



OUTER HOUSE, COURT OF SESSION

[2021] CSOH 87

P901/20

OPINION OF LORD DOHERTY

In the petition of

WILDLAND LIMITED

Petitioner

for Judicial Review of a decision of The Highland Council dated 5 August 2020 granting planning permission for the construction of a vertical launch space port etc near Dunbuie, Talmine, Tongue

**Petitioner: MG Thomson QC, Van der Westhuizen; Morton Fraser LLP**

**Respondent: Burnet QC; DWF LLP**

**Interested Party (Highland and Islands Enterprise): J Findlay QC, N McLean solicitor advocate; Brodies LLP**

20 August 2021

**Introduction**

[1] The respondent is The Highland Council. It is the planning authority for The Highland Council area. On 5 August 2020 it granted planning permission in respect of application 20/00616/FUL submitted by Highland and Islands Enterprise (“HIE”) for the construction of a vertical launch space port with launch operations control centre, site integration facility, launch pad complex, antenna park, access road, fencing, services and associated infrastructure at land 2.6 km south west of Dunbuie, Talmine, Tongue. The petitioner controls land adjacent to the site of the proposed development. It made written representations to the respondent against the proposed development.

[2] The proposed development, to be known as Space Hub Sutherland (“SHS”), is a dedicated facility for the vertical launch of a range of different launch vehicles (“LVs”) by multiple launch service providers to deliver small satellites into orbit around earth. It is to be operated by a launch site operator (“LSO”). The key elements of the surface infrastructure of the proposed development include: (i) a launch operation control centre building; (ii) a launch site integration facility building; (iii) a launch pad complex from where LVs will take off; (iv) an antenna park; (v) an access road, 2.5 km in length, from the A838 road to the launch pad. The site is on the A’Mhòine peninsula. It extends to approximately 307 hectares, with built development and infrastructure covering approximately 3.13 hectares. The site boundary overlaps five designated sites, namely the Caithness and Sutherland Peatlands Special Area of Conservation (“the SAC”), the Caithness and Sutherland Peatlands Special Protection Area (“the SPA”), the Caithness and Sutherland Peatlands Ramsar site, and the Ben Hutig and A’ Mhòine Sites of Special Scientific Interest.

### **Background to the application**

[3] The application was subject to the Town and Country Planning (Environmental Impact Assessment) (Scotland) Regulations 2017 (“the 2017 Regulations”) and was accompanied by an environmental impact assessment report (“EIAR”). The EIAR considered environmental effects associated with the construction, operational and decommissioning phases of the proposed development, and included chapters on, *inter alia*, ecology, ornithology, traffic and transport, and a summary and schedule of mitigation and monitoring. The EIAR recognised that article 6(3) of EU Council Directive 92/43/EEC (“the Habitats Directive”), as implemented by regulation 48 of the Conservation (Natural

Habitats, &c.) Regulation 1994 (“the Habitats Regulations”), requires that plans or projects that are not directly connected with or necessary to the management of a European site, but would be likely to have a significant effect on such a site, either individually or in combination with other plans or projects, are to be subject to an “appropriate assessment” of their implications for the European site in view of the site’s objectives.

[4] The qualifying interests for which the SAC is designated are: blanket bog, depressions on peat substrates, otter, acid peat-stained lakes and ponds, wet heathland with cross-leaved heath, clear-water lakes or lochs with aquatic vegetation and poor to moderate nutrient levels, marsh saxifrage and very wet mires often identified by an unstable “quaking” surface. The qualifying species for which the SPA is designated are birds listed in Annex 1 of Directive 2009/147/EC on the Conservation of Wild Birds and/or breeding birds listed in Schedule 1 to the Wildlife and Countryside Act 1981 (“WCA”), in particular: black-throated diver, common scoter, dunlin, golden eagle, golden plover, greenshank, hen harrier, merlin, red-throated diver, short-eared owl, widgeon, and wood sandpiper.

[5] For the purposes of the EIAR a representative LV with dimensions of 19 metres in height and 1.3 metres in diameter was used. Furthermore, in relation to the operational phase a representative launch operating scenario was defined to represent normal operational activities, and assessments were based on up to 12 launches per year and an assumption of one launch per month. The EIAR predicted that during the operational phase the proposed development would lead to increased traffic volumes on a number of roads in the vicinity on launch days, primarily caused by spectator traffic. It considered that with the implementation of mitigation measures such as: (i) a Launch Day Traffic Management Plan; (ii) a Temporary Traffic Regulation Order or Traffic Regulation Order; (iii) improved signage and (iv) passing place works, no significant residual effects were anticipated. As

regards public safety, the EIAR noted that it was anticipated that during certain periods of launch campaigns, measures would be required to control the public from entering the launch exclusion zone (“LEZ”), which would include an area of 1.8 km radius around the launch pad and a downrange land overflight exclusion zone. Those control measures were provided within the Visitor Management Strategy (“VMS”). In relation to non-ornithological interests, the EIAR considered that there would be no significant effect of increased visitors or visitor management on designated sites including the SAC during the operational phase, due to the VMS. In relation to ornithological interests the EIAR recognised that unless there were mitigation measures there would be likely to be significant effects on ornithological interests during the construction phase and during the operation of the development. However, following the application of mitigation no residual effects were predicted. The VMS set out a strategy to manage visitors and to identify the principles for the development and management of safe and effective arrangements for visitor management around launches, while minimising any damage to the environment. The VMS envisaged that safety, environment and security for the development would be dealt with in separate more detailed plans, and that the purpose of the VMS was to explain how those plans would operate to ensure a holistic approach to visitor management. The VMS would be provided to the appointed LSO, who would prepare a separate detailed Visitor Management Plan (“VMP”) in consultation with stakeholders.

[6] In addition to the petitioner, other objectors included Scottish Natural Heritage (“SNH”) and the Royal Society for the Protection of Birds Scotland (the “RSPB”). SNH (now NatureScot) is the public body responsible for Scotland’s natural heritage. It is a statutory consultee where an EIAR has been submitted to a planning authority (2017 Regulations, regulations 2(1) and 22(2)(a)). The RSPB is not a statutory consultee.

[7] SNH's objection was dated 12 March 2020. It was a holding objection. Among the matters raised were concerns about the development's effects on the SAC and SPA during the operational phase. SNH sought information from HIE on a number of matters. Both the petitioner and the RSPB raised concerns about visitor management and about issues relating to ornithology.

[8] The respondent's transport planning team did not object to the application, but it considered that appropriate mitigation would be required to manage the impact of spectator traffic on the road network. It sought suspensive conditions to ensure that a VMP is submitted and agreed in writing prior to any launch being carried out, and that thereafter the agreed VMP should be implemented in full. It envisaged that the VMP would set out the size, layout and location of car and coach parking required to accommodate visitors at or close to viewing areas and suitable and accessible routes for pedestrians from the parking to the viewing areas, and that the visitor facilities would be provided prior to any launch.

[9] On 1 May 2020 SNH requested HIE to work through various scenarios, setting out the detail of how visitors and protestors would be handled. It also asked how the LEZ and surrounding area would be policed and how protestors would be removed. As a result HIE provided the respondent and SNH with a document dated 28 May 2020 titled "VMS Clarifications – Scenario Planning" ("VMSC").

[10] On 8 June 2020 SNH withdrew its holding objection. It indicated that it was satisfied that sufficient information in relation to visitor management had been provided to demonstrate that a practical and workable solution to the issue of visitor management could be found which would avoid an adverse effect on the integrity of the SAC and the SPA. Its advice was that the proposal could be progressed with appropriate mitigation, but that it was essential that the provision of that mitigation should be a condition of the planning

permission. Condition 11 of the permission was drafted in order to achieve that. On about 15 June 2020 the respondent published a redacted copy of the VMSC on its ePlanning portal.

[11] The respondent's planning officers prepared a report of handling for the planning committee which recommended that planning permission be granted subject to a number of conditions, including condition 11. The report summarised the matters raised in objection to the application and the events surrounding SNH's objection and its subsequent withdrawal. The petitioners had queried with the respondent whether the VMSC was supplementary information in terms of the 2017 Regulations which required to be published. The report noted this suggestion but opined that the VMSC provided clarifications, did not change the scope of the development, did not alter the conclusions of the EIAR, and that it was not supplementary information. It noted that the Habitats Regulations applied, that the respondent required to consider the effect of the proposed development on the SAC and SPA, and that the necessary appropriate assessment was contained in Appendix 2 of the report. That assessment explained the requirements of the Habitats Regulations, the likely significant effects of the proposed development on the SAC and SPA, and why the respondent was required to carry out an appropriate assessment. It referred to the relevant impacts and it concluded that there would not be an adverse effect on the site integrity of either the SAC or the SPA if the mitigation set out in the appropriate assessment was applied.

### **Condition 11 of the planning permission**

[12] Condition 11 of the planning permission states:

"11. No later than 6 months prior to the first launch from the site, a visitor management plan (VMP) shall be submitted to and approved in writing by the Planning Authority in consultation with SNH, Transport Scotland, and emergency services. The VMP shall be based on the principles set out in the Visitor

Management Strategy submitted with the Environmental Impact Assessment Report as clarified by the Scenario Planning with Supporting Planning Assumptions document (May 2020) and shall set out the proposed management of visitors to the site and the launch exclusion zone for the period of the launch campaign.

The approved VMP shall include:

- a) The period of the launch campaign;
- b) Details of how visitors will be managed during launch and non-launch scenarios across the application site and the Launch Exclusion Zone, having particular regard to the impact of visitor management on the qualifying features of the Caithness and Sutherland SAC, SPA and Ramsar site. For the avoidance of doubt there shall be no vehicles used for the management of visitors within the areas of the Launch Exclusion Zone that coincide with the Caithness and Sutherland SAC, SPA and Ramsar site, except in an emergency situation;
- c) The estimated visitor numbers, proposed viewing areas, visitor traffic routes to these areas and the traffic generation on these routes
- d) The size, layout and location of the car, campervan and coach parking required to accommodate the estimated visitors at or close to the viewing areas and details of suitable accessible routes for pedestrians from the parking to the viewing areas;
- e) Provision of the agreed visitor facilities (including parking facilities) prior to launch;
- f) Measures to encourage sustainable transport to the site including remote park and ride and provision of public transport services from rail stations and larger settlements within Caithness and Sutherland;
- g) Proposals for a suitable Traffic Regulation Order mechanism to control stopping and waiting on the A838 (and at other locations which are identified as likely to be impacted by uncontrolled parking in the vicinity of the launch site). This shall include any associated signage;
- h) Proposals for any byelaws (not relevant to the Space Industry Act 2018) to establish the Launch Exclusion Zone which will impact on the public road network;
- i) Security measures which may affect the free flow of traffic on the public road;
- j) Proposals of road signage to inform and warn road users on the main visitor routes and within the settlements of Melness, Talmine and Tongue

and to redirect road users where required, including any signage on the public road required for the Launch Exclusion Zone; and

- k) Proposals for a public information protocol and a communications strategy (including a website) to provide information on the traffic management proposals and the provision of an advance schedule of launches.

Thereafter the approved VMP shall be implemented in full. The VMP will also include provision for monitoring of visitor management and a review of the VMP shall be undertaken, in consultation with the Council, SNH, Transport Scotland, and emergency services following each launch during the first year of launches. Thereafter, monitoring and review of the visitor management plan will take place at the end of the 2nd year of operation and thereafter every anniversary of the first launch from the development; or 6 months in advance of the first launch by any new Launch Site Operator; or at the request of the Launch Event Visitor Management Group. Following each review of the VMP, the revised VMP shall be submitted for the written approval of the Planning Authority in consultation with SNH, Transport Scotland, and emergency services. Thereafter the revised VMP shall be implemented in full.

Reason: To ensure that visitors are managed in a manner which would not have an adverse effect on the qualifying features of Caithness and Sutherland Peatlands Special Protection Area and Caithness and Sutherland Peatlands Special Area of Conservation, or on the local road network. To ensure the principles in the Visitor Management Strategy submitted with the Environmental Impact Assessment Report as clarified by the Scenario Planning with Supporting Planning Assumptions document (May 2020) are carried forward to the detailed Visitor Management Plan and to allow sufficient time for planning and implementation. The inclusion of suitable reviews of impacts post launch, and appropriate monitoring of qualifying habitats and species is required to inform, and where necessary change, future visitor management. Changes may be required in response to predicted effects and effects which have not been predicted due to the novelty of the proposal, the evolution of technologies, changes in visitor behaviour and unforeseen factors.”

### **Relevant statutory provisions**

[13] Regulations 2, 3, 5, 21, 22, 26 and 27 of the 2017 Regulations provide:

“(1) In these Regulations—

...

‘*additional information*’ means—

- (a) supplementary information required in accordance with regulation 26(2); or

- (b) any other information provided by the developer which, in the opinion of the planning authority or the Scottish Ministers, as the case may be, is substantive information about a matter to be included in the EIA report in accordance with regulation 5(2);

...

*'the consultation bodies'* means—

...

- (b) Scottish Natural Heritage;

...

*'environmental information'* means—

- (a) the EIA report submitted in respect of the proposed development;
- (b) any additional information submitted in respect of the development;
- (c) any representations made by any consultation body, or other public body, consulted in respect of the development in accordance with these Regulations; and
- (d) any representations duly made by any other person about the environmental effects of the development;

...

### **3. Prohibition on granting planning permission without an environmental impact assessment**

The planning authority or the Scottish Ministers, as the case may be, must not grant planning permission for EIA development unless an environmental impact assessment has been carried out in respect of that development and in carrying out such assessment the planning authority or the Scottish Ministers, as the case may be, must take the environmental information into account.

...

### **5. —Environmental Impact Assessment Report**

- (1) An application for planning permission for EIA development must be accompanied by an environmental impact assessment report ("EIA report").

(2) An EIA report is a report prepared in accordance with this regulation by the developer which includes (at least) —

- (a) a description of the development comprising information on the site, design, size and other relevant features of the development;
- (b) a description of the likely significant effects of the development on the environment;
- (c) a description of the features of the development and any measures envisaged in order to avoid, prevent or reduce and, if possible, offset likely significant adverse effects on the environment;

...

(3) Where a scoping opinion (or scoping direction) is issued, the EIA report must be based on that scoping opinion (or scoping direction, as the case may be), and include the information that may reasonably be required for reaching a reasoned conclusion on the significant effects of the development on the environment, taking into account current knowledge and methods of assessment.

...

## **21. —Publication of EIA report**

(1) Where, in relation to an EIA application the developer submits to the planning authority or the Scottish Ministers, as the case may be, an EIA report the planning authority or the Scottish Ministers, as the case may be, must publish as soon as possible a notice in accordance with this regulation.

(2) Notice under paragraph (1) must —

- (a) describe the application and the proposed development to which the EIA report relates;
- (b) state that the proposed development is subject to environmental impact assessment and, where relevant, state that it is likely to have significant effects on the environment in an EEA State;
- (c) state that the EIA report is available for inspection free of charge and the times and places at which, and the means by which, the EIA report is available for inspection;
- (d) state how copies of the EIA report may be obtained;
- (e) state the cost of a copy of the EIA report;

(f) state how and by what date representations may be made (being a date not earlier than 30 days after last date on which the notice is published);

(g) provide details of the arrangements for public participation in the decision making procedure including a description of how notice is to be given of any subsequent submission by the developer of additional information and how representations in relation to that additional information may be made; and

(h) state the nature of possible decisions to be taken in relation to the application and provide details of the authority by which such decisions are to be taken.

...

## **22. – Consultation where EIA report received by planning authority**

(1) Where a planning authority receive in connection with an EIA application (including an EIA application under consideration on review under section 43A(8) (right to require review of planning decisions and failure to take such decisions)) an EIA report, they must—

...

(b) consult the bodies mentioned in paragraph (2) about the EIA report and inform them how and by what date representations may be made (being a date not earlier than 30 days after the date on which the copy of the EIA report was sent).

(2) The bodies are—

(a) the consultation bodies;

...

## **26. – Supplementary information and evidence relating to EIA reports**

(1) This regulation applies where the Scottish Ministers or the planning authority, are dealing with—

(a) an EIA application;

...

(2) In order to ensure the completeness and quality of the EIA report, the planning authority or the Scottish Ministers, as the case may be, must (having regard in particular to current knowledge and methods of assessment) seek from the developer supplementary information about a matter to be included in the EIA

report in accordance with regulation 5(2) which in the opinion of the planning authority or the Scottish Ministers, as the case may be, is directly relevant to reaching a reasoned conclusion on the significant effects of the development on the environment.

(3) The developer must provide that supplementary information and such information is referred to in these Regulations as “supplementary information”.

(4) The planning authority or the Scottish Ministers may in writing require to be produced to them such evidence in respect of any EIA report or additional information as they may reasonably call for to verify any information contained in the EIA report or such additional information, as the case may be.

**27. – Publication of additional information**

(1) Where additional information is provided to the planning authority or the Scottish Ministers, regulations 20 to 22, 24 and 25 apply to the provision of such additional information as they apply to the submission of an EIA report as if references to the EIA report were references to that additional information.  
...”

[14] Regulation 48 of the Habitat Regulations (as amended by the Conservation (Natural Habitats, &c.) Amendment (Scotland) Regulations 2007) provides:

**“48. – Assessment of implications for European site**

(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 or to enable the competent authority to determine whether an appropriate assessment is required.

(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."

## **The judicial review**

### *The issues*

[15] In this petition for judicial review the petitioner seeks reduction of the planning permission. In a Joint Statement of Issues the parties identified the following issues which they ask the court to determine:

1. Whether the respondent erred in law by failing to consider the environmental impacts of the proposed visitor facilities and how visitors will be managed outwith the LEZ when deciding to grant planning permission?
2. Whether the respondent erred in law by failing to consider whether HIE can implement the mitigation measures required by condition 11 or what the consequences of a failure to do so would be when deciding to grant planning permission?
3. Whether the respondent erred in law by failing to publish additional and/or supplementary information as required under condition 27(1) read with condition 21(1) and (2) of the Town and Country Planning (Environmental Impact Assessment) (Scotland) Regulations 2017?

4. Whether the respondent erred in law by failing to consider or secure the implementation of measures required to mitigate non-visitor related operational effects of the proposed development on ornithological interests?
5. Whether the respondent erred in law by proceeding on an inadequate and incorrect factual basis, and failing properly to make an appropriate assessment under regulation 48 of the Conservation (Natural Habitats, &c) Regulation 1994 before granting planning permission?
6. Whether the respondent erred in law by failing to consider the potential legal consequences arising from the disturbance of bird species listed on Schedule 1 or from the harassment of bird species listed on Schedule 1A to the Wildlife and Countryside Act 1981?
7. Whether in the circumstances the court should exercise its discretion to reduce the decision?

I find it convenient to examine and answer each of these questions in turn.

1. *Whether the respondent erred in law by failing to consider the environmental impacts of the proposed visitor facilities and how visitors will be managed outwith the LEZ when deciding to grant planning permission?*

*The submissions for the petitioner*

[16] Senior counsel for the petitioner submitted that the respondent had erred in law in failing to treat the SHS and the visitor facilities as a single integrated development. It had erred in law in not being alive to the danger of the salami slicing of applications for development and to the need to avoid a scenario whereby HIE obtained a foot in the door (*Pearce v Secretary of State for the Environment* [2021] EWHC 326 (Admin); *Brown v Carlisle*

*City Council* [2010] EWCA Civ 523, [2011] Env LR 5). If the application had not been for the integrated development, it ought at least to have identified detailed proposals for the visitor facilities. HIE had not shown that it would not have been reasonably possible to do that. That was the test (*Pearce v Secretary of State for the Environment*, para [116](iv)). There ought to have been an environmental assessment of the cumulative impact of the SHS and the visitor facilities. As matters stood, the size, nature and locations of the visitor facilities had not been identified by HIE, and there had been no assessment of their likely environmental impact. In those circumstances the respondent had not complied with regulations 3 and 5 of the 2017 Regulations. It had been perverse of the respondent to follow the course which it had.

*The submissions for the respondent and HIE*

[17] Senior counsel for the respondent and for HIE submitted that there had been no salami slicing. That involved splitting what was truly a single development in an attempt to avoid an appropriate cumulative assessment of environmental impact. Developments which were related but were progressed separately for good reasons did not require to be treated as a single development. Here there was sufficient information to enable the making of the SHS application, but insufficient information at present to enable making the application (or applications) which would be required to develop aspects of the visitor facilities. For good reason, there was uncertainty at present as to precisely what would be required by way of visitor facilities. For example, the person who was to be responsible for the VMP and its implementation - the LSO - had not been appointed. The radius of the LEZ would be dependent upon licensing regulations which had not yet been made. The EIAR in respect of the proposed development only required to reflect current knowledge and

methods of assessment (see eg the 2017 Regulations, regulation 5(3) and regulation 26(2)). When a further application relating to visitor facilities was made the cumulative environmental impact of the SHS and the visitor facilities would be assessed. The present case fell to be distinguished from *Brown v Carlisle City Council* and *Pearce v Secretary of State for the Environment*. In those cases information which would have enabled a cumulative assessment of the impact of different aspects of what was considered to be a single integrated development was available at the time of the application. Not so here. The position in the present case was more akin to that in *R (Khan) v London Borough of Sutton & Others* [2014] EWHC 3663 (Admin) and *Preston New Road Action Group v Secretary of State for Communities and Local Government and Another* [2018] EWCA Civ 9. In both of those cases information concerning the related development was limited and the court rejected the suggestion that there was salami slicing. The respondent had been entitled to decide as it had in the circumstances. It had not erred in law. It was not in breach of regulations 3 or 5 of the 2017 Regulations. It had not acted perversely in following the course which it had.

### ***Decision and reasons***

[18] I am not persuaded that the respondent has erred in law. In my view this is not a case where there has been salami slicing of a project which ought to have been assessed as a single development. On the contrary, there is a rational justification for not identifying the proposed location of visitor facilities and for not applying for permission to develop them at this stage.

[19] Until the size of the LEZ is clarified there is obvious uncertainty about appropriate locations for visitor viewing areas or car parking. It was not sensible for the petitioner to attempt to identify such locations. Nor was it sensible to seek planning permission for their

development, or to include an assessment of their environmental impacts as part of the present application. In my view none of those things were things which HIE were reasonably required to do.

[20] Development of the visitor facilities will require a further application for planning permission. At that stage the cumulative environmental impact of SHS and the visitor facilities will require to be assessed.

[21] Accordingly, the circumstances of the present case appear to me to be clearly distinguishable from those in *Brown v Carlisle City Council* and *Pearce v Secretary of State for the Environment*, and to be much more akin to the circumstances in *R (Khan) v London Borough of Sutton & Others* and *Preston New Road Action Group v Secretary of State for Communities and Local Government and Another*.

[22] It follows in my opinion that the petitioner has not made good this ground of challenge. It has not demonstrated that the respondent has breached regulation 3 or regulation 5 of the 2017 Regulations or that it has erred in law in any other respect. In my opinion the respondent was entitled to take the course which it did.

**2. *Whether the respondent erred in law by failing to consider whether HIE can implement the mitigation measures required by condition 11 or what the consequences of a failure to do so would be when deciding to grant planning permission.***

*The submissions for the petitioner*

[23] Senior counsel for the petitioner submitted that on a proper construction of the first part of condition 11 (i.e. up to the end of subparagraph k)), it was a positive condition not a negative condition. It obliged the developer to submit and obtain approval for a VMP within 6 months of the first launch. The second part of the condition - dealing with

implementation and review of the VMP - was also a positive condition. The difficulty for the respondent and HIE was that there was no basis upon which the respondent could conclude that the land on which the visitor facilities would require to be constructed was land which the interested party controlled. The condition was unlawful because it required the interested party to do things which it might not be in a position to perform. The condition had been fundamental to the granting of permission. If the condition was unenforceable the permission could not stand, it would have to be reduced.

*The submissions for the respondent and HIE*

[24] It was submitted that the first part of condition 11 is a negative condition. The developer was not obliged to fulfil it, but unless and until it did there could be no launch. The implementation part of the condition provided for enforcement and review of the VMP once it has been agreed, i.e. if the negative condition was fulfilled. It would be wrong to suppose that the agreed VMP would require the developer to do something which it was not able to perform. The condition was valid and enforceable.

*Decision and reasons*

[25] In my opinion the first part of condition 11 is a negative condition (*Grampian Regional Council v Secretary of State for Scotland and City of Aberdeen District Council* 1984 SC (HL) 58; *British Railways Board v Secretary of State for the Environment and Others* [1993] 3 PLR 125; paragraph 38 of Planning Circular 4/1998: the use of conditions in planning permissions). On a proper construction it does not oblige the developer to agree a VMP with the content described in subparagraphs a) to k). Rather, it provides that the SHS cannot be operated unless such a VMP is agreed at least 6 months before the launch date.

[26] The second part of the condition has effect where a VMP has been duly approved in accordance with the first part of condition 11. The second part contains positive conditions which would require to be complied with in that event. It is not a negative condition. Accordingly, it would be an unlawful condition if it required HIE to do things which it was clear that it could not do.

[27] However, in my opinion it is not clear that the VMP which would be approved would be bound to contain provisions of that nature (eg a requirement that HIE erect visitor facilities on land which it does not control). I agree with senior counsel for the respondent and HIE that for present purposes the court ought not to proceed on the basis that the approved VMP will require HIE to do something which it will be unable to perform.

[28] It follows that I reject the contention that condition 11 is unlawful.

**3. *Whether the respondent erred in law by failing to publish additional and/or supplementary information as required under condition 27(1) read with condition 21(1) and (2) of the Town and Country Planning (Environmental Impact Assessment) (Scotland) Regulations 2017.***

*The submissions for the petitioner*

[29] Senior counsel for the petitioner submitted that the VMSC had been supplementary information, failing which additional information, within the meaning of regulation 2(1), read with regulation 5(2) and regulation 26(2) of the 2017 Regulations, and that it should have been published (condition 27(1) read with condition 21(1) and (3)).

[30] The RSPB Technical Note dated 8 April 2020 had included information (eg about vantage point locations) that was not included within the EIAR or supporting

documentation. It also purported to address survey limitations identified by RSPB Scotland. It was additional information that should have been published.

[31] Technical Appendices 6.1 to 6.5 in Volume 4 of the EIAR were the reports of the ornithological surveys undertaken by HIE in support of the development. They were part of the EIAR. Accordingly, the respondent should have published appropriately redacted versions of them (condition 21).

*The submissions for the respondent and HIE*

[32] It was submitted that neither the VMSC nor the RSPB Technical Note were requested by the respondent as "supplementary information". Nor were they additional information. They did not require to be published by the respondent.

[33] The petitioners had queried with the respondent whether the VMSC was supplementary information in terms of the 2017 Regulations which required to be published. The report of handling noted this suggestion but opined that the VMSC provided clarifications, did not change the scope of the development, did not alter the conclusions of the EIAR, and that it was not supplementary information. The RSPB Technical Note responded to RSPB's objection and was prepared by HIE primarily to show where in the EIAR the issues raised by RSPB had been addressed. It merely provided clarification of matters already covered in the EIAR.

[34] The respondent's assessments that the VMSC and the RSPB Technical Note were not additional information were assessments which were open to it. They were not perverse.

[35] Even if the VMSC and RSPB Technical Note had required to be advertised, the petitioner was not prejudiced by any failure to publish them. It had sufficient opportunity to make its concerns known to the respondent. If the respondent had been required to

publish the VMSC it would only have been obliged to publish the redacted version. That had been made available on its website.

[36] The Technical Appendices were not mentioned in the petition. The complaint first emerged in the note of argument. The Technical Appendices had been available on request, and on 6 March 2020 the petitioner had been provided with unredacted versions after making a request for them. In view of their contents it had not been unreasonable for the respondent to conclude that they need not be published.

*Decision and reasons*

[37] In my opinion neither the VMSC nor the RSPB Technical Note were supplementary information. Neither was requested by the respondent in terms of regulation 26(2).

[38] In my judgement it was open to the respondent to decide that the VMSC provided clarifications, that it did not change the scope of the development, and that it did not alter the conclusions of the EIAR. It was also open to it to conclude that it was not additional information and that it did not require to be published.

[39] Similarly, in my view the respondent was entitled to decide that the RSPB Technical Note responded to RSPB's objection, that it was prepared by HIE primarily to show where in the EIAR the issues raised by RSPB had been addressed, and that it merely provided clarification of matters already covered in the EIAR. It was entitled to conclude that it was not additional information and that it did not require to be published.

[40] In neither case am I persuaded that the respondent erred in law in acting as it did.

[41] Strictly speaking, the Technical Appendices were part of the EIAR and they ought to have been published. However, I am not satisfied that this breach is material, or that it caused any substantial prejudice to the petitioner or anyone else.

[42] If, contrary to my view, the VMSC and RSPB Technical Note ought to have been advertised, I am not persuaded that the petitioner was prejudiced by any failure to publish the VMSC. It had sufficient opportunity to make its concerns about it known to the respondent. Moreover, if the respondent had been required to publish the VMSC it would only have been obliged to publish the redacted version. That had been available on its website. On the other hand, the RSPB Technical Note was not available and, *prima facie*, the petitioner and the RSPB may have been prejudiced by that. Whether that prejudice would have been material enough to justify reduction of the decision would have been a matter in relation to which I would have sought further submissions.

*4. Whether the respondent erred in law by failing to consider or secure the implementation of measures required to mitigate non-visitor related operational effects of the proposed development on ornithological interests?*

*The submissions for the petitioner*

[43] Senior counsel for the petitioner submitted that the respondent erred in law by failing to consider or secure the implementation of measures required to mitigate non-visitor related operational effects of the proposed development on ornithological interests. The essence of the complaint was that the relevant conditions attached to the planning permission did not contain effective mechanisms to secure their implementation.

*The submissions for the respondent and HIE*

[44] The potential effects of the development on ornithological interests were considered in chapter 6 of the EIAR and in paragraphs 10.60-10.83 of the report of handling.

Appropriate mitigation measures were identified and implemented. Assessment of the

mitigation proposed in the EIAR, including its sufficiency, was a matter of planning judgement for the respondent, and not a matter that can ground a legal challenge.

*Decision and reasons*

[45] I am not persuaded that this is a good ground of challenge. In my opinion assessment of the mitigation proposed in the EIAR, including its sufficiency, was a matter of planning judgement for the respondent. I am not satisfied that the respondent erred in law in exercising that planning judgement.

5. *Whether the respondent erred in law by proceeding on an inadequate and incorrect factual basis, and by failing properly to make an appropriate assessment under regulation 48 of the Conservation (Natural Habitats, &c) Regulation 1994 before granting planning permission?*

*The submissions for the petitioner*

[46] Senior counsel for the petitioner submitted that the respondent had not complied with its obligation to make an appropriate assessment under regulation 48 of the Habitats Regulations. It was not clear that it had in fact endorsed, adopted or otherwise approved the document titled "Appropriate Assessment" (attached as Appendix 2 to the report of handling).

[47] If the respondent had adopted the assessment in Appendix 2, it had nevertheless erred in law by proceeding on an inadequate and incorrect factual basis. The petitioner and RSPB had raised concerns about the integrity of the ornithological surveys. However the report of handling had not detailed those concerns. In order to enable the respondent to make an appropriate assessment and to conclude that, with mitigation, there would be no

adverse effects on the integrity of the SAC and the SPA, the report should either have questioned the factual basis for the concerns raised by the petitioner and RSPB or explained why they did not matter. Insofar as the respondent was relying on the views of SNH, it required to be satisfied that SNH had resolved those differences (and how they had done so).

[48] Further, in terms of article 6(3) of the Habitats Directive and regulations 48(5) and (6) of the Habitats Regulations a competent authority can only agree to a plan or project after having ascertained that it will not adversely affect the integrity of the site concerned, having regard to the manner in which it is proposed to be carried out or to any conditions or restrictions subject to which that authorisation may be given. A plan or project can only be authorised where the competent authority is convinced that it will not adversely affect the integrity of the site concerned. It can only be certain that a plan or project will not adversely affect the integrity of the site where no reasonable scientific doubt remains as to the absence of such effects (*Landelijke Vereniging tot Behoud van de Waddenzee v Staatssecretaris van Landbouw, Natuurbeheer en Visserij* (C-127/02) [2005] 2 CMLR 31, paragraphs 56-58; *Sweetman v An Bord Pleanala* (C-258/11) [2014] PRST 1092 at paragraph 40). On the information before it the respondent could not reasonably have concluded that there was no reasonable scientific doubt that the proposed development would not have an adverse effect on the integrity of the SAC and the SPA. In the absence of (i) details of the proposed visitor facilities and information about how visitors will be managed outwith the LEZ; (ii) the information referred to in condition 11; and (iii) certainty that HIE can implement the proposed mitigation measures or what the consequences of a failure to do so would be, the respondent had not been in a position to be able to make an appropriate assessment of the environmental effects of visitor facilities and visitor management activities on the integrity

of the SAC and the SPA, or to conclude that the proposed development will not adversely affect the integrity of those sites.

*The submissions for the respondent and HIE*

[49] It was clear that the respondent had endorsed the appropriate assessment in Appendix 2. The report of handling required to give guidance and advice to the respondent in relation to the key determining issues in dispute. It did not require to provide detailed comment in relation to all representations or evidence. The respondent had considered whether the ornithological surveys were adequate and it had attached importance to the fact that SNH was content with them. The respondent had been entitled to proceed to make an assessment on the basis of the material which was before it, which included the EIAR, the VMP, the VMSC, and the advice from SNH. The respondent's conclusion that the proposed development would not have an adverse effect on the integrity of the SAC and the SPA was a matter of planning judgement. It was a conclusion that the respondent was entitled to reach. It was the same conclusion as SNH had reached. The existence or non-existence of a reasonable doubt is primarily a matter of fact for the decision-maker to determine (*RSPB v Scottish Ministers* 2017 SC 552, [2017] CSIH 31, at para [206]). The respondent was entitled to come to the conclusions that it came to. It was entitled, and expected, to place considerable weight on the opinion of SNH as the relevant statutory consultee (*R (Morge) v Hampshire County Council* [2011] 1 WLR 268, at paragraph 45; *RSPB v Scottish Ministers*, at para [228]).

*Decision and reasons*

[50] Paragraphs 10.64 and 10.65 of the report of handling clearly directed the respondent to the appropriate assessment in Appendix 2. That document made it plain that the

respondent required to make an appropriate assessment. In my view the respondent was fully aware of that, and it endorsed the assessment in Appendix 2.

[51] I am satisfied that paragraph 10.78 of the report of handling adequately raised the issue of the robustness of the ornithological surveys. In my opinion it was not necessary for the report of handling to say more. It was a matter of considerable significance that SNH, the statutory consultee, did not have concerns about the robustness of the surveys.

[52] The amount of information required by a planning authority in order to determine a planning application is a matter of planning judgement. In my opinion the respondent was entitled to decide that it had adequate information to undertake an appropriate assessment and to determine the application. On the basis of the information available to it, including the EIAR, the VMP, the VMSC and the advice from SNH, it was open to the respondent to conclude that the potential environmental effects (both visitor and non-visitor) of the development could be addressed by the proposed conditions attached to the permission, with the result that the development would not have an adverse effect on the integrity of the SAC and the SPA. I do not accept that it was not possible for the respondent to reach that conclusion without knowing the contents of the approved VMP.

[53] I am not persuaded that the respondent did not apply the correct test. In my opinion there is nothing in the appropriate assessment which suggests the existence of any such error, and there is nothing in the report of handling which causes me to conclude that the report led the respondent into any such error.

[54] The existence, or otherwise, of a reasonable doubt is primarily a matter of fact for the decision-maker to determine (*RSPB v Scottish Ministers*, at para [206]). In my opinion the respondent was entitled to come to the conclusions which it came to. It was entitled, and expected, to place considerable weight on the opinion of SNH as the relevant statutory

consultee (*R (Morge) v Hampshire County Council*, at paragraph 45; *RSPB v Scottish Ministers*, at para [228]). SNH's view was that sufficient information had been provided to demonstrate that a practical and workable solution to the issue of visitor management could be found which would avoid an adverse effect on the integrity of the SAC and the SPA.

[55] It follows that I am not satisfied that this ground of challenge is well founded.

**6. *Whether the respondent erred in law by failing to consider the potential legal consequences arising from the disturbance of bird species listed on Schedule 1 or from the harassment of bird species listed on Schedule 1A to the Wildlife and Countryside Act 1981?***

*The submissions for the petitioner*

[56] It was submitted that the respondent ought to have considered the potential legal consequences arising from the disturbance of bird species listed on Schedule 1 to the Wildlife and Countryside Act 1981 ("the WCA"), and from the harassment of bird species listed on Schedule 1A, during the operational phase of the proposed development. Its failure to do so was an error of law. The VMS, the VMSC, and the decision granting planning permission did not provide a mechanism whereby unlawful disturbance and harassment of those birds could be avoided. In the absence of such a mechanism there might have to be a moratorium on launches during the breeding season, in which case the assumption in the EIAR of one launch per month may not have been justified. This was a matter which ought to have been considered by HIE and the respondent.

*The submissions for the respondent and HIE*

[57] The respondent did not require to detail or consider the other potential legal consequences arising from the disturbance of birds listed in Schedule 1 to the WCA or from

the harassment of birds listed in Schedule 1A. It required to consider the application in terms of the Town and Country Planning (Scotland) Act 1997 and other planning policy considerations in relation to the appropriateness of the land use proposed. It did not have to consider matters covered by other regulatory regimes, and it did not require to impose a condition in relation to them. The report of handling did not have to address them.

Licensing and other matters of regulatory control could be left to the relevant regulatory authorities to consider (see *R (Frack Free Balcombe Residents Association) v West Sussex County Council* [2014] EWHC 4108 (Admin), per Gilbert J at para [100]). The respondent was entitled to focus on whether the proposed development was an acceptable use of the land. In any case, the issue of the breeding season and monthly launches was considered and discussed at the planning committee meeting at which the decision was taken, and the representative from SNH was satisfied that permission for the development could be granted subject to the proposed conditions.

#### *Decision and reasons*

[58] I am not persuaded that the petitioner's contention is well founded. The report of handling did not have to address the potential legal consequences arising from possible contraventions of the WCA. In my opinion licensing and other matters of regulatory control could be left to the relevant regulatory authorities to consider (see *R (Frack Free Balcombe Residents Association) v West Sussex County Council*, per Gilbert J at para [100]). The possible effect of the breeding season was a matter which SNH and the respondent considered, but neither concluded that it ought to prevent the grant of planning permission subject to the recommended conditions. In my view no error of law on the respondent's part has been established.

7. *Whether in the circumstances the court should exercise its discretion to reduce the decision?*

*The submissions for the petitioner*

[59] Senior counsel for the petitioner submitted that in the event of issues 1, 2, 4, 5 or 6 being resolved in the petitioner's favour the decision should be reduced. So far as issue 3 was concerned, he accepted that if the court found that one or more of the VMSC, the RSPB Technical Note and the Technical Appendices ought to have been published it would require to consider whether anyone had been prejudiced by the relevant failure to publish. The RSPB Technical Note in particular contained matters which RSPB might have wished to respond to.

*The submissions for the respondent and HIE*

[60] I did not understand senior counsel for the respondent or senior counsel for HIE to quarrel with the proposition that in the event of issues 1, 2, 4, 5 or 6 being resolved in the petitioner's favour the decision would require to be reduced. In relation to issue 3, their position was that even if one or more of the three documents ought to have been published the decision should not be reduced. There had been no material prejudice to the petitioner or anyone else. Even if there had been some prejudice, there would have been no real prospect of a different decision being reached if further submissions had been made.

*Decision and reasons*

[61] Since I have held that none of the grounds of challenge is well founded it is unnecessary to answer this question, and I do not propose to do so (other than to say what I have already said in relation to issue 3).

**Disposal**

[62] I shall sustain the third to eighth pleas-in-law for the respondent and the third to eighth pleas-in-law for the interested party, repel the petitioner's pleas-in-law, and refuse the petition. I shall reserve meantime all questions of expenses.