 1999 Regulations as they do for the 1990 Act. Hence, "development", when used in the 1999 Regulations, carries the same meaning as in s.55 of the 1990 Act.

42. Similarly, by reg.2(3) , expressions used in both the 1999 Regulations and the EIA Directive , have the same meaning for the purposes of the 1999 Regulations as they do for the EIA Directive .

43. Regulation 3(2) imposes a prohibition on the grant of planning permission or subsequent consent for defined EIA development to which reg.3 applies, unless the relevant planning authority, Secretary of State or inspector has first taken the relevant environmental information into consideration and has stated in their decision that they have done so.

44. Regulation 25 deals with the grant of planning permission for unauthorised EIA development. It includes:

> "(2) Where it appears to the local planning authority by whom or on whose behalf an enforcement notice is to be issued that the matters constituting the breach of planning control comprise or include Schedule 1 development or Schedule 2 development they shall, before the enforcement notice is issued, adopt a screening opinion."

45. Paragraph 17 of Sch.1 to the EIA Regulations 1999 is in materially the same terms as para.17 of Annex I to the Directive concerning installations for the intensive rearing of poultry or pigs.

46. Schedule 2, para.2 contains a table setting out the descriptions of development, and applicable thresholds and criteria, for the purpose of classifying development as Sch.2 development.

47. Under the heading "Agriculture and aquaculture" the table includes: ***160**

> **"Column 1 Description of development**
>
> The carrying out of development to provide any of the following -
>
> (c) Intensive livestock installations (unless included in Schedule 1)"

48. The "applicable threshold and criteria" are listed alongside, in Column 2:

> "The area of floorspace exceeds 500 square metres."

49. Schedule 2 , contains the following definitions:

> "'area of works' as including 'any area occupied by apparatus, equipment, machinery, materials, plant, spoil heaps or other facilities or stores required for construction or installation'.
>
> 'floorspace' as meaning 'the floorspace in a building or buildings'. "

50. Schedule 3 sets out the selection criteria for screening sch.2 development. Paragraph 1 provides:

> **"1. Characteristics of development**
>
> The characteristics of a development must be considered having regard, in particular, to:
>
> a) the size of the development;
> b) the cumulation with other development;
> c) the use of natural resources;
> d) the production of waste;
> e) pollution and nuisances; and
> f) the risk of accidents, having particular regard to the substances or technologies used."

51. Paragraph 2 provides that "the environmental sensitivity of geographical areas likely to be affected by development" must be considered, paying particular attention to areas classified or protected under Member States' legislation.

The Town and Country Planning (Environmental Impact Assessment) Regulations 2011

52. The Town and Country Planning (Environmental Impact Assessment) Regulations 2011 (the "2011 Regulations") replaced the 1999 Regulations and came into force on August 24, 2011. For the purposes of the present claim, they do not make any material changes to the regime set out above.

Town and Country Planning Act 1990

53. By s.57(1) of the 1990 Act, planning permission is required for the carrying out of any development of land.

54. Section 55 of the 1990 Act defines "development". So far as is relevant, it provides that:

> "(1) Subject to the following provisions of this section, in this Act, except where the context otherwise requires, 'development' means the carrying out of building, engineering, mining or other operations in, on, over or under land, or the making of any material change in the use of any buildings or other land.
> (IA) For the purposes of this Act 'building operations' includes - ***161**
>
> (a) demolition of buildings;
> (b) rebuilding;
> (c) structural alterations of or additions to buildings; and
> (d) other operations normally undertaken by a person carrying on business as a builder."
>
> (2) The following operations or uses of land shall not be taken for the purposes of this Act to involve development of the land -
>
> …
> (e) the use of any land for the purposes of agriculture or forestry (including afforestation) and the use for any of those purposes of any building occupied together with land so used;
> (f) in the case of buildings or other land which are used for a purpose of any class specified in an order made by the Secretary of State under this section, the use of the buildings or other land, or subject to the provisions of the order, of any part of the buildings or the other land, for any other purpose of the same class;
> (g) the demolition of any description of building specified in a direction given by the Secretary of State to local planning authorities generally or to a particular local planning authority."

55. A "building" is defined in s.336(1) of the 1990 Act as including "any structure or erection, and any part of a building, as so defined, but does not include plant or machinery comprised in a building".

56. The use of any land for the purposes of agriculture or forestry is excluded from the definition of development by s.55(2)(e) .

57. However, this site is subject to a direction made by the Secretary of State under art.4 of the Town and Country Planning (General Permitted Development) (England and Wales) Order 1995 which removes certain permitted development rights, including agricultural permitted development rights under Sch.2, Pt 6, Classes A and B of the GPDO .

Grounds for judicial review in respect of the poultry units

58. The claimant's grounds for judicial review raised the following issues:

a) Did the Council make a material error of fact or fail to have regard to relevant considerations?
b) Did the Council misdirect itself in law in its application of s.55 TCPA 1990 to the poultry units, apart from the issue of the EIA Directive ?
c) Were the poultry units capable of constituting "intensive livestock installations" within the scope of the EIA Directive and/or the EIA Regulations 1999 ?
d) Did the Council misdirect itself in law by failing to interpret the meaning of "development" in s.55 TCPA 1990 so as to give effect to the EIA Directive ?
e) If it is not possible to interpret s.55 TCPA 1990 so as to give effect to the EAI Directive , was there a failure to transpose the EIA Directive and has the Council failed to consider its obligation, as an emanation of the State, to give direct effect to the Directive? ***162**

(a) Did the Council make a material error of fact or fail to have regard to relevant considerations?

59. The claimant submitted that the Council made a material error of fact in acting upon the assumption that the units would only be pegged to the ground in extremely windy conditions. In its reply to the planning contravention notice, on May 14, 2010, GVP stated that the units rested on metal skids and could be held down with metal spikes in the event of extreme winds. This led the Council's officers to state in the Report:

> "They weigh about 2 tonnes and, when occupied by the birds, would weigh an estimated 4 tonnes. This is sufficient to stay on the ground under its own weight although they can be held down with metal spikes in extreme winds."

60. However, in Mr Kerr's statement, made May 10, 2010, he explained that the units are "held down by metal pegs to stop them blowing over", which, the claimant argued, implied that they were permanently pegged. On the other hand, when Ms Bartlett made a site visit on July 11, 2011, the units were not "affixed to the ground by means of pegs or any other method" (witness statement July 14, 2011).

61. In the light of this evidence, the claimant has failed to establish, on the facts, that the units are permanently pegged. It is unclear whether in practice the units are usually pegged to the ground, as a precaution against wind, or only pegged down when it is actually windy. However, the key point is that the units do not need to be affixed to the ground at all times, but in the course of normal use during all seasons, they will need to be fixed to the ground in adverse weather conditions. In my judgment, the Council did not make a material error of fact on this issue.

62. The claimant also submitted that, in deciding that the poultry units were not "development" within s.55 TCPA 1990 , the Council failed to have regard to the need for a water pipe to be laid to supply mains water close to the units and that the slope of the hill had to be excavated to accommodate three units.

63. In my view, on a fair reading of the report, and its decisions, the Council did have regard to all the works carried out on site when making its decision. The weight to be given to these factors was a matter for the Council.

(b) Did the Council misdirect itself in law in its application of s.55 TCPA 1990 to the poultry units, apart from the issue of the EIA Directive?

64. In my judgment, the Council was required to direct itself correctly in law in relation to the meaning and scope of s.55 TCPA 1990 and, having done so, it was entitled to exercise its planning judgment in deciding whether or not, on the evidence, the poultry units constituted "development" within the meaning of s.55 . The exercise of that judgment is, of course, subject to review on traditional public law grounds.

65. I do not accept the claimant's submission that whether or not the units constituted "development" under s.55 was a question of jurisdictional fact which fell to be determined by the court. In *R. (A) v London Borough of Croydon [2009] UKSC 8; [2009] 1 W.L.R. 2557* , the Supreme Court distinguished between an evaluative question,· which Parliament intended to be decided by the decision-maker, and an objective question to which there was a right or wrong answer, which was not a matter of opinion. In the case of an objective question, upon which the exercise of executive power depends, the court will decide whether or not the requisite ***163*** precondition has been satisfied. In my judgment, the question as to whether or not the poultry units constitute "development" within s.55 is an evaluative question, which requires an exercise of judgment by the local planning authority.

66. The Council submitted that it correctly applied the test in *Skerritts of Nottingham Ltd v Secretary of State for the Environment, Transport and the Regions [2000] 2 P.L.R. 102* in deciding whether or not the poultry units were "buildings". The Court of Appeal in *Skerritts* applied a three-fold test, derived from the judgment of Jenkins J. in *Cardiff Rating Authority v Guest Keen Baldwin's Iron & Steel Co Ltd [1949] 1 K.B. 385* . Pill L.J. said, at 113:

> "Jenkins J stated a three-fold test that involved considering size, permanence and degree of physical attachment in considering whether an item was a building or structure. In relation to permanence, he said:
>
> > 'It further suggests some degree of permanence in relation to the hereditament, i.e. things which once installed on the hereditament would normally remain in situ and only be removed by a process amounting to pulling down or taking to pieces.'
>
> In my judgment, that test introduces a degree of flexibility into the approach to permanence. It does so, first, by qualifying the word 'permanence' by the expression 'some degree'. Second, it does so by using the word 'normally'. Third, it does so by introducing the concept of removing the building 'by taking to pieces'."

67. The Council submitted that it had to make a planning judgment which was a matter of fact and degree. It had assessed the evidence, and acknowledged that the "sheer size, weight and bulk" of the units pointed towards a finding that they were "buildings". However, these factors were outweighed by the fact that the units were not attached to the ground, and were mobile. They were mounted on skids and so could be moved around the site by a tractor or 4x4, or even dismantled and removed from the site altogether in a few hours. On the evidence, it was entitled to conclude that the units were impermanent and were chattels, not buildings.

68. In my judgment, the claimant was correct in its submission that the Council erred in law in taking too narrow an approach to the meaning of "development" in s.55 .

69. The term "building" in s.336(1) TCPA 1990 has a wide definition which includes "any structure or erection". This definition has been interpreted by the courts to include structures which would not ordinarily be described as buildings. In *Skerritts* an Inspector held that the erection of a 40m by 17m by 5m high marquee for an eight-month period was the erection of a building. In *Hall Hunter v First Secretary of State [2007] 2 P. & C.R. 5* the erection of polytunnels was also the erection of a building. Both decisions were upheld by the Courts. Sullivan J. said in *Hall Hunter* of those putting the poly tunnels together ([18]):

> "When I asked [Leading Counsel for the farm] what the 10 man team were doing if they were not in ordinary language erecting or constructing something, vis an erection or a structure, I did not receive a satisfactory answer."

70. In the light of these authorities, the Council should have carefully considered whether a poultry unit was an "erection" or "structure" within the meaning of s.336(1) , particularly bearing in mind the substantial size and weight of each unit. ***164**

71. I also accept the claimant's submission that the Council did not have regard to the relevant authorities when it concluded that the units were chattels not buildings since they were capable of being moved around the site. In *Barvis Ltd v Secretary of State for the Environment (1971) 22 P. & C.R. 710* , a tower crane on a steel track was held to be a "structure" or "erection" and thus a "building", even though it was moved around the site and, at the end of the contract, it would be dismantled and

removed to another site. Moreover, an object may be a building in planning law without being incorporated into the land, as part of the realty: *R. v Swansea City Council ex p Elitestone (1993) 66 P. & C.R. 422* .

72. I accept the claimant's submission that the Council did not direct itself correctly in law on the issue of permanence. Permanence has to be construed in terms of significance in the planning context. In *Skerritts* Schiemann L.J. said of permanence: " *in situ* for how long, to which I would answer: for a sufficient length of time to be of significance in the planning context" (at 1034). For the polytunnels in *Hall Hunter* to remain in one particular location for three months was found by the Inspector to be sufficient to be of consequence in the planning context (at [19]). In this case, the units were permanently in their field, and there was no limit on the length of time they would remain there—they could be there for years. The ability to move them around the field did not remove the significance of their presence in planning terms. The visual and landscape impact of the units was not affected to any material extent by any periodic changes to their position in the field.

73. The Council submitted that each unit was prefabricated and easily assembled so its construction was not an operation "normally undertaken by a person carrying on business as a builder" (s.55(1A)(d) . It followed that constructing the units was not a "building operation" within the meaning of s.55 TCPA 1990 . In my judgment, s.55(1A) is inclusive: it is not intended to be an exhaustive definition of "building operations". In any event, I accept the submission made on behalf of the Secretary of State that the works carried out to construct and install the units were capable of coming within s.55(1A)(d) . On my reading of the Council's Report and decision, it failed to consider the application of s.55(1A)(d) .

74. The Secretary of State also submitted that the Council erred in failing to consider whether the construction of the poultry units came within the residual category in s.55(1) , namely, "other operations in, on, over or under land". This residual category is not limited to building, engineering or mining operations: see, *Coleshill and District Investment Co Ltd v Minister of Housing and Local Government [1969] 1 W.L.R. 746* and *Beronstone Ltd v First Secretary of State [2006] EWHC 2391 (Admin)* . I respectfully disagree with the view of Jack J. in *Tewksbury Borough Council v Keeley [2004] EWHC 2954* , at [37], which appears to decide to the contrary. I agree with the Secretary of State that this term is sufficiently broad to encompass the construction / installation of the poultry units, if they do not fall within the meaning of "building operations", and therefore the Council should have gone on to consider this question.

75. I conclude, therefore, that the Council misdirected itself in law in its application of s.55 TCPA 1990 to the poultry units. ***165**

(c) Were the poultry units capable of constituting "intensive livestock installations" within the scope of the EIA Directive and/ or the EIA Regulations 1999?

76. The primary issue between the parties was whether the Council misdirected itself in law by failing to interpret the definition of development in s.55 TCPA 1990 so as to give effect to the EIA Directive . In its defence, the Council contended that the poultry units did not fall within the scope of the EIA Directive or the EIA Regulations 1999 , and so the issue raised by the Claimant was academic.

77. I accept the submission of the claimant and the Secretary of State that, on a proper reading of the Council's reasons, it did not address itself to the question of whether or not the poultry units fell within the scope of the EIA Directive or the EIA Regulations 1999 . It decided the issue solely on the basis that the poultry units did not constitute "development" within s.55 TCPA 1999 , and therefore there was no requirement to carry out EIA. In assessing whether or not the Council erred in law, it is first necessary for me to determine whether or not the poultry units are capable of corning within the scope of the EIA Directive or the EIA Regulations 1999 . If not, the Council would not be open to criticism on this ground.

The EIA Directive

78. Article 1 of the EIA Directive indicates that it is intended to have wide application:

> "This Directive shall apply to the assessment of the environmental effects of those public and private projects which are likely to have significant effects on the environment."

79. This broad approach is maintained through the wide definition of "project" in art.1(2) .

80. On a literal interpretation, I consider that the poultry units could corne within the first limb of the definition of "project" in art.1(2) :

> "the execution of construction works or of other installations or schemes;"

Establishment of the poultry units did involve "construction works" and the term installation is an apt description of them. I was not convinced that the units could corne within the second limb of the definition.

81. In reaching this conclusion, I have had regard to the principle that the EIA Directive is of wide scope and has a very broad purpose: *Kraaijeveld C-72/95 [1996] ECR 1-5403* at [31], [39]. See also *Brussels Hoofdstedelijk Gewest C-275/09* .

82. I have also taken into account the European Commission's *Interpretation of definitions of certain project categories of annex I and II of the EIA Directive* which gives guidance on the meaning of the term "project" in the Directive:

> "The term 'installation' is not defined in the EIA Directive . A definition of this term is provided in the IPPC Directive, but this definition [1] is not considered to be appropriate for the purposes of the EIA Directive . ***166**
>
> Even though mobile installations are not mentioned explicitly in the EIA Directive , the scope of the Directive also covers these as well as temporary installations. [2] When mobile and/or temporary installations have the characteristics (and associated impacts) of project categories included in Annex I and II of the EIA Directive , they must be subject to its requirements. [3] Furthermore, when a mobile installation is moved elsewhere, the need for a new EIA has to be considered."

83. This guidance, including footnote 3 below, make it clear that mobile installations fall within the scope of the Directive.

84. The poultry units on this site plainly do not come within Annex 1, paragraph 17 , because the number of ducks does not meet the threshold.

85. However, the poultry units may come within Annex 11, paragraph l(e) which provides for:

> "Intensive livestock installations (projects not included in Annex 1)"

86. It is notable that there is no minimum size or number of livestock in this paragraph, unlike the Integrated Pollution, Prevention and Control Directive, referred to by the Council.

87. The European Commission guidance on Annex II, paragraph 1(e) states:

> "This project category can be considered to include installations for the concentrated rearing of livestock either in purpose-built units or in areas dedicated to this activity, either indoor or outdoor."

88. The Claimant submitted that GVP's operations are capable of coming within this description. The livestock are reared in purpose built sheds within a fenced off area for daytime activity. They are kept at a concentrated density both in the sheds and outside. This density cannot be sustained naturally - the birds require supplies of feed and water and the removal of manure. The Council disagreed: see [100] and [101] below.

The EIA Regulations 1999

89. Regulation 3(1) EIA Regulations 1999 applies to every application for planning permission for EIA development. By reg.3(2) , the planning authority shall not grant planning permission or subsequent consent, pursuant to an application to which the Regulations apply, unless it has first taken environmental information into consideration (reg.3(2)). The way in which the Regulations are structured means that, in the absence of "development" within the meaning of s.55 TCPA 1990 , the Regulations are not engaged.

90. The correct approach to determining whether a development falls within the scope of one of the Sch.2 categories has been considered by the Court of Appeal in *R. (on the application of Goodman) v Lewisham LBC [2003] EWCA Civ 140; [2003] Env. L.R. 28* per Buxton L.J., with whom Brooke L.J. and Morland J. agreed: ***167**

> "8. In the present case, the only serious contender for a category of Schedule 2 development under which the application might fall is paragraph 10(b) of the Schedule: infrastructure projects that are urban development projects. These are very wide and to some extent obscure expressions and a good deal of legitimate disagreement will be involved in applying them to the facts of any given case. That emboldened Lewisham to argue, and the judge to agree, that such a determination on the part of the local authority could only be challenged if it were *Wednesbury* unreasonable. I do not agree. However fact-sensitive such a determination may be, it is not simply a finding of fact, nor of discretionary judgment. Rather, it involves the application of the authority's understanding of the meaning in law of the expression used in the Regulation. If the authority reaches an understanding of those expressions that is wrong as a matter of law, then the court must correct that error: and in determining the meaning of the statutory expressions the concept of reasonable judgment as embodied in *Wednesbury* simply has no part to play. That, however, is not the end of the matter. The meaning in law may itself be sufficiently imprecise that in applying it to the facts, as opposed to determining what the meaning was in the first place, a range of different conclusions may be legitimately available. That approach to decision-making was emphasised by Lord Mustill, speaking for the House of Lords, in *R v Monopolies Commission ex p South Yorkshire Transport Ltd [1993] 1 WLR 23* at p 32G, when he said that there may be cases where the criterion, upon which in law the decision has to be made,
>
> > "may itself be so imprecise that different decision-makers, each acting rationally, might reach differing conclusions when applying it to the facts of a given case. In such a case the court is entitled to substitute its own opinion for that of the person to whom the decision has been entrusted only if the decision is so aberrant that it cannot be classed as rational."
>
> 9. That is the decision as to whether the development is a Schedule 2 development. If the authority concludes that it is such, it then has to go on and decide whether that Schedule 2 development is also an EIA development, by determining whether it is likely to have significant effects on the environment by virtue of factors such as its nature, size or location. That is an

> enquiry of a nature to which the *Wednesbury* principle does apply, and I understand Sullivan J to have so held in *R (Malster) v Ipswich BC [2002] PLCR 251* [61]."

91. That approach was recently confirmed by the Court of Appeal in *Wye Valley Action Association* , per Richards L.J. at [16] and [35].

92. The poultry units plainly fall outside the scope of para.17 of Sch.1 to the EIA Regulations 1999 as the number of ducks does not meet the threshold.

93. Schedule 2, para.2 provides for:

> "The carrying out of development to provide any of the following -
>
> (c) Intensive livestock installations (unless included in Schedule 1)" ***168**

94. The "applicable threshold and criteria" in relation to intensive livestock installations are that "[t]he area of floorspace exceeds 500 square metres". The word "floorspace" is defined as meaning "the floorspace in a building or buildings".

95. However, the floorspace threshold does not apply to this site because it comes within the definition of a "sensitive area", as it is designated as an Area of Outstanding Natural Beauty.

96. The Council submitted that, because the threshold refers to floor space in a building, it must follow that an "intensive livestock installation" must comprise a building or buildings. Since the Council has decided that the poultry units are not buildings, they cannot be intensive livestock installations within Sch.2 .

97. In my judgment, the Council's submission is misconceived, for the reasons given by the Claimant and the Secretary of State.

98. The Council's interpretation does not follow from the structure or sense of Sch.2 . Schedule 2 defines categories of activities that will require EIA if they are likely to have significant effects on the environment. In accordance with the EIA Directive , member states can define such categories of development by imposing relevant criteria or thresholds. Schedule 2 imposes a relevant criterion or threshold for an intensive livestock installation which is not in a sensitive area. In such locations, an intensive livestock installation will only require EIA if it involves new floorspace of more than 500 square metres. This does not mean that a proposal which does not involve a building is not an "intensive livestock installation" at all. It means that an intensive livestock installation will not require EIA unless it involves construction of new floorspace in a building or buildings of more than 500 square metres.

99. The Council seeks to interpret the meaning of the term 'intensive livestock installations' by reference to a threshold which is only found in the Regulations. Since the term is in the Directive also, its meaning cannot be affected by national regulations. The term must mean the same in both the Directive and the Regulations (see Regulation 2(3)). Terms in the EIA Directive have a European law meaning:

> "The Court has consistently held that, in light of both the principle that Community law should be applied uniformly and the principle of equality, the terms of a provision of Community law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope is normally to be given throughout the Community an autonomous and uniform interpretation which must take into account the context of the provision and the purpose of the legislation in question" *R. (Wells) v Secretary of State for Transport, Local Government and the Regions C-201/02, ECJ* at [37].

100. If the Council's submission was correct, the effect would be that the UK has set a discretionary threshold or criterion which means that an intensive livestock installation in the United Kingdom must be a building. However, the EIA Directive does not allow a member state to narrow the meaning of the projects in Annex II (although there is no prohibition on widening their meaning). Article 4(2) allows a Member State to set thresholds or criteria to determine whether a project in Annex II requires EIA. But that concerns the second question—whether the Annex II project is likely to have a significant effect on the environment. ***169**

101. For these reasons, I consider that "intensive livestock installation" has the same meaning in the EIA Regulations as in the EIA Directive , and it is not limited to installations which comprise buildings.

102. The Council also submitted that the poultry units operation at this site was far too small to be an intensive livestock installation requiring EIA. The number of ducks was significantly less than the guidance concerning indicative thresholds and criteria for identification of Sch.2 development requiring EIA, set out in Annex A to Circular 2/99 on Environmental Impact Assessments (para A4):

> "The significance or otherwise of the impacts of intensive livestock installations will often depend on the level of odours, increased traffic and the arrangements for waste handling. EIA is more likely to be required for intensive livestock installations if they are designed to house more than 750 sows, 2,000 fattening pigs, 60, 000 broilers or 50, 000 layers, turkeys or other poultry."

103. The Council relied upon the distinction, endorsed by the Court of Appeal in *R. (Roudham and Larling Parish Council) v Breckland Council [2008] EWCA Civ 714* at [18] between "an intensive operation, in the sense of factory farming" and an "albeit large-scale exercise in traditional farming" (emphasis in original).

104. In the light of these submissions, I do not express a concluded view on whether the poultry units do come within the meaning of the term "intensive livestock installation", but I am satisfied that they are capable of doing so. I do not, therefore, accept the Council's submission that the EIA issue is academic and need not be considered further by the Council.

(d) Did the Council misdirect itself in law by failing to interpret the meaning of "development" in s. 55 TCPA 1990 so as to give effect to the EIA Directive?

105. The UK has implemented the EIA Directive by three alternative mechanisms:

a) incorporating EIA into the planning application process. At the time the relevant regulations were the Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999 ;
b) incorporating EIA into another consent process which is required as well as planning permission (e.g. the Transport and Works (Assessment of Environmental Effects) Regulations 2006);
c) providing a separate EIA consent process for projects that may have permitted development rights or not amount to development (e.g., the Environmental Impact Assessment (Forestry) (England and Wales) Regulations 1999)

106. It is common ground that no EIA regimes in categories (b) or (c) apply to the poultry units. Thus the EIA Directive can only be given effect under the UK's planning regime.

107. The Council, in its Report, rejected the Claimant's request for an EIA on the ground that an EIA was required only if the poultry units constituted "development" and fell within one of the classes for which an EIA was required under the EIA Regulations 1999 . Since the Council found that the poultry units did not comprise "development" under s.55 TCPA 1990 , no EIA was required. ***170**

108. In support of this position, the Council referred to *R. (Save Britain's Heritage) v Secretary of State for Communities and Local Government [2011] EWCA Civ 334* per Sullivan L.J. at [6]:

> "For the purposes of planning control, the United Kingdom has implemented the [EIA] Directive by grafting its requirements - for screening, to decide whether a proposed development falls within the Directive, and if so, for the production of an environmental statement - on to the planning application process: see [the EIA Regulations]. If there is no need for an application for planning permission, the Directive does not bite on demolition."

109. The Council also relied on the judgment of Davis J. in *R. (Carol Candlish) v Hastings Borough Council [2005] EWHC 1539 (Admin)* , at [61]:

> "… It is plain that the 1999 Regulations are geared to the actual application for development consent. That that is a legitimate approach for a Member State to adopt seems to me to be indicated by the definition of 'development consent' and the references thereafter to such consent in the amended Directive. It also accords with the observations of the Advocate-General in paragraphs 67 to 69 of his Opinion in Naturschutz . In my view there is no justification for treating the word 'development', as used repeatedly in the 1999 Regulations, as though it means 'project' of some wider kind: and the Regulations are clear that the relevant assessment is to be made by reference to the application for planning permission …."

110. The Council submitted that once it had decided that the poultry units were not "development", it had no further duty to consider their environmental impact, since the EIA regime is given effect, in the United Kingdom:

a) "through this country's system of planning control (*R. (Horner) v Lancashire CC [2007] EWCA Civ 784* per Auld L.J. at [12]);
b) by grafting the requirements of the EIA Directive on to the domestic planning process (*Save Britain's Heritage* per Sullivan L.J. at [6]);
c) and gearing the EIA Regulations "to the actual application for development consent" (*Carol Candlish* per Davis J. at [61]); and
d) in accordance with the UK Government's discretion (*R. (Loader) v Secretary of State for Communities and Local Government [2011] EWHC 2010 (Admin)* , per Lloyd Jones J. at [8]) and the principle of subsidiarity (*Berkeley v Secretary of State for the Environment [2001] EWCA Civ 1012* , per Schiemann L.J. at [47.4]).

111. However, the Secretary of State and the claimant correctly submitted that the national court is required to interpret national law so far as possible, in the light of the wording and the purpose of an ED Directive in order to achieve the result sought by the Directive: see *Pfeiffer v Deutsches Rotes Kreuz [2005] I.R.L.R. 137; [2005] I.C.R. 1307* at [113]–[115]; *Marleasing SA v La Comercial Internacional de Alimentacion SA [1990] 1-4135* , at [8].

112. If it is not possible to interpret national law so as to comply with a Directive then inconsistent national law has to be set aside. By way of illustration, the Court of Appeal held that the definition of "development" was inconsistent with the EIA Directive in *R (SAVE Britain's Heritage v Secretary of State for Communities and Local Government [2011] EWCA Civ 334, [2011] LGR 493* in that it excluded ***171** categories of demolition. Consequently the Court declared that parts of a direction which excluded demolition from the definition of development, and so the need for planning permission, were unlawful.

113. However, the Secretary of State submitted that such a drastic option was not required in this instance. I agree. In my judgment, the definition of "development" in s.55 TCPA 1990 can, and should, be interpreted broadly by planning authorities so as to include, wherever possible, projects which require EIA under the EIA Directive , or developments which require EIA under the EIA Regulations 1999 . Otherwise the Directive will not be effectively implemented into UK law.

114. In this case, the Council misdirected itself in law by failing to have regard to the obligation to interpret the meaning of "development" in s. 55 TCPA 1990 in this way. I am satisfied that, if the Council concludes that the poultry units are a project which requires EIA under the EIA Directive , or a development which requires EIA under the EIA Regulations , the meaning of "development" in s.55 is sufficiently broad to be capable of encompassing the poultry units.

(e) If it is not possible to interpret s.55 TCP A 1990 so as to give effect to the EIA Directive, was there a failure to transpose the EIA Directive and has the Council failed to consider its obligation, as an emanation of the State, to give direct effect to the Directive?

115. In the light of my conclusions under section (d) above, I do not need to decide this issue.

Conclusion

116. My conclusion on the judicial review in respect of the poultry units is that the Council misdirected itself in law in its interpretation and application of the term "development" in s.55 TCPA 1990 .

Grounds for judicial review in respect of the stock pond

117. The Claimant contended that the EIA screening opinion obtained in respect of the stock pond should have considered the cumulative effect of the other activities and works on the site. The failure to do so meant that there was no consideration of the overall environmental impact at the site.

118. Schedule 3 to the EIA Regulations 1999 sets out the selection criteria for screening schedule 2 development. Paragraph 1 provides that the characteristics of a development must be considered having regard, in particular, a list of factors which includes "the cumulation with other development".

119. The Defendant submitted that the requirement under Schedule 3 was limited to consideration of other "development", within the meaning of s.55 TCPA 1990 .

120. The parallel provision in Annex 3 to the Directive refers to "the cumulation with other projects". Applying the principles set out in [111] to [114] above, in order to give effect to the Directive, the term "development" in both Sch.3 and s.55 TCPA 1990 has to be interpreted broadly, so as to include projects which require EIA under the terms of the Directive.

121. The screening opinion only considered the cumulative impact of traffic, and not any of the other "development" within the meaning of s.55 which the Council ***172** found had taken place at the site. It did not treat the poultry units as "development", on the basis of the Council's earlier decision to that effect.

122. In my judgment, the screening opinion was inadequate, and thus the Council acted unlawfully by granting planning permission without having carried out a lawful screening opinion. The screening opinion needs to be carried out afresh, once the Council has re-considered its decision in relation to the poultry units.

123. The claimant did not pursue its other ground on the meaning of "significant effects on the environment" in art.2(1) of the EIA Directive in the light of the Court of Appeal judgment in *R. (Loader) v Secretary of State for Communities and Local Government [2012] EWCA Civ 869* .

Conclusions

124. For the reasons set out above, both claims for judicial review are allowed. I will hear submissions on the form of relief to be granted. ***173**

Footnotes

1 *"Installation means a stationary technical unit where one or more activities listed in Annex I [of Directive 2008/1/EC] are carried out, and any other directly associated activities which have a technical connection with the activities carried out on that site and which could have an effect on emissions and pollution"* . Directive 2008/1 of the European Parliament and of the Council of January 15, 2008 concerning integrated pollution prevention and control .

2 Moreover, Annex II(13) , second indent, explicitly includes Annex I projects undertaken exclusively or mainly for the development and testing of new methods or products and not used for more than two years.

3 It is clear that even mobile installations will be considered for the purposes of the EIA Directive , in relation to a specific site.

