

Case Number: CO/7223/2007

**Neutral Citation Number: [2007] EWHC 3166(Admin)**  
**IN THE HIGH COURT OF JUSTICE**  
**QUEEN'S BENCH DIVISION**  
**ADMINISTRATIVE COURT**

Sitting at  
Birmingham Crown Court  
Queen Elizabeth II Law Courts  
1 Newton Street  
Birmingham B4 7NA

Thursday, 20 December 2007

**B e f o r e:**

**MR JUSTICE JACKSON**

**Between:**

**THE QUEEN ON THE APPLICATION OF KEVIN PAUL LEWIS\_**

**Claimant**

v

**REDCAR AND CLEVELAND BOROUGH COUNCIL\_**

**Defendant**

and

**PERSIMMON HOMES TEESSIDE LIMITED\_**

**Interested Party**

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**MR GORDON NARDELL** appeared on behalf of the **Claimant** (instructed by Irwin Mitchell Solicitors).

**MS FRANCES PATTERSON QC AND MR JOHN HUNTER** appeared on behalf of the **Defendant** (instructed by Legal & Democratic Services Division, Redcar & Cleveland Borough Council).

**MR JAMES MAURICI** appeared on behalf of the **Interested Party** (instructed by Ward Hadaway Solicitors).

**J U D G M E N T**  
(As Approved by the Court)

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1. MR JUSTICE JACKSON: This judgment is in seven parts, namely: part 1, introduction; part 2, the facts; part 3, the present proceedings; part 4, the law relating to bias and pre-determination; part 5, the claimant's first ground; part 6, the claimant's second ground; part 7, conclusion.

#### Part 1

##### Introduction

2. MR JUSTICE JACKSON: This is a claim for judicial review of a decision to grant outline planning permission for a development on the coast of Cleveland. The claimant is Kevin Paul Lewis, a resident of Redcar. The defendant is Redcar and Cleveland Borough Council ("the council"). The interested party in these proceedings is Persimmon Homes Teesside Limited ("Persimmon").

3. The coast at Redcar runs in an east-west direction, just to the north of the town. The land, the subject of the disputed planning permission, lies in the northern part of Redcar, just to the south of the beach ("the site"). The site includes an open area known as Coatham Common and a boating lake. The council is the owner of the site. For many years, there has been a proposal to construct on the site a mix of residential development and leisure facilities ("the Coatham development project" or "the project").

4. The site adjoins an area used by many species of birds. I shall therefore set out the enactments relevant to conservation which impact upon the proposed development.

5. Council Directive 79/409/EC of 2nd April 1979, on the Conservation of Wild Birds, is generally referred to as "the Birds Directive". Article 4 of the Birds Directive provides for member states to classify areas used by rare or sensitive species of birds as special protection areas ("SPAs"). Council Directive 92/43/EC of 21st May 1992, on the Conservation of Natural Habitats and of Wild Fauna and Flora, is generally referred to as "the Habitats Directive". Article 6 of the Habitats Directive provides:

"1. For special areas of conservation, Member States shall establish the necessary conservation measures involving, if need be, appropriate management plans specifically designed for the sites or integrated into other development plans, and appropriate statutory, administrative or contractual measures which correspond to the ecological requirements of the natural habitat types in Annex I and the species in Annex II present on the sites.

"2. Member States shall take appropriate steps to avoid, in the special areas of conservation, the deterioration of natural habitats and the habitats of species as well as disturbances of the species for which the areas have been designated, in so far as such disturbance could be significant in relation to the objectives of this directive.

"3. Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. In the light

of the conclusions of the implications for the site and subject to the provisions of paragraph 4, the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public."

6. Areas which have been designated SPAs under Article 4 of the Birds Directive constitute special areas of conservation for the purposes of Article 6 of the Habitats Directive.

7. The Conservation (Natural Habitats, &c) Regulations 1994, SI No 2716 of 1994, will be referred to as "the 1994 Regulations". Regulation 48 of the 1994 Regulations transposes the requirements of Article 6 of the Habitats Directive into UK domestic law. Regulation 48 provides:

"1. A competent authority, before deciding to undertake, or give any consent, permission or other authorisation for, a plan or project which (a) is likely to have a significant effect on a European site in Great Britain (either alone or in combination with other plans or projects), and (b) is not directly connected with or necessary to the management of the site, shall make an appropriate assessment of the implications for the site, in view of that site's conservation objectives.

"2. A person applying for any such consent, permission or other authorisation shall provide such information as the competent authority may reasonably require for the purposes of the assessment.

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

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

"5. In the light of the conclusions of the assessment, and subject to regulation 49, the authority shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the European site.

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

8. An area which has been designated a SPA under Article 4 of the Birds Directive constitutes a "European site" for the purposes of Regulation 48. Because many rare birds visit the coast of Teesmouth and Cleveland, this area has been classified as a SPA. The

full title of this SPA is Teesmouth and Cleveland Coast Special Protection Area ("the SPA").

9. The southern boundary of the SPA lies approximately 50 metres north of the promenade at Coatham. The boundary of the SPA follows the mean high watermark along Coatham Sands, as far as the northernmost point of Coatham Seafront, where it then sweeps northeast to include the southern edge of Coatham Rocks. The SPA also includes Redcar Rocks and the beach immediately adjacent as far as mean high water and the sand dunes from approximately 0.5 of a kilometre west of Coatham, west along the South Gare Peninsular.

10. The SPA includes a range of coastal habitats such as sand and mud flats, rocky shore, salt marsh, freshwater marsh and sand dunes extending over 1,250 hectares. These habitats are all centred on and around an estuary that has been considerably modified by human activities. When combined, these habitats provide feeding and roosting opportunities for important numbers of water birds, both in winter and during passage periods. The site qualifies under Article 4.1 of the Birds Directive by supporting populations of European importance of little tern and sandwich tern. During the breeding season, approximately 37 pairs of little tern are present. During passage periods, approximately 2,190 sandwich tern can be present at the SPA.

11. The SPA also qualifies under Article 4.2 of the Birds Directive by supporting populations of European importance of the migratory species ringed plover, knot and redshank. During passage periods approximately 634 ringed plover occur at the SPA, representing at least 1.3 per cent of the Europe/North Africa wintering population. During the winter approximately 4,190 knot and 1,648 redshank occur at the SPA. These counts represent at least 1.2 per cent of the wintering Northeastern Canada, Greenland, Iceland, Northwestern Europe population and 1.1 per cent of the wintering Eastern Atlantic population.

12. In addition to the above, the SPA also qualifies as a wetland of international importance under Article 4.2 of the Birds Directive by regularly supporting about 20,000 waterfowl. Over winter, the area regularly supports approximately 21,406 individual waterfowl, including sanderling, lapwing, shelduck, cormorant, redshank and knot.

13. Natural England ("NE"), formerly known as English Nature, is a nature conservation body for the purposes of Regulation 48.3 of the 1994 Regulations. The Royal Society for the Protection of Birds ("RSPB") is also a nature conservation body for the purposes of that regulation. Nathaniel Lichfield & Partners ("NLP") are a firm of planning consultants who have been acting for Persimmon. E3 Ecology Limited ("E3") are a specialist ecological consultancy who have been acting for Persimmon on the instructions of NLP.

14. The Town and Country Planning (General Development Procedure Order) 1995 will be referred to as "the GDPO". The Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999 will be referred to as "the 1999 Regulations".

15. Article 20 of the GDPO, in conjunction with Regulation 32 of the 1999 Regulations, envisages that where a planning application is accompanied by an environmental assessment, it will generally be dealt with within 16 weeks. However, provision is also made for a failure to accomplish that and the time limit is not binding.

16. It is normal practice for a local authority to have a scheme of delegation to officers. In the present case, the council's scheme of delegation included delegated

power 157AB. Delegated power 157AB authorised the council's development control manager, Mrs Doreen Mealing, to make assessments as to the requirements necessary to enable applications to be processed. This power was delegated to her by the council's planning committee.

17. In this judgment I shall refer to the European Convention on Human Rights as "ECHR". I shall refer to the European Court of Justice as "ECJ".

18. After these introductory remarks, it is now time to turn to the facts.

## Part 2

### The facts

19. In 1995 the claimant and his family moved to [address]; a house in which they have remained for the last 22 years. Their property backs onto Coatham Common. Over the last 22 years, they have used the common for many different recreational purposes.

20. In 1999, the Redcar and Cleveland Borough Council adopted the Redcar and Cleveland local plan. Policy L6 of the local plan allocated Coatham Common and the surrounding area for major leisure and linked housing development, along with retail or food and drink units incidental to the main leisure use.

21. In 2002 the council, which was then controlled by Labour, prepared a scheme for the development of Coatham Common and the surrounding land. At the local election in May 2003, the Labour Party lost control of the council. Power passed to a coalition comprising Liberal Democrats, Conservatives and East Cleveland Independents ("the coalition"). The coalition remained in control of the council for the next four years. The council's cabinet comprised ten councillors, representing each party in the coalition. Mr Stephen Kay, an East Cleveland Independent, was a member of the cabinet responsible for education.

22. The coalition decided to proceed with the Coatham development project. The details of that project evolved over time and were the subject of much public debate. One of the controversial issues was the amount of housing development which should be constructed on the site and the extent of the leisure facilities which should be constructed. More fundamentally, there was a difference of opinion between those who wanted some form of development to proceed and those (like the claimant) who wished the site to remain undeveloped. Those who were opposed to any form of development on the site formed a group known as, "Friends of Coatham Common". The Friends of Coatham Common campaigned to keep that area as open space.

23. In 2003, the council appointed Persimmon as its development partner. It was intended that Persimmon would carry out the necessary design work, apply for planning permission and thereafter construct both the residential development and the leisure facilities. In November and December 2003, the council organised a public exhibition relating to the proposed development. This exhibition was part of the process of public consultation which was carried out as the scheme evolved.

24. In December 2004, Persimmon instructed NLP to commence preparatory work in relation to the planning application. During 2005, the public debate about the merits of the scheme and the details of the scheme continued. In February 2005, another public exhibition was held. In April 2005, three members of the coalition (Chris Abbott, Vera Moody and Stephen Kay) published an article commending the scheme as being highly beneficial to the community. Later in the year, the same three councillors published

another article to similar effect under the heading "Cabinet Column". This article appears to have been written in autumn 2005.

25. In January 2006, NLP submitted to the council an environmental statement scoping report. Section 6 of this report discussed the effect of the proposed development on birds and other wildlife which inhabited the site and surrounding areas. In the same month, the council published its management plan for Coatham Beach. This beach lies immediately to the north of the site. The council in its management plan proposed to dedicate separate areas of the beach to different activities. The council also proposed to create a wildlife protection zone for the benefit of wading birds during the winter months.

26. On the 28th February 2006, the council's cabinet, including Mr Kay, met to consider the Coatham development project. The cabinet resolved to enter into written heads of terms with Persimmon. Those heads of terms were duly executed either during or at the end of the meeting.

27. On 11th May 2006, the council sent a copy of the environmental statement scoping report to NE. NE responded, drawing attention to the fact that the boundary of the site lay close to the SPA and that the effects of the development upon the SPA should be properly considered.

28. On 14th July 2006, NLP, acting on behalf of Persimmon, submitted to the council an application for outline planning permission in respect of the proposed development.

29. On 26th July, NLP submitted to the council an environmental statement. This included Appendix 6A which was an assessment of impacts on the SPA. Appendix 6A was prepared by E3 on the instructions of NLP.

30. On 3rd August, the council sent copies of the planning application to RSPB and NE. By letters dated 24th August and 8th September respectively, both bodies objected to the planning application on the grounds of lack of information and risks to wildlife in the SPA. Thereafter, there followed a dialogue between the council and those bodies, during which their concerns were addressed. I shall return to this dialogue in part 6 below.

31. A period of public consultation in respect of Persimmon's planning application commenced on 15th September 2006. Members of the public viewed copies of the application at the council's offices. The merits of the application became a matter of public debate.

32. On 2nd October, the Labour Group of councillors who were then in opposition issued a news release arguing that planning permission should be refused. The Labour councillors accepted that there was a need to regenerate the Coatham area. However, they regarded the current proposals as unsatisfactory and as including too high a proportion of housing. The Labour MP for Redcar, Ms Vera Baird QC MP, expressed similar views in a message to the protesters dated 7th October and in a letter to her constituents dated 8th November 2007. Press cuttings dating from this period indicate that the proposed development was a matter of growing political controversy. The coalition supported the proposals and the Labour Group opposed them.

33. It did not prove possible for the planning application to be progressed within the period of 16 weeks envisaged by Article 20 of the GDPO and paragraph 32 of the 1999 Regulations. The reason for this delay was that the concerns of NE and RSPB concerning the impact of the proposed development on wildlife had not been assuaged. Persimmon and its advisers did not achieve success on this front until early 2007.

34. On 30th January 2007, NLP and their ecological consultants, E3, prepared a final

version of their report entitled "Assessment of Impacts on Teesmouth and Cleveland Coast SPA and Ramsar Site". This document was submitted to RSPB and NE on 2nd February 2007. It found favour with both bodies. By a letter dated 9th February, NE withdrew its objection to the planning application, provided that the following conditions were attached to any permission granted:

"1. The development shall be carried out in complete accordance with the plans contained in the applicant's Environmental Statement and updated by those specified in Section 8 of Coatham Enclosure, Redcar 'assessment of Impacts on Teesmouth and Cleveland Coast SPA and Ramsar Site' 30th January 2007, along with Coatham Enclosure Landscape Enabling Works to the Boating Lake and Environs: Description of Physical Works and Drawings, 5171/L99-003 and 5171/L99-005.

"2. Demolition and construction works in the boating lake area will avoid the period of two hours either side of high tide between September and March inclusive. Acoustic screening (fencing) will be deployed around all demolition and construction works occurring within 50m of the boating lake edge.

"3. A simple barrier along with an explanatory interpretive panel will be erected and maintained to deter public access to the boating lake island between September and March inclusive. Rowing boat usage of the lake will be confined to the period 1 May to 15 September. Model boating activities on the lake and usage of the adjacent "performance deck" will avoid the period of two hours either side of high tide between September and March inclusive.

"4. Four weeks prior to the start of demolition and construction works the applicant will submit to the Council details of a monitoring programme of waterbird usage of the boating lake and the foreshore to cover a period commencing with the start of demolition and concluding three years after completion of the development.

"5. Mitigation for potential bird disturbance caused by increased recreational usage of the SPA/Ramsar/SSSI foreshore associated with the development will be provided by the finalisation and implementation of the Council's Beach Management Plan (and in particular those measures specified in Section 8.3 of Coatham Enclosure, Redcar 'Assessment of Impacts on Teesmouth and Cleveland Coast SPA and Ramsar Site' 30th January 2007) prior to the completion of the development, along with an interpretation and visitor guidance strategy to include appropriate signage at beach access points.

"6. Prior to the completion of the development the applicant will submit to the satisfaction of the Council a strategy to address the



sustainable management of the dune habitats to the north west of the application site, in accordance with Section 8.4 of Coatham Enclosure, Redcar 'Assessment of Impacts on Teesmouth and Cleveland Coast SPA and Ramsar Site' 30th January 2007, and will implement its provisions.

"7. Detailed planting proposals for the development which incorporate native tree and shrub species suitable for use by linnets will be submitted to the satisfaction of the Council."

35. By a letter dated 13th February 2007, RSPB withdrew its objection to the planning application, provided that the planning permission was subject to appropriate conditions. The conditions stipulated by RSPB were similar, but not identical, to those required by NE.

36. On an unknown date in or shortly after February 2007, Mrs Mealing, the council's development control manager, made the following undated memorandum on her file:

"Mixed Use Redevelopment Scheme to Provide Tourism, Sport, Recreation and Leisure, Linked Housing and Community Facilities Including New Highways and Infrastructure Works — Coatham Enclosure, Redcar.

"1. This is a record of the appropriate assessment required by Regulation 48 of the Habitats Regulations 1994 (as amended 2004) undertaken by Redcar and Cleveland Borough Council in respect of the above scheme in accordance with the Habitats Directive. Having considered that the scheme may be likely to have a significant effect on the Teesmouth and Cleveland Coast SPA and Ramsar site and the South Gare and Coatham Sands SSSI and that the plan is not directly connected with or necessary to the management of the site, an appropriate assessment has been undertaken of the implications of the proposal in view of the site's conservation objectives.

"2. Natural England were originally consulted under Regulation 48 in August 2006 and this consultation process continued until February 2007. The conclusions of the final version of the Appropriate Assessment (dated 30th January 2007) are in accordance with the advice and recommendations of Natural England. Additional information was submitted by the applicants to address concerns raised by Natural England.

"3. The site's conservation objectives have been taken into account, and the assessment has concluded that subject to conditions, the proposed development would not adversely affect the integrity of the SPA/Ramsar site and would not be likely to cause damage and disturbance to the SSSI."

37. In making this memorandum, Mrs Mealing was exercising Power 157AB under the council's scheme of delegation. I shall refer to this document as "the Mealing memo".

38. By early 2007, all political parties in Redcar and Cleveland were turning their attention to the forthcoming elections. With this in mind, in February 2007 the corporate communications team of the council produced a document entitled "Local Elections 2007, Guidance Note on Publicity". This document includes the following passage:

"On May 3rd, local elections will take place throughout the Redcar and Cleveland borough. This note has been produced to provide you with advice regarding Council publicity and activities during the pre-election period. Local elections take place every four years and those wishing to serve as local councillors will have to stand for election should they wish to serve a four year period as an elected representative for their ward. By law, as soon as the local elections are called, restrictions will be placed upon the Council and its staff in relation to its activities and the material that the Council can send out to the public. For the local elections 2007, this pre-election period commences Thursday 27th March and finishes on local election polling day -- 10 pm Thursday 3rd May 2007. (All candidates must be registered by Wednesday 4th April).

"Pre-election publicity -- general principles. Council staff should never use their position to engage in activity which supports, or could be deemed to support, a political party or prospective candidate. However, this is even more important during the publication of a notice of election and polling day.

"Do NOT issue publicity which may be seen to affect public support for a political party ... express -- in any publication, report or form of communication -- a recommendation, opinion or comment which may be seen to support controversial issues or views which will identify you with a candidate or political party.

"Whilst the pre-election period does impact on some aspects of Council business, as always, it is important to ensure a common sense approach to daily operational activity and decision-making -- if in doubt, or if you have any queries regarding publicity, distribution of information or activities, please do not hesitate to contact the Corporate Communications Team ...

"Meetings and operational decision making.

Any meetings or decision making relating to the 'day-to-day' business of the Council that do not involve controversial local issues should continue to go ahead -- including those meetings and decisions involving partners and outside agencies."

39. On 27th March, formal notice of the local elections was given. Following the lead of all counsel in this case, I shall refer to the period between 27th March and 3rd May as "the purdah period".

40. Neither the coalition, nor the council officers, took the view that the progress of

Persimmon's planning application should be suspended during the purdah period. Accordingly, arrangements were made for the planning committee to meet and consider that application on 3rd April. Because of the large number of members of the public expected to attend this meeting, a church hall was hired for the occasion. Mr George Dunning, the leader of the Labour Group on the council, took the view that it was improper for such a meeting to take place during the purdah period. He expressed that view to Mr Frankland, the council's monitoring officer. On 2nd April 2007, Mr Dunning followed this matter up with a letter to Mr Frankland in the following terms:

"Special planning committee, Tuesday 3rd April 2007 -- Coatham development.

"You will be aware that I have already expressed grave concerns over the wisdom and propriety of holding a meeting to determine such a controversial matter during the Election period -- and that my concerns are shared by the Member of Parliament for Redcar, Vera Baird QC.

"Those concerns have been made clear not only to yourself but also your colleague Rachel Dooris and the Chief Executive.

"I believe that a matter has now very recently come to light which makes it imperative that you reconsider whether this meeting should now go ahead. I refer to a document which has today been passed to non-coalition members of the planning committee, Cllrs Brenda Forster and Mary Lanigan, which appears to have been intended for distribution only to the Coalition members on the planning committee. I attach a copy of the document."

41. The document which Mr Dunning attached to his letter reads as follows:  
"Coatham Development Planning Application.

Planning Committee Coalition Members.

"Remember this is 'The Big One' for the Coalition so it's important it gets through. There will probably be a lot of people attending but don't let that sway you. Stand up and be counted for the sake of the coalition."

42. I shall refer to this document as "the anonymous note".

43. Despite the reservations expressed by Mr Dunning, the meeting fixed for 3rd April went ahead. The principal document prepared for the meeting was an officer's report, to which I shall refer further later in this judgment. That report recommended that outline planning permission be granted, subject to 47 conditions. Those conditions included the matters which had been stipulated by NE and RSPB.

44. At lunchtime on Tuesday 3rd April 2007, 13 councillors and numerous members of the public gathered at Bow Street Church Hall for the planning committee meeting. The 13 councillors present included Mr Kay, other representatives of the coalition and representatives of the Labour Party. The members of the public included numerous

persons who were opposed to the development. The meeting proceeded. A council officer spoke, elaborating on the officer's report. A number of objectors expressed their concerns forcibly. A representative of Persimmon spoke in favour of the scheme. The committee then deliberated. The committee resolved by a majority that outline planning permission should be granted, subject to the proposed 47 conditions.

45. Following that meeting, Mr Frankland asked the council's internal auditor to investigate the anonymous note. The auditor was unable to establish who had written the note, although ultimately he concluded that it had done no harm, in the sense that it had not influenced any member's voting.

46. A small part of the site lay outside the area designated in the local plan for leisure and residential development. By a letter dated 11th April, Mrs Mealing drew this matter to the attention of the Secretary of State, so that the Secretary of State could consider whether or not she should call the application in for her own determination.

47. On 1st May 2007, the council entered into a development agreement with Persimmon, under which Persimmon agreed to carry out the development for which outline planning permission had been granted. The execution of the development agreement is not mentioned in any of the witness statements. However, this fact was told to me by counsel the day before yesterday (Day 2 of the hearing) as an agreed fact and of course I accept it.

48. On 3rd May 2007, the local elections were held. The coalition was voted out of office. Labour councillors were elected in sufficient numbers to form an outright majority on the council. Mr Dunning, the Labour leader, became the leader of the council.

49. On 15th May, the Secretary of State responded to Mrs Mealing's letter of 11th April, stating that the Secretary of State would not call in Persimmon's planning application. In these circumstances, the council took the view that the planning committee's decision of 3rd April should now be formalised. On 24th May, the council issued to Persimmon and to NLP a notice of planning permission for the development, subject to the 47 conditions previously mentioned.

50. The claimant for his part was aggrieved by the grant of planning permission. He took the view that the proposed development was objectionable on many grounds. He also took the view that the planning permission granted was unlawful. Accordingly, he commenced the present proceedings.

### Part 3

#### The present proceedings

51. By a claim form issued on 27th August 2007, the claimant applied to the Administrative Court for a declaration that the planning permission granted for the Coatham development project was unlawful. The council was named as defendant on the claim form and Persimmon was identified as an interested party. The first ground of claim set out in the claimant's claim form was appearance of bias or predetermination. The second ground of claim set out was misapplication of the integrity test under Regulation 48 of the 1994 Regulations. Both the council and Persimmon filed acknowledgments of service resisting the claimant's claim. The council and Persimmon also contended that the claimant's claim was such that permission to proceed with the claim should be refused.

52. On 14th November 2007, Collins J considered the matter on the papers. He regarded the claimant's contentions as arguable. Accordingly, Collins J directed that there be a rolled-up hearing of the permission application and (if permission be granted) of the substantive issues.

53. That hearing has taken place on two days of this week at Birmingham Crown Court. The hearing has been held whilst the jury in a criminal trial has been in retirement. This circumstance has necessitated occasional interruptions whilst I dealt with matters concerning the criminal trial. On the other hand, this procedure has enabled the present litigation to have an early hearing and to proceed to judgment before Christmas which was in accordance with the wishes of all parties.

54. Mr Gordon Nardell is counsel for the claimant at the present hearing. Ms Frances Patterson QC and Mr John Hunter appear for the council. Mr James Maurici appears for Persimmon. I am grateful to all counsel for the excellence of their skeleton arguments and oral submissions. It is clear that the issues raised on all sides are formidable and merit a full hearing. Accordingly, the court grants to the claimant permission to proceed with his claim for judicial review.

55. I shall now address the claimant's two grounds separately. Before doing so, however, I must first review the law relating to bias and predetermination.

#### Part 4

#### The law relating to bias and predetermination

56. The law requires that a decision maker should give proper consideration to the arguments and evidence placed before him at the time when he is reaching his decision. This necessitates that the decision maker should not have made up his mind in advance and should not be biased in favour of one side or the other. These principles are not easy to apply in the context of local government. In that context, the decision makers are often councillors who are publicly committed to policies relevant to the issues under consideration. Indeed, sometimes those policies form part of the manifestos upon which the councillors were elected. I shall therefore turn for guidance to recent authorities in which such problems have been addressed.

57. In R v Amber Valley DC, ex parte Jackson [1985] 1 WLR 298 Woolf J refused to grant an injunction to restrain a district council from considering a planning application which the majority of the council had previously resolved to support. Woolf J noted that the rules of natural justice were not rigid, but must alter in accordance with the context. The judge held that councillors were entitled to be predisposed towards a particular outcome. The councillors would be acting lawfully, provided that they considered the arguments on their merits and took into account all material considerations.

58. In R v Waltham Forest LBC, ex parte Baxter [1988] 1 QB 419 a group of ratepayers challenged the council's decision to impose a substantial increase in rates. The grounds of challenge were that several councillors had voted on party lines, rather than in accordance with their own opinions. Both the Divisional Court and the Court of Appeal dismissed the ratepayers' challenge. Giving the leading judgment in the Court of Appeal, Sir John Donaldson MR held that the councillors were entitled to give weight to the views of colleagues and to party policy, but they were not entitled to vote blindly in support of party policy. The conduct of the councillors in that case fell on the right side of the line.

59. Mr Nardell submits, and I accept, that the Court of Appeal's judgment in Baxter must be read in context. The setting of rates is a decision about resources which involves political considerations. This exercise is somewhat different in character from determining a planning application.

60. Porter v Magill [2001] UKHL 67; [2002] 2AC 357 is the House of Lords decision arising out of the well known "homes for votes" saga in Westminster. Westminster City Council's auditor certified that certain councillors had caused approximately £31 million loss to the council by their wilful misconduct. The House of Lords held that the auditor's decision was valid. Despite the fact that the auditor had issued a press statement in the course of his investigations, the House of Lords dismissed allegations of bias or apparent bias against the auditor. In reaching this conclusion, the House of Lords modified the common law test for bias in the light of the Strasbourg jurisprudence on ECHR Article 6. At paragraph 88, Lord Hope noted that there was a close relationship between the concepts of independence and impartiality. He continued:

"In both cases the concept requires not only that the tribunal must be truly independent and free from actual bias, proof of which is likely to be very difficult, but also that it must not appear in the objective sense to lack these essential qualities."

61. Lord Hope formulated the test for apparent bias in these terms at paragraph 103: "The question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased."

62. Lord Hope observed at paragraph 104 of his speech that assertions by a decision maker that he was unbiased would carry little weight in relation to the issue of apparent bias. Lord Bingham, Lord Steyn, Lord Hobhouse and Lord Scott all agreed with Lord Hope's reasoning in relation to the bias and apparent bias issue.

63. Bovis Homes Ltd v New Forest District Council [2002] EWHC 483 (Admin) was decided one month after the House of Lords decision in Porter v Magill. In that case, Ouseley J held that a decision of the council's planning and transportation committee was unlawful by reason of apparent bias on the part of the chairman and by reason of predetermination.

64. In relation to predetermination, Ouseley J said this:

"111. In my judgment a Council acts unlawfully where its decision-making body has predetermined the outcome of the consideration which it is obliged to give to a matter, whether by the delegation of its decision to another body, or by the adoption of an inflexible policy, or as in effect is alleged here, by the closing of its mind to the consideration and weighing of the relevant factors because of a decision already reached or because of a determination to reach a particular decision. It is seen in a corporate determination to adhere to a particular view, regardless of the relevant factors or how they could be weighed. It is to be distinguished from a legitimate predisposition towards a particular point of view. I derive those principles from the Kirkstall Valley Campaign Ltd case to which I have already referred, particularly at page 321G.

"112. There is obviously an overlap between this requirement and the commonplace requirement to have rational regard to relevant considerations. But, in my judgment, the requirement to avoid predetermination goes further. The further vice of predetermination is that the very process of democratic decision making, weighing and balancing relevant factors and taking account of any other viewpoints, which may justify a different balance, is evaded. Even if all the considerations have passed through the predetermined mind, the weighing and balancing of them will not have been undertaken in the manner required. Additionally, where a view has been predetermined, the reasons given may support that view without actually being the true reasons. The decision-making process will not then have proceeded from reasoning to decision, but in the reverse order. In those circumstances, the reasons given would not be the true reasons but a sham.

"113. In my judgment the sequence of steps and the accumulation of events here shows predetermination and a closed mind, rather than just a strong disposition to include the land within the NFHA."

65. In Georgiou v Enfield London Borough Council [2004] EWHC 779 (Admin); [2004] LGR 497, Richards J quashed a grant of planning permission and listed building consent on the grounds of apparent bias and apparent predetermination. Four members of the planning committee were members of a committee known as "CAG" which had previously resolved to support the proposals. Richards J noted that bias and predetermination were separate, but related concepts. At paragraph 30, he noted that although Porter v Magill was a case of alleged predetermination, it was decided by reference to the test for apparent bias. Turning to the facts of the case before him, Richards J concluded at paragraph 33 that:

"... a fair minded and informed observer would conclude that there was a real possibility of bias, in the sense of the decisions being approached with closed minds and without impartial consideration of all the planning issues, as a result of the support expressed by the CAG being carried over into support for the applications in the context of the planning committee's decisions."

66. The principle of law which I derive from Georgiou is that the test of the fair minded and informed observer is applicable not only in cases of alleged apparent bias, but also in cases of alleged apparent predetermination. If either is established, the decision in question is unlawful. Georgiou is also authority for the proposition that the fair minded and informed observer test must be applied with appropriate caution. It must not be applied in a way that will render local authority decision making impossible or unduly difficult; see paragraph 31 of Richards J's judgment. I deduce from this paragraph that our notional, fair minded and informed observer is a person familiar with the structure of local government and that he or she makes due allowance for the need to carry on local authority decision making without undue disruption.

67. In Flaherty v National Greyhound Racing Club Ltd [2005] EWCA Civ 1117, the

Court of Appeal reversed a finding that there was apparent bias on the part of the stewards of the National Greyhound Racing Club. At paragraph 27, Scott Baker LJ formulated the test for apparent bias in this way:

"The test for apparent bias involves a two stage process. First the Court must ascertain all the circumstances which have a bearing on the suggestion that the tribunal was biased. Secondly it must ask itself whether those circumstances would lead a fair minded and informed observer to conclude that there 'Was a real possibility that the tribunal was biased'."

68. Scott Baker LJ went on to hold that the trial judge had failed properly to carry out the first stage of this process. Both the President and Sir Peter Gibson agreed with that judgment.

69. In R (Island Farm Development Ltd) v Bridgend County Borough Council [2006] EWHC 2189 (Admin) the claimants unsuccessfully challenged the lawfulness of a decision by the defendant council not to sell certain land to the claimants. The issues in Island Farm are somewhat removed from the issues in the present case. As Collins J noted at paragraph 18 of his judgment, a decision about selling assets is not akin to a planning decision. What is significant, however, is that at paragraph 30 of his judgment in Island Farm, Collins J expressed doubts about the approach of Richards J in Georgiou. Collins J expressed his doubts in this way:

"30 ... Councillors will inevitably be bound to have views on and may well have expressed them about issues of public interest locally. Such may, as here, have been raised as election issues. It would be quite impossible for decisions to be made by the elected members whom the law requires to make them if their observations could disqualify them because it might appear that they had formed a view in advance. The decision of the Court of Appeal in Baxter's case, of the New Zealand Court of Appeal in the Lower Hutt case and of Woolf J in the Amber Valley case do not support this approach. Nor is it consistent with those authorities that no weight should be attached to their own witness statements. Porter v Magill was a very different situation and involved what amounted to a quasi-judicial decision by the Auditor. In such a case, it is easy to see why the appearance of bias tests should apply to its full extent.

"31. The reality is that Councillors must be trusted to abide by the rules which the law lays down, namely that, whatever their views, they must approach their decision-making with an open mind in the sense that they must have regard to all material considerations and be prepared to change their views if persuaded that they should."

70. If history had ended in August 2006 when Island Farm was decided, it may be said that there are two conflicting first instance decisions and this court must choose between them. However, history did not end then. In November 2006, the Court of Appeal reviewed the authorities on bias in National Assembly for Wales v Condrón [2006] EWCA Civ 1573; [2006] 49 EG94 (CS). In this case, the Court of Appeal



reversed a judgment quashing a grant of planning permission on grounds of apparent bias. Richards LJ, giving the leading judgment, applied the test of the fair minded and informed observer. He approved the passage in Flaherty, setting out a two stage process for the application of that test. Richards LJ subsequently referred to his own decision in Georgiou and Collins J's decision in Island Farm without any hint of either retraction or disapproval. Both Wall and Ward LJJ agreed with the judgment of Richards LJ.

71. Faced with this line of authority, it seems to me that I must seek to reconcile Georgiou and Island Farm, rather than to choose between them. The key to such reconciliation lies in paragraph 31 of the judgment in Georgiou. This paragraph requires that the test for apparent bias should be applied "with appropriate caution". The test must not be applied "in a way that will render local authority decision making impossible or unduly difficult". The difficulties which must be avoided in the application of that test are highlighted by Collins J in Island Farm. In order to apply the test "with appropriate caution" and in order to avoid the difficulties identified, it is necessary to assume that the notional, fair minded and informed observer is cognisant of the practicalities of local government. He does not take it amiss that councillors have previously expressed views on matters which arise for decision. In the ordinary run of events, he will trust councillors, whatever their pre-existing views, to approach decision making with an open mind.

72. In Gillies v Secretary of State for Work and Pensions [2006] UKHL2, the House of Lords was considering an allegation of apparent bias in respect of a tribunal member. In applying the test of the fair minded and informed observer, Lord Hope stated at paragraph 17 that the observer was neither complacent, nor unduly sensitive or suspicious. In my view, an observer who has these admirable qualities would be cognisant of the practicalities of local government. He would not take it amiss that councillors have previously expressed views on matters which arise for decision. In the ordinary run of events, he would trust councillors, whatever their pre-existing views, to approach decision making with an open mind. All this flows from the fact that the observer is not unduly sensitive or suspicious. On the other hand, he is not complacent. If there are additional and unusual circumstances which suggest that councillors may have closed their minds before embarking upon a decision, he will regretfully conclude that there is a real possibility of bias or predetermination.

73. From this review and reconciliation of the authorities, I derive four propositions.

74. 1. Actual or apparent bias or predetermination on the part of a decision maker renders his decision unlawful.

75. 2. If a fair minded and informed observer who is neither complacent nor unduly sensitive or suspicious, having considered the facts, would conclude that there was a real possibility of bias or predetermination, then apparent bias or predetermination is established. For the sake of brevity, I shall use the phrase "the notional observer" to denote an observer who is fair minded, informed, not complacent and not unduly sensitive or suspicious.

76. 3. In the context of decisions reached by a council committee, the notional observer is a person cognisant of the practicalities of local government. He does not take it amiss that councillors have previously expressed views on matters which arise for decision. In the ordinary run of events, he trusts councillors, whatever their pre-existing views, to approach decision making with an open mind. If, however, there are additional and unusual circumstances which suggest that councillors may have closed their minds

before embarking upon a decision, then he will conclude that there is a real possibility of bias or predetermination.

77. 4. Before the court makes a finding of apparent bias or predetermination, it must first identify with precision the facts which would drive the notional observer to such a conclusion.

78. With the benefit of this guidance from the authorities, I must now tackle the claimant's first ground of claim.

#### Part 5

#### The claimant's first ground

79. The claimant's first ground is that the planning committee's decision to grant planning permission for the Coatham development project was unlawful by reason of apparent bias or apparent predetermination. In paragraph 10 of his skeleton argument, Mr Nardell relies upon the following seven factors as being matters which would cause the notional observer to conclude that there was a real possibility of bias or predetermination.

80. A. The committee was dealing with a scheme essentially promoted by the council itself on council-owned land, where the council had a pecuniary interest in the grant of permission.

81. B. The rival positions of applicant and objectors mirrored the battle lines in the imminent local election in which the coalition had very publicly associated themselves closely with the scheme and had criticised and were continuing to criticise its opponents in highly charged language.

82. C. The acutely politicised atmosphere was evidenced, if evidence were needed, by the anonymous note whose provenance (despite Mr Frankland's hint at his paragraph 17 that it was generated by persons associated with the claimant) remains uncertain.

83. D. The national and local guidance served to emphasise the particular importance of appearances when an election is underway.

84. E. Councillor Kay was not merely a member of the cabinet, but had personally and specifically associated himself with the council's promotion of the scheme and denigration of its opponents. He moved the formal proposal committee for approval of the scheme.

85. F. The coalition members voted en bloc to approve.

86. G. There was no obvious overriding reason for the application to be determined at a special committee meeting during purdah, nor for Councillor Kay to attend. A fair minded member of the public would have at the very least a suspicion that Councillor Kay and his coalition colleagues proceeded as and when they did, to obtain a decision to grant planning permission before they lost control to a Labour opposition which had a very different view of this scheme.

87. In the course of his oral submissions, Mr Nardell relied upon a further matter which emerged during the hearing, namely that the council entered into a development agreement with Persimmon on 1st May 2007. This was just two days before the election and also it was before the Secretary of State had decided whether or not to exercise her discretion to call in the planning application for her own determination. I shall refer to the seven factors set out in Mr Nardell's skeleton argument as factor A, factor B and so forth. In order to maintain Mr Nardell's nomenclature, I shall refer to the eighth factor

which was advanced in oral argument as factor H. Let me now address those eight factors individually.

88. Factor A is not remarkable or unusual. It is a fact of life that local authorities sometimes have to deal with planning applications in which they have a financial interest or concerning land which they own. The notional observer, being cognisant of the practicalities of local government, would not suspect bias or predetermination by reason of factor A.

89. I turn now to factor B. The notional observer would be aware that originally the Coatham development project had all parties' support. However, as the details of the project were fleshed out, the Labour Group became opposed to the scheme because of the emphasis on housing at the expense of leisure facilities. The mere fact that the coalition supported the project, whereas the Labour Group opposed it, would not make the notional observer suspect bias or predetermination. He would trust those councillors serving on the planning committee, whatever their pre-existing views, to approach their task with an open mind and to focus upon planning considerations. There is, however, a second element to factor B; namely the battle lines in the imminent local election. The public pronouncements of the coalition in the run-up to the local elections were strongly supportive of the Coatham development project and strongly critical of those who opposed the project. The Labour Group, on the other hand, was known to oppose the project, at least in its present form.

90. The notional observer would begin to fear that coalition councillors might feel constrained to vote in favour of planning permission by reason of the coalition's pre-election public statements in support of the project. See, for example, the focus newsletter published by the Liberal Democrats. This newsletter is headed:

"What's the best thing to happen in Redcar for decades? The answer: the Coatham links development. The Liberal Democrats want to tell you why. When did Redcar ever have an £88 million development? How can we pass up on that sort a project?"

91. I turn now to factor C, the anonymous note. This document was drawn to the attention of the monitoring officer, Mr Frankland. Mr Frankland made a brief but appropriate investigation and concluded that the note was bogus. He took steps to ensure that all members of the planning committee would disregard it. In the circumstances, he took the view that the existence of the note would not affect the fairness of the committee's decision. The view formed by Mr Frankland was subsequently vindicated by the auditor's investigation. In my view, the notional observer would not be perturbed by the anonymous note referred to in factor C. He would dismiss it as a mischievous document for which no political party was responsible and which would not influence the committee's deliberations.

92. I come now to factor D. The local guidance, which is quoted in part 2 above, made it clear that meetings could go ahead during the purdah period if they did not involve controversial local issues. The committee meeting held on 3rd April plainly did involve a controversial local issue. The fact that special premises were hired for the meeting in order to accommodate many members of the public was an acknowledgment that the meeting involved controversial local issues. Mr Frankland took the view, as set out in his witness statement, that the meeting should go ahead for a number of reasons. This was a long running scheme, council business had to continue during the purdah

period and so forth. I do not agree with Mr Frankland's analysis. The holding of this particular public meeting during the purdah period was a clear breach of the guidance issued by the council, an extract from which I have quoted in part 2 above. It is also significant that Mr Dunning, the leader of the Labour opposition, specifically opposed the holding of such a controversial meeting during the purdah period.

93. In relation to factor D, I conclude that the coalition acted in breach of local guidance and in the face of Labour opposition by failing to postpone the meeting fixed for 3rd April. This is an unusual circumstance which would have aroused the suspicion of the notional observer.

94. I come now to factor E. The fact that Mr Kay was a member of the council's cabinet and was party to the decision of 28th February 2006 would not by itself disqualify him from participating in the committee meeting of 3rd April. When, however, one also looks at the public pronouncements of the cabinet in support of the scheme, the picture changes. For example, the first section of an article in the Evening Gazette of 4th October 2006 reads as follows:

"A major multi-million-pound redevelopment scheme in Redcar is at the centre of a new political row. Labour councillors have called for the Coatham Enclosure project to go back to the drawing board. But Councillor Eric Empson, the chairman of Redcar and Cleveland Council's cabinet, said the move was 'beyond belief' and would cost the authority millions as promised investment."

95. The council's cabinet was an inner group. Out of 59 councillors, only ten were members of the cabinet. In view of the fact that the cabinet had become so closely identified with the Coatham development project, the notional observer would be alarmed if a cabinet member were to participate in the committee meeting.

96. I come now to factor F. In the normal course of events, this is not a matter which would arouse the concerns of the notional observer. He is, after all, not unduly sensitive or suspicious. However, against the background of the previous matters set out, the fact that no coalition member took a different view upon a highly controversial planning application would somewhat increase the notional observer's concerns.

97. I turn now to factors G and H together. Mr Nardell submits that these are indicative of a scorched earth policy. It is a fact that the planning meeting was held in April, when it ought to have been held in May after the elections. There was also a degree of unseemly haste in signing the development agreement with Persimmon. The agreement was signed two days before the election and without waiting for the Secretary of State to say whether or not she would call in the planning application.

98. The notional observer, although trusting of councillors and not unduly suspicious, would regard it as a serious possibility that the coalition was trying to force through the Coatham development project in advance of the election.

99. Let me now draw the threads together. The following facts are relevant by way of background, but do not by themselves arouse the suspicions of the notional observer.

100. 1. The planning committee was dealing with a scheme promoted by the council itself on council-owned land, where the council had a pecuniary interest in the grant of permission.

101. 2. The fact that coalition councillors had previously expressed support for the scheme and Labour councillors had previously expressed opposition.

102. 3. The fact that Mr Kay was a member of the cabinet which had decided to sign the heads of agreement with Persimmon 14 months before the planning meeting.

103. In my judgment, however, five further facts, when taken in conjunction with the previous facts, would tip the balance and would cause the notional observer to conclude that there was a real possibility of bias or predetermination. These facts are:

104. 1. The merits of the Coatham development project had become a party political issue in the imminent local election. The coalition's support for the project featured in its pre-election literature.

105. 2. Contrary to the council's own guidance and in the face of Labour opposition, the coalition proceeded with the planning meeting during the purdah period.

106. 3. One of the coalition councillors who spoke and voted at the planning meeting was a member of the council's cabinet. The cabinet had not only resolved to sign the heads of agreement on 28th February 2006, but also more recently had made forceful public statements in support of the project.

107. 4. Despite the formidable arguments on both sides, not a single member of the coalition either abstained or voted against the motion.

108. 5. On the 1st May 2007, just two days before the election and also before the Secretary of State had reached a decision about calling in, the council entered into a binding development agreement with Persimmon. The coalition thereby further tied the hands of its successor.

109. Ms Patterson points out that the decision reached on 3rd April was not a surprising one. The Coatham development project was in accordance with the adopted local plan. It was a longstanding project which had previously enjoyed all parties' support. The site is in an area identified for regeneration in the development plan. The planning application was supported by ONE Northeast (the Regional Development Agency) and by the Northeast Assembly.

110. I agree with Ms Patterson that against that background and also having regard to the officer's report, the decision to grant planning permission was not one to cause surprise. On the other hand, the decision reached was far from inevitable. There were serious issues as to how the development should be structured as between housing and leisure facilities. The opposition to the development project in its current form, as expressed by Vera Baird QC MP and by the Labour Group of councillors, shows that different views could properly be held on the question of granting planning permission.

111. I quite accept that members of the planning committee, including Mr Kay, had received training. That is a factor which the notional observer would take into account. The notional observer would also take into account that by April 2007, the 16-week period envisaged by Section 20 of the GDPO and Regulation 32 of the 1999 Regulations had long expired. The notional observer would also take into account that the monitoring officer approved the decision to proceed with the meeting on 3rd April and advised Mr Kay that he could participate; indeed, Mrs Mealing gave similar advice. Nevertheless, these matters would not allay the suspicions of the notional observer. In my judgment, having regard to the guidance given in the authorities, a fair minded and informed observer, having regard to the facts identified above, would conclude that there was a real possibility of bias or predetermination on the part of the planning committee.

112. In the result, therefore, the claimant succeeds on his first ground of claim. In my judgment, the council's decision to grant planning permission for the Coatham development project was unlawful by reason of apparent bias or apparent

predetermination. The planning permission granted should be quashed on that ground.

Part 6

The claimant's second ground

113. The claimant's second ground of challenge is that the council failed properly to apply the integrity test under Regulation 48 of the 1994 Regulations. As explained in part 1 of this judgment, the sea to the north of the site and the sand dunes to the west of the site formed part of the SPA. The SPA was a European site within the meaning of Regulation 48 of the 1994 Regulations. The council was therefore obliged to comply with the requirements of that Regulation.

114. The claimant contends that the council failed to comply with the requirements of Regulation 48 in two respects. First, the council failed to make an appropriate assessment as required by Regulation 48.1. Secondly, the council failed in the light of the conclusions of the assessment (if made) to ascertain that the development would not adversely affect the integrity of the SPA as required by Regulation 48.5.

115. The principal authority relied upon by counsel as illuminating the interpretation of Regulation 48 is the decision of the ECJ in Landelijke Vereniging tot Behoud van de Waddenzee v Staatssecretaris van Landbouw Natuurbeheer en Visserij, C127/02; [2004] ECR-I 7405. This case concerned the interpretation of Article 6 of the Habitats Directive which underlies Regulation 48 of our domestic regulations. In Waddenzee, the Dutch court referred four questions to the ECJ for preliminary ruling. The fourth of those questions reads as follows:

"(a) When Article 6(3) of the Habitats Directive is applied, on the basis of which criteria must it be determined whether or not there are 'appropriate steps' within the meaning of Article 6(2) or an 'appropriate assessment' within the meaning of Article 6(3), in connection with the certainty required before agreeing to a plan or project?

(b) Do the terms 'appropriate steps' or 'appropriate assessment' have independent meaning or, in assessing these terms, is account also to be taken of Article 174(2) EC and in particular the precautionary principle referred to therein?

(c) If account must be taken of the precautionary principle referred to in Article 174(2) EC, does that mean that a particular activity, such as the cockle fishing in question, can be authorised where there is no obvious doubt as to the absence of a possible significant effect or is that permissible only where there is no doubt as to the absence of such an effect or where the absence can be ascertained?"

116. Article 174(2) EC, which is referred to in that question, provides as follows: "Community policy on the environment shall aim at a high level of protection taking into account the diversity of situations in the various regions of the Community. It shall be based on the precautionary principle ..."

117. The ECJ's answer to question 4 includes the following passages:

"52. As regards the concept of 'appropriate assessment' within the meaning of Article 6(3) of the Habitats Directive, it must be pointed out that the provision does not define any particular method for carrying out such an assessment.

"53. None the less, according to the wording of that provision, an appropriate assessment of the implications for the site concerned of the plan or project must precede its approval and take into account the cumulative effects which result from the combination of that plan or project with other plans or projects in view of the site's conservation objectives.

"54. Such an assessment therefore implies that all aspects of the plan or project which can, either individually or in combination with other plans or projects, affect those objectives must be identified in the light of the best scientific knowledge in the field ...

"56. It is therefore apparent that the plan or project in question may be granted authorisation only on the condition that the competent national authorities are convinced that it will not adversely affect the integrity of the site concerned.

"57. So, where doubt remains as to the absence of adverse effects on the integrity of the site linked to the plan or project being considered, the competent authority will have to refuse authorisation.

"58. In this respect, it is clear that the authorisation criterion laid down in the second sentence of Article 6(3) of the Habitats Directive integrates the precautionary principle (See case C-157/96 National Farmers' Union and others [1998] ECR I-2211, paragraph 63) and makes it possible effectively to prevent adverse effects on the integrity of protected sites as the result of the plans or projects being considered. A less stringent authorisation criterion than that in question could not as effectively ensure the fulfillment of the objective of site protection intended under that provision ...

"61. In view of the foregoing, the answer to the fourth question must be that, under Article 6.3 of the Habitats Directive, an appropriate assessment of the implications for the site concerned of the plan or project implies that, prior to its approval, all the aspects of the plan or project which can, by themselves or in combination with other plans or projects, affect the site's conservation objectives must be identified in the light of the best scientific knowledge in the field. The competent national authorities, taking account of the appropriate assessment of the implications of mechanical cockle fishing for the site concerned in the light of the site's conservation objectives, are to authorise such an activity only if they have made certain that it will

not adversely affect the integrity of that site. That is the case where no reasonable scientific doubt remains as to the absence of such effects."

118. I derive two propositions from Waddenzee which bear on the interpretation of Regulation 48. First, no particular method is required for carrying out the appropriate assessment required by Regulation 48.1. Secondly, the ascertainment required by Regulation 48.5 means ascertainment with a high degree of certainty.

119. With the benefit of this guidance from the ECJ, I must now turn to the two breaches alleged by the claimant. In relation to the first alleged breach, it is necessary to review the dialogue between the council on the one hand and RSPB and NE on the other hand, which have been briefly referred to in part 2 above.

120. By a letter dated 24th August 2006, the RSPB set out in some detail its concerns about the assessment of impacts on the SPA which had been submitted by the council. In particular, the assessment document did not adequately evaluate the conservation importance of the SPA. The sensitivity of oystercatchers, dunlin, turnstone, sanderling and redshank had been understated. In addition, the assessment document understated the impact of the proposed development on wading birds which fed or roosted in the boating lake within the development site.

121. By a letter dated 8th September 2007, NE set out criticisms of the council's assessment document which were broadly similar to the criticisms advanced by RSPB. NE also expressed concern about the impact of the development upon wildlife living in the sand dunes.

122. On the 8th November 2006, E3 issued a revised report assessing the impact of the proposed development upon the SPA. On 16th November, the council submitted this revised report to NE and RSPB. NE responded on 8th December, stating that most of its concerns had been met. However, further information was required in certain areas and certain amendments would be necessary for the beach management plan for the purpose of protecting wildlife. RSPB responded to the council on 8th January 2007, making broadly similar points about E3's second draft report.

123. In the light of the comments made by NE and RSPB, E3 prepared a third draft of its report upon which NE and RSPB commented in late January. With the benefit of these further comments, E3 prepared the fourth and final version of its assessment report which was dated 30th January 2007. The final version of E3's report was sent by the council to NE and RSPB on 30th January. As set out in part 2 above, those two bodies replied expressing their satisfaction with the report as an appropriate assessment and consenting to the planning application, subject to conditions. Thereafter, Mrs Mealing wrote her memo.

124. Mr Nardell contends that at no stage did the council make an appropriate assessment as required by Regulation 48.1. The assessment report which went through four revisions was made by E3 (who were consultant to the developer), not by the council. The Mealing memo, although made by the proper officer of the council, does not constitute an appropriate assessment.

125. I do not accept these submissions. In my view, there has been proper compliance with Regulation 48.1, 2 and 3. The developer provided information as required by Regulation 48.2. The council, as competent authority, consulted with two nature conservation bodies as required by Regulation 48.3. Mrs Mealing, who was the proper



officer of the council for this purpose, carried on an iterative process between August 2006 and February 2007 which could properly be described as making an appropriate assessment. Mrs Mealing gathered comments from RSPB and NE. She required E3 to prepare successive drafts of its report until all necessary information was contained in the final version. She recorded the upshot of the exercise in the Mealing memo.

126. No specific procedure is required for the purpose of making an appropriate assessment; see Waddenzee, paragraph 52. The method adopted by Mrs Mealing cannot be impugned. I should place on record that Mr Nardell did not pursue in oral argument certain of his pleaded contentions in relation to the first alleged breach of Regulation 48.

127. I turn now to the second breach of Regulation 48 which is alleged, namely non-compliance with Regulation 48.5. Mr Nardell submits that it was the duty of the planning committee at its meeting on 3rd April to carry out the ascertainment exercise required by Regulation 48.5. The committee could not do so because the test to be applied was not set out in the officer's report. Furthermore, the information required to apply the test was not provided in the officer's report.

128. I do not accept these submissions. Paragraphs 3.9, 3.10 and 4.10 of the officer's report are sufficient for the purposes of Regulation 48.5. More fundamentally, however, it can be seen that the planning committee did in fact carry out the process of ascertainment required by Regulation 48.5.

129. The last page of the document granting planning permission records the committee's reasons for its decision. One of the reasons stated reads as follows:

"It is considered that coastal protection measures could be implemented to mitigate against flood risk and subject to suitable safeguarding conditions, the integrity of the nearby protected sites will not be compromised."

130. The various mitigation measures which the council undertook to put in place satisfied both NE and RSPB that wildlife in the SPA would be protected. It is hardly surprising that the planning committee was similarly satisfied in respect of these matters. It seems to me that the committee was satisfied with the requisite degree of certainty.

131. Let me now draw the threads together. The planning permission granted by the council is not invalidated by any breach of Regulation 48. The claimant fails in his second ground of claim.

#### Part 7

#### Conclusion

132. All parties have enjoyed a measure of success in this litigation. The claimant has succeeded on the first ground of claim. The council and Persimmon have succeeded on the second ground of claim. The overall result is that the grant of planning permission to Persimmon is unlawful and must be quashed. I request that counsel agree a suitable form of order to give effect to the court's decision.